APEC Business Advisory Council
Australia

Document: LWG 27-006
Draft: **FIRST**
Source: ABAC Australia
Date: 27 February 2007
Meeting: Seattle, USA

MODEL MEASURES FOR RTAs/FTAs

TRADE IN GOODS CHAPTER

1. BACKGROUND

APEC Leaders adopted "Best Practices for RTAs/FTAs" in 2004 to address issues arising from the proliferation of RTAs and FTAs in the APEC Region in recent years.

In 2005 it was agreed that APEC would develop model measures for as many commonly accepted RTA/FTA chapters as possible by 2008. At Hanoi in 2006 APEC Ministers accepted 6 model chapters. One chapter was on 'Trade in Goods'.

2. ANALYSIS OF TRADE ON GOODS MODEL CHAPTER

CONTENTS

TRADE IN GOODS CHAPTER

1. General Comments:

- **Format**

The draft chapter covers subject areas commonly included in a trade in goods chapter in regional or free trade agreements ("RTAs/FTAs").

Individual agreements order subject matter idiosyncratically, which means that in some cases, ancillary issues may be included in a goods chapter, and in others they may be dealt with separately in the agreement.

Different agreements adopt different approaches to the overall format of the text. While that choice may seem of little significance provided all subject matter is covered, from a business perspective it would enhance clarity should there be a common format. Business would know where particular issues of interest are located within what are often complex and lengthy documents.

ABAC could recommend that to the extent possible RTAs/ FTAs within the APEC region adopt a common format, including the ordering of subject matter and treatment of annexes.

- **Model provisions**

The most significant issue for business in relation to all the model chapters as drafted, including the goods chapter, is the form that they have taken. Unfortunately no attempt has been made to provide true model measures, capable of adoption in whole or part by drafters of future agreements.

It is understood that the detail of individual provisions will always depend on the particular circumstances of the economies involved, their relationship, and the desired outcomes of the agreement under negotiation. RTAs/ FTAs around the Region are unlikely to become completely uniform in style and content in the near future.

It is noted that the model measures are specifically intended as a guide and they are deliberately not expressed in the legal language that might be used in an agreement.

While the trade in goods chapter is typically a complex one in that it either includes specific reference to individual sectors or refers to schedules or annexes dealing with specific sectors, or related issues such as rules of origin, customs procedures, tariff schedules, certification requirements, anti dumping, countervailing or safeguard measures, it would still be possible to provide examples of core provisions that may be easily included in all RTAs/FTAs.

For example, while variation in detail exists, the provision establishing application of the principle of national treatment is similar in a number of RTAs/FTAs between APEC economies, and an agreed model may be possible:

In the North America Free Trade Agreement - Article 301:

1. *Each Party shall accord national treatment to the goods of another Party in accordance with Article III of the general Agreement on Tariffs and Trade (GATT), including its interpretative notes, and to this end Article III of the GATT and its interpretative notes, or any equivalent provision of a*

successor agreement to which all Parties are party, are incorporated into and made part of this Agreement.

2. *The provisions of paragraph 1 regarding national treatment shall mean, with respect to a state or province, treatment no less favorable than the most favorable treatment accorded by such state or province to any like, directly competitive or substitutable goods, as the case may be, of the Party of which it forms a part.*

In the Free Trade Agreement between Chile and Korea – Article 3.3:

1. *Each Party shall accord national treatment to the goods of the other Party in accordance with Article III of GATT, including its interpretative notes, and to this end, Article III of GATT and its interpretative notes, or any equivalent provisions of a successor agreement to which both parties are party are incorporated into and made part of the Agreement.*
2. *For the purpose of paragraph 1, each Party shall grant to the goods of the other party a treatment no less favorable than the most favorable treatment granted by that Party to its own like or directly competitive or substitutable goods of national origin.*

In the Free Trade Agreement between Singapore and Australia – Article 2:

National Treatment on Internal Taxation and Regulation

Each Party shall accord national treatment to the goods of the other party in accordance with Article III of the GATT 1994. To this end the provisions of Article III of the GATT 1994, are incorporated into and shall form part of this Agreement.

In the Free Trade Agreement between Thailand and Australia – Article 202:

Each Party shall accord national treatment to the goods of the other Party in accordance with Article III of GATT 1994.

Not all provisions may be as consistent in application as this one; however there are a significant number for which a model could be agreed.

Provisions such as those covering general considerations of the agreement, or those relating to elimination and reduction of customs duties, anti dumping measures, subsidies and countervailing measures, temporary admission of goods, duty free entry of commercial samples, non tariff measures, goods re entered after repair or alteration, establishment of a review body, could all be relatively uncontroversial in composition.

More complicated provisions such as those providing for export taxes and export duties may be simply drafted with reference to annexes for greater detail to suit individual circumstances.

This would be of assistance to drafters, particularly in those economies with less negotiating experience or resources to devote to RTA/FTA processes.

It would also provide significant predictability and clarity for business participating in the process and in operating throughout the Region, should some degree of uniformity follow.

The practical effect for business of the ultimate adoption of even some uniform provisions would be a less complicated regulatory environment in which to work. The meaning and interpretation of individual provisions would be more predictable, and easier for business to apply.

The model chapters as drafted provide a checklist, and a guide, which is useful in itself, but their limitations result in an opportunity lost for business.

