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19 June 2013

Multilateral Division
Trade and Industry Department
17/F, Trade and Industry Department Tower
700 Nathan Road
Kowloon

Dear Sirs

Re: Negotiation of Trade in Services Agreement

The Hong Kong Institute of Directors (“HKIoD”) is pleased to forward our response to the captioned paper.

HKIoD is Hong Kong’s premier body representing directors to foster the long-term success of companies through advocacy and standards-setting in corporate governance and professional development for directors. We are committed to contributing towards the formulation of public policies that are conducive to the advancement of Hong Kong’s international status.

In developing the response, we have consulted our members and organised focused discussions.

Should you require further information regarding our response, please do not hesitate to contact me on tel no. 2889 9986.

With best regards

Yours sincerely
THE HONG KONG INSTITUTE OF DIRECTORS



Dr Carlye Tsui

Enc

cc: Dr Kelvin Wong, Chairman, HKIoD
Prof Christopher To, Deputy Chairman, HKIoD &
Chairman, Economics and Public Affairs Committee

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Negotiation of Trade in Services Agreement

The Hong Kong Institute of Directors would like to present views and comments on the trade in services agreement (TISA) negotiations.

Nature of the negotiations

It appears to us that the TISA negotiations are not taking place as part of the WTO process. The result would be a plurilateral agreement, though the professed objective is that it could become multilateral in future.

It is not unheard of, that in bilateral or regional trade agreements among bigger and smaller economies, the interests of the stronger economies dominate. The TISA negotiations may be no different, with the agreement reached favouring those stronger economies and the global services corporations based in those strongest economies.

Hong Kong could perhaps take some pride in being among the group participating in the negotiations. But in light of the nature of the negotiations, the Administration will want to avoid the pitfalls that may come about.

Investor-state dispute process

It appears to us the TISA might be one that would not have access to the WTO disputes process. Instead, there is the likelihood that “investor-state dispute processes” will be part of the TISA. In contrast, the WTO General Agreement on Trade in Services (GATS) uses the WTO government-to-government dispute process. Investor-state dispute processes do not exist in GATS or any of the WTO agreements.

Investor-state dispute processes would allow a single foreign investor to sue a government for significant damages if a law policy of that government harms the investment, even if the law or policy is in the public interest. Hong Kong actually came into the spotlight when Philip Morris brought a claim under a Hong Kong-Australia bilateral investment treaty to seek compensation from the Australian government for its tobacco plain packaging legislation. Investor-state dispute processes can be a threat to a government’s ability to make policy and regulate in the public interest.

The Administration will want to consider the pitfalls that could come about if the TISA were to include investor-state dispute processes.

Coverage: “positive list” or “negative list”?

It appears to us that the negotiations are to take a “positive list approach” in relation to market access and a “negative list approach” in relation to national treatment.

A positive list approach allows the Administration to make deliberate decisions about which services to be included in the agreement, and therefore retains the freedom to regulate. GATS is a positive list agreement.

The Administration will want to consider taking up a position to insist on “positive list approach” as to all matters in the TISA.

Exclude public services from coverage

Many essential public services are provided on a commercial basis even when provided by the government. Government provision has a role to play in ensuring universal access to public services. It is essential to retain full ability for government to regulate and fund public services in the public interest.

Depending on what is considered “public service” and excluded, the TISA could render some government-provided, publicly-funded public services subject to the TISA’s market access commitments.

Even under GATS, the issue has raised some concerns. A somewhat ambiguous definition of “public service” there would strictly mean that few government-provided, publicly-funded public services are not subject to GATS. Even the WTO Secretariat has raised the need for a clearer definition to exclude public services for GATS purposes.

The Administration will want to be sure that the TISA, if reached, does exclude “public services” from its coverage.

Retain ability to make policy and regulate

The TISA negotiations could see proposals to include “necessity tests” that would have the effect of restricting a government’s ability to regulate in the public interest. The Administration will want to be sure that the TISA, if reached, would not take away the government’s ability to regulate services to achieve public policy goals, like public health, financial stability, consumer rights, public security and environmental protection, and not result in a downward harmonisation of standards.

Movement of natural persons

HKIoD believes Hong Kong should welcome skilled workers and professionals, but the Administration will want to be sure that the TISA, if reached, will not result in a concession of the ability to regulate the movement of people.

Privacy and data security

Service trade could involve processing, storing and transferring of data. The Administration will want to be sure that the TISA, if reached, will put in place an appropriately strong protection framework.

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