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How Cos. Can Shape Int'l Service Agreement Negotiations

Law360, New York (February 06, 2013, 12:12 PM ET) -- In an October Law360 Expert Analysis article — "What An International Services Agreement Would Mean" — we welcomed the growing momentum among a group of developed and developing economies[1] to negotiate an international services agreement (ISA). A high-standard ISA, we noted, could create important new opportunities for companies in all services sectors (e.g., telecommunications, audiovisual, financial, energy and construction, among others) to sell to and invest in other markets. If structured effectively, it could also attract economies with large services markets that are not currently at the table, such as Brazil, China, India, and Indonesia.

On Jan. 15, the Obama administration took another crucial step toward making the project a reality, notifying Congress that it intends to enter ISA negotiations. The first round of formal negotiations could be held as early as March in Geneva. In this article, we identify some of the key issues that negotiators will tackle and explain how the outcomes on these issues could have real commercial consequences for international services companies. We also note some practical steps that companies can take to advocate their economic interests and influence the negotiations in their favor.

Key Issues in the Negotiation

ISA negotiators will be seeking agreement on a range of issues related to the restrictions that their governments impose on (mostly foreign) participation in their services sectors. Some of these issues will be general or "horizontal," e.g., the scope and structure of the agreement, rules for issuing regulations and settling disputes, and procedures for other countries to join the ISA in the future. Other issues will be economy-specific, for example the extent to which each economy will be able to impose foreign equity limitations or take other restrictive measures in given services sectors. The following are some of the most commercially significant issues that negotiators will seek to reach agreement on during ISA talks.

Market Access and National Treatment

At the core of the ISA negotiation will be extensive bargaining over the extent to which governments may impose restrictions in their services sectors. Part of this discussion will relate to the concept of "market access," which concerns policies such as limitations on the number of services companies in a market, requirements to form a certain kind of corporate entity (such as a joint venture with a local partner), or foreign equity caps.

The other part will relate to the obligation to provide "national treatment," under which governments may not discriminate against firms simply because they are foreign. The negotiations will result in each economy having its own "schedule" of commitments, which will reflect, for each services sector, the restrictions that the economy is permitted to impose. For many services companies that want to do business in any of the ISA economies, this is the heart of the agreement.

Cross-Border Data Flows

Since the last trade agreement relating to services was negotiated almost two decades ago, explosive innovations in information and communications technology have fundamentally changed how companies provide services. Ensuring that data can cross borders freely is critical not just for technology companies but for almost all services companies, which increasingly provide their services electronically.

Companies in the financial services, media and entertainment services, professional services, and many other service sectors have a huge stake in an ISA that ensures largely unfettered cross-border flows of digitized information. This issue will be contentious, however; while the United States strongly supports free data flows, many other economies have significant reservations.

State-Owned Enterprises

Services companies may be put at a competitive disadvantage when state-owned enterprises ("SOEs") receive financial support and regulatory preferences from their governments. State-owned telecommunications firms that are involved in developing technical standards may receive a regulatory leg up on foreign competitors. National postal monopolies may cross-subsidize affiliate banks and insurance companies, making it difficult for foreign financial services firms to compete. And national oil and gas companies may enjoy access to distribution channels that are not available to foreign firms. Internationally engaged services firms across sectors have a strong interest in seeing ISA negotiators develop rules to ensure that SOEs operate solely on commercial terms and that foreign companies can compete on a level playing field.

"Services That Have Yet to Be Conceived"

A longstanding issue in services trade negotiations concerns how to treat services that do not currently exist but that, as a result of technological or other innovations, could eventually exist and might not fit neatly into today's established categories.

For example, if the past generation is any guide, the next generation may see innovations by technology companies, energy companies and health care companies that ISA negotiators meeting in Geneva in 2013 could not possibly have imagined, much less crafted rules for. How should an ISA address such "new" services? Should they be presumed to be open to participation by services companies in all ISA economies? Or should each economy have to affirmatively agree to open its market to those services? Innovative services companies have a significant stake in the answers to these questions.

How Companies Can Shape the Outcome

Though the ISA negotiations will be held among governments, companies will have many opportunities to advocate their interests and shape the agreement in a way that increases the commercial opportunities that they gain from it. The following are some general ideas for how services firms can seek to influence the negotiations.

Better Understand the Issues and Terminology

International trade negotiators, like experts in any field, use concepts and terminology that can be difficult for nonexperts to fully grasp. In the case of the ISA, terms like "market access" and "negative list" have specific meanings, and how negotiators approach them has specific commercial implications. Companies that understand the concepts and vernacular, and can relate them to their global business objectives, will be able to more effectively advocate their interests in the negotiations.

Engage Intensively With National Governments

Government negotiators largely represent the interests of companies from their countries who stand to gain from the further liberalization of services sectors. Though the mechanisms will vary, there will be opportunities for services companies in every ISA economy to convey their negotiating "wish lists" to government officials, both in Geneva and in national capitals. (For example, on Jan. 24 the Office of the U.S. Trade Representative issued a Federal Register notice inviting comments on U.S. priorities in the ISA negotiations.) Companies that actively and intelligently engage with their trade and other ministries, and in particular with the ISA negotiators, will increase the chances of having the agreement make progress on their issues.

Develop Coalitions

Services companies often have interests that align closely with those of similarly situated firms in other economies. For example, Internet companies from Chile, Turkey and the United States may all share an interest in preserving free cross-border data flows and avoiding requirements to establish data centers in the countries where they do business. As a result, companies that can develop coalitions with like-minded firms, both at home and abroad, can create a type of "force multiplier" for their efforts to influence the outcome of negotiations.

The soon-to-be-launched ISA negotiations are an important step in the development of modern international trade rules. For internationally engaged services companies, they provide a critical opportunity to improve the business environments that they face around the world.

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[1] The other ISA economies are Australia, Canada, Chile, Colombia, Costa Rica, the European Union, Hong Kong, Iceland, Israel, Japan, Korea, Mexico, New Zealand, Norway, Pakistan, Panama, Peru, Switzerland, Taiwan and Turkey.