ABAC could urge the future development of model measures that are more than guidelines and are truly draft RTA/FTA provisions. It would be of substantial assistance to regional business, however, if agreement were reached upon the possible wording of commonly included provisions, with variations to allow for choices where necessary.

- **Sectoral annexes and side letters**

Existing RTAs/FTAs rely heavily upon the incorporation of annexes and side letters to either deal with issues that remain unresolved but of continuing negotiation and effort or to accommodate the natural evolution of trade issues between the parties as time passes. In many cases, significant aspects of the agreement are covered through such mechanisms.

Many of the issues dealt with through these annexes relate to the trade in goods chapter, and many relate to specific goods sectors.

In some cases this mechanism allows dealing with detailed information or listing that would be inappropriate or cumbersome within the text of the main agreement.

Annexes cover issues such as certification processes, quarantine, horticultural and food products, treatment of pharmaceuticals (*AUSFTA)*, rules of origin (*SAFTA*), trade in textiles and apparel goods or the automotive sector (*NAFTA*), agreements in relation to wine or steel or modified application of the agreement (*ANZCERTA*), schedules of commitments for each individual economy and side letters on issues such as telecommunications, intellectual property rights, foreign bank branches (*CAFTA).*

The model chapter makes no reference to the inclusion of such annexes, other than in relation to the scheduling of tariff commitments.

In reality the likely coverage of annexes could be extensive and varied in nature. While these agreements are individual in content, establishing some common format in relation to the treatment of additional subject matter to be dealt with by side letter or annex would contribute significantly to clarity and make the agreements easier for business to use.

ABAC could recommend the inclusion of reference to the type of areas that might be covered by an annex to an agreement rather than specific provision within the agreement itself and suggested referencing and formatting for such annexes.

2. Enabling Clause:

Although reference has been made to "other relevant WTO provisions" specific reference should be made to the *Enabling Clause*, under "General considerations relevant to the chapter".

Given the diversity of APEC economies, and the real possibility that RTAs/FTAs may be negotiated by two or more developing economies in the Region, some reference should be made to the particular provisions of the *Enabling Clause (the Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries).*

The WTO Agreements provide for two types of RTA/FTA in relation to trade in goods. (Agreements in relation to trade in services are covered by the same rules regardless of the development status of the parties: *GATS Article V*.)

Generally applicable rules in relation to trade in goods in RTAS/FTAs are found in Article XXIV of the *General Agreement on Tariffs and Trade (GATT).*

The *Enabling Clause* covers preferential trade in goods in RTAs/FTAs between developing countries. This GATT Decision allows divergence from MFN obligations where agreements are between developing economies only. It does not cover agreements between developed and developing economies and does not permit trade preferences from developed to developing economies.

ABAC could recommend that reference to the Enabling Clause and its effect be included in this chapter.

3. **Rules of Origin:**

A significant issue for trade throughout the world, has been the inability of Members of the WTO to agree upon a common approach and universal rules to determine origin.

Potentially all RTAs/FTAs may adopt different approaches and rules in relation to origin, creating a complex business environment regardless of other removal of trade barriers.

Rules of origin are of central importance to a Trade in Goods chapter, and will presumably be the subject of a stand alone model chapter to be agreed at a later date.

Nevertheless, some reference to the role of rules of origin and the manner in which they will be dealt with would be useful here. Indeed, some existing RTAs/FTAs group issues such as rules of origin, customs procedures, agriculture and sanitary and phytosanitary measures together under a section heading "Trade in Goods" (e.g. *NAFTA*).

The *Common Declaration with Regard to Preferential Rules of Origin*, attached to the *WTO Agreement on Rules of Origin,* acknowledges that some Members apply preferential rules of origin (as may be included in RTAs/ FTAs) and sets out WTO requirements for such preferences.

Members are required to notify the WTO Secretariat of their preferential rules of origin and any modifications that they make to them, for circulation to other Members. The model provision should acknowledge this requirement to ensure that information regarding the existence of preferences is made available for business as promptly as possible. Changes to preferential rules of origin may not be made retroactively.

ABAC could recommend that reference be made to WTO requirements in relation to rules of origin and the intended treatment of rules of origin in the APEC model measures.

4. **Country of Origin markings:**

Some RTAs/FTAs specify requirements for country of origin markings (eg *NAFTA*).

This may be useful in ensuring that common rules apply and that business is aware of the applicable requirements.

ABAC could recommend that provisions be included in relation to country of origin marking requirements.

5. Tariff phasing out arrangements:

Provision is made for the adoption of a schedule for the elimination and reduction of tariffs, however no mention is made of the requirement that the phase out period be no greater than 10 years unless exceptional circumstances apply (as set out in *GATT Article XXIV* and *the Understanding on the interpretation of Article XXIV).*

GATT Article XXIV paragraph 5 provides:

Accordingly, the provisions of this Agreement shall not prevent, as between the territories of contracting parties, the formation of a customs union or of a free-trade area or the adoption of an interim agreement necessary for the formation of a customs union or of a free-trade area;

Provided that:

(a) with respect to a customs union, or an interim agreement leading to a formation of a customs union, the duties and other regulations of commerce imposed at the institution of any such union or interim agreement in respect of trade with contracting parties not parties to such union or agreement shall not on the whole be higher or more restrictive than the general incidence of the duties and regulations of commerce applicable in the constituent territories prior to the formation of such union or the adoption of such interim agreement, as the case may be;

(b) ***with respect to a free-trade area****, or an interim agreement leading to the formation of a free-trade area, the duties and other regulations of commerce maintained in each of the constituent territories and applicable at the formation of such free–trade area or the adoption of such interim agreement to the trade of contracting parties not included in such area or not parties to such agreement shall not be higher or more restrictive than the corresponding duties and other regulations of commerce existing in the same constituent territories prior to the formation of the free-trade area, or interim agreement as the case may be; and*

(c) ***any interim agreement referred to in subparagraphs (a) and (b) shall include a plan and schedule for the formation of such a customs union or of such a free-trade area within a reasonable length of time.***

The *Understanding on the Interpretation of the GATT 1994* provides an explanatory note on the meaning of the term "*reasonable length of time"*, prescribing a period of not longer than 10 years to effectively establish a free trade area.

