



What An International Services Agreement Would Mean

Law360, New York (October 25, 2012, 12:29 PM ET) -- Globally engaged companies have many opportunities to use international trade and investment rules for their business objectives. International economic agreements are typically negotiated in places like Washington, D.C., and Brussels and Beijing, and government negotiators speak a particular language and respond to particular political dynamics. Companies operating across borders, on the other hand, do business well beyond national capitals, use their own vernacular, and confront different sets of opportunities and challenges.

Yet these rules can greatly affect the commercial risks and opportunities that companies face. In no area of international commerce is this truer than in the area of services. Companies selling services rather than goods — for example in the telecommunications, media and entertainment, financial, logistics, energy, construction, or professional services sectors — now account for 68 percent of global output and fully half of the GDP of developing countries. While they are massive job and growth generators in their own rights, services companies also contribute to high productivity in the manufacturing and agriculture sectors and allow companies to develop efficient and truly global supply chains.

This is why the current effort to negotiate an international services agreement (ISA) is so important. An ISA has the potential to create substantial new opportunities for services companies to sell to and invest in other markets, to clarify the regulatory "rules of the road" in key countries, and to help level the competitive playing field for services companies worldwide.

This article identifies the main issues under discussion and describes the practical implications that the negotiation of an ISA could have for internationally engaged companies.

Which economies are currently participating in ISA discussions?

The economies currently participating in ISA discussions, which represent 70 percent of global output and call themselves the "Really Good Friends of Services," include Australia, Canada, Chile, Colombia, Costa Rica, the European Union, Hong Kong, Israel, Japan, Mexico, New Zealand, Norway, Panama, Peru, South Korea, Switzerland, Taiwan, Turkey and the United States. Other economies may join the talks as they progress.

What's the problem that an ISA would help solve?

Companies in all services sectors — including in some of the highest-growth areas, such as information and communications technology (ICT) — face a wide array of regulatory and market access obstacles when doing business internationally. Governments impose equity limitations to prevent foreign service providers from obtaining controlling stakes in domestic firms. They limit the number of companies that can compete in their markets. They require service companies to establish subsidiaries or perform certain functions (such as ICT companies locating data centers) in their territories. And they require foreign companies to establish specific types of legal entities or set up joint ventures with local partners.

While the World Trade Organization General Agreement on Trade in Services places some limits on the extent to which governments can restrict foreign participation in their services sectors, many governments still maintain significant protections and preferences for their own companies. The global playing field for services remains uneven — the aim of the ISA talks is to achieve a more competitive global environment for trade and investment in services.

How would an ISA help open services markets and level the competitive playing field?

Under a strong, high-standard ISA, governments would agree to treat foreign services companies better, for example by eliminating foreign equity caps, scrapping restrictions on licenses, and dispensing with joint venture or local partner requirements. Indeed, the Really Good Friends have provisionally agreed that an ISA should be comprehensive and seek to increase opportunities for all types of foreign companies to provide their services, however they provide them.

That is, the agreement would create new opportunities for companies to: provide their services across borders (e.g., accounting firms providing audits by email); serve foreign visitors (e.g., hotels and resorts hosting guests from abroad); invest overseas (e.g., retail companies establishing subsidiaries in foreign markets); and send their personnel to other countries to work (e.g., management consultants crossing borders to provide their services).

An ISA would also include a number of general rules and procedures to further promote services liberalization, including a "standstill" (in which governments would promise not to create new restrictions), a "ratchet" (in which new market openings would be automatically locked in), and provisions relating to "mutual recognition" (to allow economies' respective credentialing bodies to certify each others' validity).

How would an ISA help open the large and growing services markets in key developing economies, such as China, India and Brazil?

Big developing countries like China, India and Brazil are, for now, holding back on participating in ISA discussions — a reflection of their current reluctance to further open their services markets. How the core group of Really Good Friends decides to "multilateralize" an ISA by bringing more developing countries into the fold will greatly affect the value of the agreement.

The more the agreement requires countries to open their markets and create a level playing field, the harder it will be to bring additional developing countries under the tent. But the more the agreement allows countries to maintain restrictions on their services sectors, the less value it will have for internationally engaged companies. For an ISA to be commercially meaningful, negotiators will have to skillfully thread that policy needle.

Where do the discussions stand and what happens next?

The Really Good Friends held extensive discussions in Geneva in early October regarding the parameters and structure of a formal negotiation. They will meet again in early November and December to further discuss the architecture of the agreement, with the possibility of officially launching negotiations in February 2013.

We now live in a "services economy." While an ambitious ISA could dramatically change the terms of trade for companies that provide services, companies cannot sit on the sidelines. They need to understand what the language and substance of the negotiations means for their business objectives. They need to position themselves to influence the negotiations in a manner that is commercially favorable for their companies and their sectors. And they need to vocally confirm to governments and the private sector alike how critical increased liberalization of trade and investment in services is for economic growth and job creation in all countries.

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