> *3. The "reasonable length of time" referred to in paragraph 5(c) of Article XXIV should exceed 10 years only in exceptional cases. In cases where Members parties to an interim agreement believe that 10 years would be insufficient they shall provide a full explanation to the Council for Trade in Goods of the need for a longer period.*

This is a significant issue for business given the adoption of much longer phase out periods in some agreements in recent years, severely affecting the ultimate benefits delivered and introducing complicated regimes going forward some time into the future.

ABAC could recommend that reference be included to the requirement that phase out periods for tariff reductions and elimination not exceed 10 years unless exceptional circumstances exist.

6. **Conformity assessment:**

A significant issue for business in the region is the need to conform to varying standards in relation to trade in a wide range of goods. While regional bodies are moving towards harmonization with appropriate international standards, this remains a long term goal.

In the meantime, there is great variation between economies in relation to both applicable standards and conformance assessment procedures.

Inclusion of a provision in the model chapter to mutually recognize conformance assessments where possible, would be a welcome step toward certainty in determining trade requirements and significantly reduce costs for business in the region.

ABAC could recommend the inclusion of a model provision to allowing parties to mutually recognize standards conformance assessments in relation to agreed goods

7. **Anti dumping measures**:

Provision is made in the model measures for three main options parties may choose from in setting up anti dumping regimes. These are, in effect, that the parties rely exclusively upon the WTO Agreement that they apply anti dumping measures that are consistent with the WTO Agreement, or that they choose not to use any anti dumping measures against one another.

In practice the third choice would be a rare one to make, with the trend being greater use of anti dumping measures rather than less.

It is acknowledged that Australia and New Zealand have operated efficiently upon the basis of not applying anti dumping measures in trade matters between them, however that arrangement is possible because of the very close relationship between the two economies and the significant similarities between the regulatory regimes operating in each country. In that case competition law is relied upon to address any uncompetitive pricing behaviour, which would otherwise have been addressed by anti dumping arrangements. It is noted however that even given the close alignment of the competition laws and regimes in these two economies, difficulties do arise where competition laws do not adequately cover some situations.

Over a long period several APEC economies have made extensive use of anti dumping processes and increasingly others have followed suit.

It is acknowledged that inappropriate use of such regimes for protectionist purposes is disruptive of the Region's business environment.

Given the diversity of the economies involved and varying degrees of development, however, it would be of great concern to business should RTAs /FTAs be negotiated in which it was agreed that reliance upon existing competition regimes would provide sufficient protection against anti competitive pricing practices.

In particular, such an option would introduce a degree of imbalance, risk and unpredictability that has been diminished with the introduction of the WTO rules and the widespread adoption of such regimes around the Region.

ABAC could recommend that note be made that the option of removing access to anti dumping procedures from RTAs/FTAs should not be taken unless adequate competition rules and processes are in place, all economies involved have adequate access to the procedures and the resources to utilize them, and a level of close legal cooperation exists between the economies.

8. **Safeguards:**

   Safeguards are an important trade remedy to guard industry against import surges that may cause a severe threat to local business. These are provided for in *GATT Article XIX* and the *WTO Agreement on Safeguards*.

   Some RTAS/FTAs provide for the application of safeguard measures and others do not.

   It is presumed that this subject, and the various options available, will be covered by a subsequent model chapter, and within a chapter dealing with agriculture in particular, however, given their importance to industry, it would be useful to make some reference to them as a potential remedy in relation to trade in goods and the intended treatment of them later in the model measures.

ABAC could note the significance of safeguards as an available remedy for business in trade in goods and recommend the inclusion of reference to safeguards in this chapter and further elaboration of options in a separate later chapter.

ABAC Australia
February 2007

Document: LWG 27-012A
Draft: **FIRST**
Source: ABAC Australia
Date: 23 May 2007
Meeting: Tokyo, Japan

Analysis of APEC Model Measures on Government Procurement

1. BACKGROUND

Leaders adopted *"Best Practices for RTAs/FTAs in APEC"* in 2004, to address issues arising from the proliferation of RTAs and FTAs in the APEC Region in recent years.

In 2005 it was agreed that APEC would develop model measures for as many commonly accepted RTA/FTA chapters as possible by 2008.

At their meeting in Hanoi in November 2006, Leaders agreed to six chapters in relation to *Trade in Goods*, *Technical Barriers to Trade*, *Transparency*, *Government Procurement*, *Cooperation and Trade Facilitation* as part of that process. An additional Chapter in relation to *Dispute Resolution* has also been drafted.

The APEC Business Advisory Council ("ABAC") wishes to provide advice to Leaders regarding the adequacy of these six chapters in meeting the needs of business in the Region.

2. BRIEF

To provide an assessment of the model chapter on government procurement adopted by Leaders in 2006, to identify key aspects that may be missing or require elaboration to meet the needs of business, noting in particular issues of clarity, predictability and coverage.

This paper is prepared to assist discussion in the Trade Liberalisation Working Group of ABAC in May/June 2007.

3. CONTENTS

Summary of Recommendations

H. Disclosure of Information
I. Use of Electronic Communications
J. Intellectual Property Protection
K. Domestic Review Procedures
L. Industry Development
M. Opportunities for Indigenous Populations
N. Disputes Settlement
O. Review of Commitments – Updating Lists of Entities Covered

Summary of Recommendations

(B) *ABAC could urge Leaders to request the future development of model measures that are more than guidelines and are truly draft RTA/FTA provisions.*

(C) *ABAC could recommend that particular attention be paid to ensuring consistency between provisions in relation to transparency and review and appeal procedures for the agreement generally and in relation to government procurement specifically.*

(D) ABAC could recommend inclusion of a summary of the objectives of the APEC Non Binding Principles on Government Procurement and Transparency and Standards on Government Procurement.

(E) ABAC could recommend the inclusion of a requirement that contact points and details of avenues of review and appeal are provided for all levels of government covered by the agreement.

(F) ABAC could recommend the incorporation of options involving adoption of the principles and provisions of the WTO Agreement on Government Procurement and encouragement of APEC economies entering RTAs/ FTAs, becoming signatories to that agreement.

(G) ABAC could recommend that the provisions in relation to technical specifications be consistent with the provisions in the "Technical Barriers to Trade" chapter.

(H) ABAC could recommend that specific provision be made for the protection of commercial in confidence information supplied in the course of tender processes.

(I) ABAC could recommend that, in line with the cost saving and sustainability advantages of paperless trading, that provisions be included that encourage the establishment of electronic procurement by governments to the greatest extent possible.

(J) ABAC could recommend that options be included for the provision of intellectual property protection for applications and material supporting applications in government tendering processes.

(K) ABAC could recommend the inclusion of reference to an independent administrative or judicial review process in relation to government procurement decisions.

(L) ABAC could recommend that a provision be included acknowledging that parties to an agreement may exempt industry assistance initiatives from rules applicable government procurement, with particular reference to SMEs or development objectives.

(M) ABAC could recommend that a provision be included acknowledging that parties to an agreement may exempt initiatives to promote the welfare and economic development of indigenous population, from rules applicable to government procurement.

(N) ABAC could recommend the inclusion of a provision encouraging parties to use the domestic tendering appeal and review provisions in relation to individual contract disputes, rather than inter governmental dispute settlement procedures, intended to address issues arising in relation to the RTA/FTA itself.

(O) ABAC could recommend that a provision be included for periodic review of commitments with specific reference to inclusion of additional government entities where appropriate.

A. Government Procurement Chapters in RTAs/FTAs

The business generated by all strata of government agencies and enterprises is a significant sector of commerce in every economy in the APEC Region.

While governments have been reluctant in many cases to relinquish absolute discretion in relation to the conduct of that business, government procurement is now viewed as an integral part of any RTA/FTA, albeit often with protections in place in relation to particular social, economic or development policy objectives or imperatives. The model chapter specifically mentions exceptions in relation to national security, public interest, and health and environmental protection for instance. The operations of State Trading Enterprises are also usually not covered by RTAs/FTAs.

Chapters covering government procurement typically aim to set out the nature of trade covered by the agreement, the agencies of government bound by the agreement, the value of the purchases covered and the processes and procedures involved in tendering, and reviewing and appealing decisions made.

In the WTO, government procurement is not covered by ***the General Agreement on Trade in Services ("GATS")*** or ***the General Agreement on Tariffs and Trade ("GATT")***. The ***WTO Agreement on Government Procurement*** is a plurilateral agreement, meaning that WTO Members are not required to be party to the agreement. The WTO Agreement has only a limited number of signatories, however in economic terms many are significant participants in world trade. The WTO Agreement on Government Procurement is discussed in section F following.

B. Model provisions

The most significant issue for business in relation to all the model chapters as drafted, including the government procurement chapter, is the form that they have taken. The chapters are similar in style and substance to the ***"Best Practices for RTAs/FTAs in APEC"*** that preceded them, and while they offer more detail as to the type of provisions that might be included in specific chapters, no attempt has been made to provide true model measures, capable of adoption in whole or part by drafters of future agreements.

It is understood that the detail of individual provisions will always depend on the particular circumstances of the economies involved, their relationship, and the desired outcomes of the agreement under negotiation. RTAs/ FTAs around the Region are unlikely to become completely uniform in style and content in the near future.

It is noted that the model measures are specifically intended as a guide and are deliberately not expressed in the legal language that might be used in an agreement.

It would be of substantial assistance to regional business, however, if agreement were reached upon the possible wording of commonly included provisions, with variations to allow for choices where necessary.

The government procurement chapter is often a controversial one in that parties are typically loathe to commit themselves to opening up their own government business, while coveting lucrative government business of their trading partners. In addition, this market is often seen as uniquely the territory of local industry and inextricably linked to domestic industry assistance. Finally, the issue is complicated by the nature of WTO arrangements in which the relevant agreement is a plurilateral one, to which not all WTO Members are signatories.

Despite all these factors, it is still be possible to provide examples of core provisions that may be easily included in most RTAs/FTAs in the APEC Region, and provisions that might be applicable in agreements where all parties are signatories to the WTO Agreement on Government Procurement.

Provisions such as those in relation to national treatment and non discrimination, procurement methods, treatment of tenders and contract awards, rules of origin, publication of information and notices, transparency, disclosure, prohibition of offsets or technical specifications are examples of those that may be drafted to accommodate most requirements.

National treatment and non discrimination provisions in the ***North American Free Trade Agreement ("NAFTA")*** and the ***Singapore – Australia Free Trade Agreement ("SAFTA")*** and the ***Agreement between the Republic of Korea and the Republic of Chile ("KCFTA")*** for instance, are all very similar in wording:

NAFTA Article 1003 : National Treatment and Non Discrimination

> ***1. With respect to measures covered by this Chapter, each Party shall accord to goods of another Party, to the suppliers of such goods and to service suppliers of another Party, treatment no less favorable than the most favorable treatment that the Party accords to:***
> ***(a) its own goods and suppliers; and***
> ***(b) goods and suppliers of another Party.***
>
> ***2. With respect to measures covered by this Chapter, no Party may:***
> ***(a) treat a locally established supplier less favorably than another locally established supplier on the basis of degree of foreign affliation or ownership;or***
> ***(b) discriminate against a locally established supplier on the basis that the goods or services offered by that supplier for the particular procurement are goods or services of another Party.***
>
> ***3. Paragraph 1 does not apply to measures respecting customs duties or other charges of any kind imposed on or in connection with importation, the method of levying such duties or charges or other import regulations, including restrictions and formalities.***

SAFTA Article 3: National Treatment

1. With respect to all laws, regulations, procedures and practices regarding government procurement covered by this Chapter, each Party shall provide immediately and unconditionally to the goods, services and suppliers of the other Party offering goods or services of the other Party, treatment no less favourable than that accorded to domestic goods, services and suppliers.

2. With respect to all laws, regulations, procedures and practices regarding government procurement covered by this Chapter, each party shall ensure:

(a) that its entities shall not treat a locally-established supplier less favourably than another locally –established supplier on the basis of degree of foreign affiliation or ownership; and

(b) that its entities shall not discriminate against a locally established supplier on the basis that it is a supplier of a good or service of the other Party.

3. The provisions of paragraphs 1 and 2 shall not apply to customs duties and charges of any kind imposed on or in connection with importation, the method of levying such duties and charges, other import regulations and formalities, and measures affecting trade in services other than laws, regulations, procedures and practices regarding government procurement covered by this Chapter.

4. A Party shall not discriminate in favour of corporate bodies in which that Party is a shareholder.

KCFTA Article 15.3 : National Treatment and Non-Discrimination

1. Each Party shall ensure that the procurement of its entities covered by this Chapter takes place in a transparent, reasonable and non-discriminatory manner, treating any supplier of either Party equally and ensuring the principle of open and effective competition.

2. With respect to any laws, regulations, procedures and practices regarding government procurement covered by this Chapter, each Party shall grant the goods, services and suppliers of the other Party a treatment no less favourable than that accorded by it to domestic goods, services and suppliers.

3. With respect to any laws, regulations, procedures and practices regarding government procurement covered by this Chapter, each Party shall ensure:

(a) that its entities do not treat a locally-established supplier less favourably than any other locally-established supplier on the basis of the degree of foreign affiliation to, or ownership by, a person of the other Party; and

(b) that its entities do not discriminate against a locally-established supplier on the basis that the goods or services offered by that supplier for a particular procurement are goods or services of the other Party.

4. This Article shall not apply to measures concerning customs duties or other charges of any kind imposed on, or in connection with importation, the method of levying such duties and charges, other import regulations, including restrictions and formalities, nor to measures affecting trade in services other than measures specifically governing procurement covered by this Chapter.

Not all provisions may be as consistent in wording as these, however there are a significant number for which a model could be agreed.

The wording of the provisions in relation to technical specifications for instance, vary from the more general to more detailed in nature, but the intent and even the effect may be very similar. For example:

SAFTA Article 5: Technical Specifications

Technical specifications laying down the characteristics of the goods or services to be procured shall not be prepared, adopted or applied with a view to, or with effect of, creating unnecessary obstacles to trade between the Parties.

NAFTA Article 1007 : Technical Specifications

1. *Each Party shall ensure that its entities do not prepare, adopt or apply any technical specification with the purpose or the effect of creating unnecessary obstacles to trade.*
2. *Each Party shall ensure that any technical specification prescribed by its entities is, where appropriate:*
   - *(a) specified in terms of performance criteria rather than design or descriptive characteristics; and*
   - *(b) based on international standards, national technical recognized national standards, or building codes.*
3. *Each Party shall ensure that the technical specifications prescribed by its entities do not require or refer to a particular trade mark or name, patent, design or type, specific origin or producer or supplier unless there is no sufficiently precise or intelligible way of otherwise describing the procurement requirements and provided that, in such*

cases, words such as "or equivalent" are included in the tender documentation.

4. *Each Party shall ensure that its entities do not seek or accept, in a manner that would have the effect of precluding competition, advice that may be used in the preparation or adoption of any technical specification for a specific procurement from a person that may have a commercial interest in that procurement.*

KCFTA Article 15.11: Technical Specifications

1. Technical specifications shall be set out in the notices, tender documents or additional documents.

2. Each Party shall ensure that its entities do not prepare, adopt or apply any technical specifications with a view to, or with the effect of, creating unnecessary obstacles to trade between the Parties.

3. Technical specifications prescribed by entities shall:

(a) be in terms of performance and functional requirements, rather than design or descriptive characteristics; and

(b) be based on international standards, where they exist or, in absence of such standards, on national technical regulations[3], recognised national standards[4] or building codes.

4. Paragraph 3 does not apply when the entity may objectively demonstrate that the use of technical specifications referred to in that paragraph would be ineffective or inappropriate for the fulfilment of the legitimate objectives pursued.

5. In all cases, entities shall consider bids which do not comply with the technical specifications but meet the essential requirements thereof and are fit for the purpose intended. The reference to technical specifications in the tender documents must include words such as "or equivalent".

6. There shall be no requirement or reference to a particular trademark or trade name, patent, design or type, specific origin, producer or supplier, unless there is no sufficiently precise or intelligible way of describing the procurement requirements and provided that words, such as "or equivalent", are included in the tender documentation.

7. The tenderer shall have the burden of proof to demonstrate that its bid meets the essential requirements.

More complicated provisions, such as those providing lists of entities covered by the agreement or contractual thresholds, may be drafted with reference to annexes for greater detail and to suit individual circumstances.

Others such as those covering exceptions to the chapter, domestic review procedures or provisions in relation to the integrity of procurement practices, may lend themselves to drafting of a number of options or alternate paragraphs. They may ultimately require individual crafting, however greater consistency between agreements would be likely even where alternatives have been offered.

Whatever uniformity could be achieved would be of assistance to drafters, particularly in those economies with less negotiating experience or resources to devote to RTA/FTA processes.

It would also provide significant predictability and clarity for business participating in the process and in operating throughout the Region, should some degree of uniformity follow.

The practical effect for business of the ultimate adoption of even some uniform provisions would be a less complicated regulatory environment in which to work. The meaning and interpretation of individual provisions would be more predictable, and easier for business to apply.

The model chapters as drafted provide a checklist, and a guide, which is useful in itself, but their limitations result in an opportunity lost for business.

ABAC could urge Leaders to request the future development of model measures that are more than guidelines and are truly draft RTA/FTA provisions.

C. Consistency of chapter content:

Although the considerations in government procurement business are different to those in private sector transactions, and although this inevitably necessitates some duplication of core provisions such as transparency and review and appeal procedures, it is important to ensure that a consistent approach is adopted and procedures are not made unduly complicated by the application of different rules.

ABAC could recommend that particular attention be paid to ensuring consistency between provisions in relation to transparency and review and appeal procedures for the agreement generally and in relation to government procurement specifically.

D. APEC Non Binding Principles on Government Procurement and Transparency Standards on Government Procurement:

The APEC Non Binding Principles on Government Procurement **("NBPs")** were endorsed by APEC Leaders in Auckland in 1999.

This model chapter is expressed as building upon the NBPs, but no detail is provided as to the objectives and coverage of those Principles.

In the interest of clarity, it is suggested that a summary noting that those Principles include objectives such as transparency, open and effective competition, fair dealing, non discrimination, value for money, accountability and due process, may be a useful inclusion in the opening paragraph.

For example the ***Thailand Australia Free Trade Agreement*** **("TAFTA")** provides in **Article 1503**:

> ***Procurement Principles***
> ***In preparation for the outcome of the negotiations mandated by Article 1502, the Parties shall, to the extent possible, promote and apply transparency, value for money, open and effective competition, fair dealing, accountability and due process, and non discrimination in their government procurement procedures.***

ABAC could recommend inclusion of a summary of the objectives of the APEC Non Binding Principles on Government Procurement and Transparency and Standards on Government Procurement.

E. Application of Agreement:

This section makes reference to the need to clearly specify positive lists of entities covered by the government procurement obligations.

Typically RTAs/FTAs include long lists of entities covered in each jurisdiction.

As many economies have multiple layers of government purchasing including central governments, state and provincial governments, and government business enterprises, it is essential for business that detailed lists of government entities covered by the agreement are provided and that appropriate contact points and avenues of review and appeal for all levels of government are provided.

ABAC could recommend the inclusion of a requirement that contact points and details of avenues of review and appeal are provided for all levels of government covered by the agreement.

F. WTO Agreement on Government Procurement:

The model chapter makes no mention of the provisions of the ***WTO Agreement on Government Procurement.***

It is noted that while not all APEC economies are signatories to this plurilateral agreement, a significant proportion of the regional trade is covered by its provisions. Canada, Hong Kong, Japan, South Korea, Singapore and the United States are all signatories.

In these circumstances it may be useful to draft model provisions that acknowledge the existence of this agreement, the possibility of incorporation of its provisions into RTAs/ FTAs involving APEC economies and potentially the desirability of encouraging other APEC economies to become signatories to the agreement.

Complications can arise in RTAS/FTAs as a result of the plurilateral nature of the ***WTO Agreement on Government Procurement***. In the ***Australia United States Free Trade Agreement (AUSFTA)*** negotiations, Australia's non signatory status was an obstacle that had to be overcome by legislative means, as the US was in effect precluded from extending access to economies that are not parties to the WTO Agreement.

ABAC could recommend the incorporation of options involving adoption of the principles and provisions of the WTO Agreement on Government Procurement and encouragement of APEC economies entering RTAs/ FTAs, becoming signatories to that agreement.

G. Technical specifications:

This provision allows for the adoption of certain types of technical specification including reference to international and national standards.

To avoid unnecessary complication and burdens for business, this chapter should align with requirements under the Technical Barriers to Trade chapter.

As noted in section B above, RTAs/FTAs vary in the detail included in technical specification provisions, although the intent is likely to be similar. It may be possible to introduce greater consistency by drafting uniform technical specification provisions.

ABAC could recommend that the provisions in relation to technical specifications be consistent with the provisions in the "Technical Barriers to Trade" chapter.

H. Disclosure of information:

This provision makes reference to the requirement that information not be disclosed that may be prejudicial to fair competition, however it does not make specific reference to the need in some circumstances to protect information that is provided in the course of tender proceedings, that may be commercial in confidence in nature. This is a significant issue for business participation in often rigorous tender processes, and specific protection of such information to allow full and appropriate disclosure and participation by all parties is necessary.

ABAC could recommend that specific provision be made for the protection of commercial in confidence information supplied in the course of tender processes.

I Use of electronic communications:

This provision as drafted encourages the establishment and maintenance of electronic systems for information and communications on procurement process and tendering opportunities but does not specifically encourage the establishment of electronic procurement itself.

It has been established that there are significant cost savings for business and sustainability arguments in favour of moving toward paperless trading systems. Government procurement provides an opportunity to adopt electronic systems that may then influence practices within private sector trade arrangements.

Model provisions might cover issues such as authentication systems, online auctions, protection of documentation from unauthorized alteration and data security.

ABAC could recommend that, in line with the cost saving and sustainability advantages of paperless trading, that provisions be included that encourage the establishment of electronic procurement by governments to the greatest extent possible.

J. Intellectual property protection:

Tendering processes often require extensive documentation and business may be required to undertake significant work to present an application. Intellectual property may exist in either the materials of the application itself, or material provided to support the application. Protection of these assets can be significant to individual businesses.

Model provisions to extend intellectual property protection to the materials provided as part of the tendering processes in government procurement should be included in this chapter.

At the very least, it should be noted that such material should not be disclosed by the government agency to third parties, or used by them other than in relation to the particular tender.

ABAC could recommend that options be included for the provision of intellectual property protection for applications and material supporting applications in government tendering processes.

K. Domestic review procedures:

This section provides for a "timely, effective, transparent and non discriminatory administrative or judicial review procedure".

No provision is made that the procedure should be conducted by an independent administrative or judicial authority. This would be highly desirable to ensure business confidence in the integrity of review processes.

ABAC could recommend the inclusion of reference to an independent administrative or judicial review process in relation to government procurement decisions.

L. Industry Development:

Appropriate, targeted, domestic industry assistance is recognized as a legitimate function of government and an acceptable part of the modern trading environment, particularly in the case of developing economies.

Government business has often provided an important resource to encourage the development of local industry. There is however an inherent tension between the need for economies to ensure that their industries have an opportunity to grow and prosper and the need to ensure that discriminatory, protectionist practices are not sheltered by exceptions to the government procurement market.

Development objectives are covered in the guidelines set out in the ***Best Practices for RTAS/FTAs in APEC*** agreed upon by Leaders in Santiago 2004. They include reference to coverage of sustainable development imperatives:

> ***RTAs/FTAs involving APEC economies can best support the achievement of the APEC Bogor Goals by having the following characteristics:***
> ...
> *Sustainable Development*
> - ***Reflecting the inter-dependent and mutually supportive linkages between the three pillars of sustainable development – economic development, social development and environmental protection – of which trade is an integral component, they reinforce the objectives of sustainable development***

It would be useful to include in the model chapter reference to inclusion in RTAs/FTAs of provisions regarding the relationship between government procurement practices and industry development.

This type of provision has been included in **SAFTA** and **AUSFTA:**

SAFTA Article 16:

> *Industry Development*
> ***Nothing in this Chapter shall prevent the Parties from using government procurement to promote industry development including measures to assist small and medium enterprises (SMEs) within their territory to gain access to the government procurement market.***

AUSFTA

Article 15.2.5 specifically bans offsets (these are requirements built into procurement such as local content, technology transfer or export performance) however this ban is subject to an exclusion in relation to Australian Government support for SMEs –

Schedule

This Chapter does not apply to:

(a) any form of preference to benefit small and medium enterprises;

ABAC could recommend that a provision be included acknowledging that parties to an agreement may exempt industry assistance initiatives from rules applicable government procurement, with particular reference to SMEs or development objectives.

M. Opportunities for Indigenous Populations:

Provision is sometimes made in relation to the desire of parties to ensure adequate and appropriate assistance for the economic development and welfare of indigenous populations.

The discussion in Section L above regarding the guidelines for ***Best Practice for RTAS/FTAs in APEC*** in relation to social development objectives is relevant in this context also.

SAFTA and **AUSFTA** both include such provisions:

SAFTA Article 15:

Opportunities for indigenous persons
Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade, nothing in this Chapter shall prevent Australia from promoting employment and training opportunities for its indigenous people in regions where significant populations exist.

AUSFTA

Schedule

This Chapter does not apply to:

(a) any form of preference to benefit small and medium enterprises;

(b) measures to protect national treasures of artistic, historic, or archaeological value;

(c) measures for the health and welfare of indigenous people; and

(d) measures for the economic and social advancement of indigenous people

ABAC could recommend that a provision be included acknowledging that parties to an agreement may exempt initiatives to promote the welfare and economic development of indigenous population, from rules applicable to government procurement.

N. Dispute Settlement:

Given the nature of government procurement contracts and often the involvement of one of the parties to the RTA/FTA, it would be desirable to expressly encourage reliance upon the tender review procedures rather than the dispute settlement provisions of the agreement.

Use of the latter course of redress essentially elevates a commercial dispute to one between the state parties to the agreement, and blurs the lines as to the roles of the relevant players.

While it is important that adequate review processes be available to address contract disputes, access to inter government mechanisms for resolution of all disputes would not be in the interests of business certainty and would potentially introduce untenable doubt and delay in contractual processes.

An appropriate provision could be similar to that included in **SAFTA Article 17**:

Dispute Settlement

A Party may not initiate dispute settlement proceedings under Chapter 16 (Dispute Settlement) regarding its rights and obligations under this Chapter unless:

(a) the matter giving rise to the dispute involves a pattern of practice; and

(b) the suppliers affected have exhausted the available remedies regarding the particular matter.

ABAC could recommend the inclusion of a provision encouraging parties to use the domestic tendering appeal and review provisions in relation to individual contract disputes, rather than inter governmental dispute settlement procedures, intended to address issues arising in relation to the RTA/FTA itself.

O. Review of Commitments – Updating Lists of Entities Covered:

One of the more onerous tasks for negotiators and drafters of RTAs/FTAs is the assembling of the lists of government departments, agencies and enterprises covered in a government procurement chapter.

In many economies governments include central, state, local or regional bodies, a wide array of departments or ministries covering particular portfolio interests, and an equally wide array of agencies and enterprises that may be partly independent of government and commercial or quasi commercial in nature.

Determining which agencies and what economic activity is to be open and what is to be exempted is a significant and, given the nature of governments, ever evolving task.

For this reason, it is essential that provision be included for regular review of the government agencies covered, to ensure that business is not precluded from opportunities that arise as a result of changed government arrangements after the conclusion of the RTA/FTA.

The guidelines included in the ***Best Practice for RTAS/FTAs in APEC*** include reference to the need for periodic review.

> ***...Periodic review helps to maintain the momentum for domestic reform and further liberalization by addressing areas that may not have been considered during the original negotiations, promoting deeper liberalization and introducing more sophisticated mechanisms for cooperation as the economies of the Parties become more integrated.***

SAFTA Article 18 provides:

…

> ***2.*** ***Not later than 12 months from the date of entry into force of this Agreement and biennially thereafter, the Parties shall examine and, where appropriate, update the entities specified in Annexes 3A and 3B.***
>
> *3.* ***As part of the examination referred to in Article 18.2, both Parties shall consider adding entities to their respective Annexes. This undertaking shall include Australia encouraging its State and Territory Governments to list their entities by the time of the first review, and Singapore considering adding entities not covered by the WTO Plurilateral Agreement on Government Procurement.***

ABAC could recommend that a provision be included for periodic review of commitments with specific reference to inclusion of additional government entities where appropriate.

Lisa Barker
April 2007

Document: LWG 27-012B
Draft: **FIRST**
Source: ABAC Australia
Date: 23 May 2007
Meeting: Tokyo, Japan

Analysis of APEC Model Measures on Goods

1. BACKGROUND

Leaders adopted "Best Practices for RTAs/FTAs" in 2004, to address issues arising from the proliferation of RTAs and FTAs in the APEC Region in recent years.

In 2005 it was agreed that APEC would develop model measures for as many commonly accepted RTA/FTA chapters as possible by 2008.

At their meeting in Hanoi in November 2006, Leaders agreed to six chapters as part of that process, and asked that the APEC Business Advisory Council provide advice as to the adequacy of these six in meeting the needs of business in the Region.

2. BRIEF

To provide an assessment of the model chapter on trade in goods adopted by Leaders in 2006, to identify key aspects that may be missing or require elaboration to meet the needs of business, noting in particular issues of clarity, predictability and coverage.

This paper is prepared to assist discussion in the Trade Liberalisation Working Group of the APEC Business Advisory Council in February 2007.

3. CONTENTS

TRADE IN GOODS CHAPTER

1. General Comments:

- **Format**

The draft chapter covers subject areas commonly included in a trade in goods chapter in regional or free trade agreements ("RTAs/FTAs").

Individual agreements order subject matter idiosyncratically, which means that in some cases, ancilliary issues may be included in a goods chapter, and in others they may be dealt with separately in the agreement.

Different agreements adopt different approaches to the overall format of the text. While that choice may seem of little significance provided all subject matter is covered, from a business perspective it would enhance clarity should there be a common format. Business would know where particular issues of interest are located within what are often complex and lengthy documents.

ABAC could recommend that to the extent possible RTAs/ FTAs within the APEC region adopt a common format, including the ordering of subject matter and treatment of annexes.

- **Model provisions**

The most significant issue for business in relation to all the model chapters as drafted, including the goods chapter, is the form that they have taken. The chapters are similar in style and substance to the *"Best Practices for RTAs/FTAs"* that preceded them, and while they offer more detail as to the type of provisions that might be included in specific chapters, no attempt has been made to provide true model measures, capable of adoption in whole or part by drafters of future agreements.

It is understood that the detail of individual provisions will always depend on the particular circumstances of the economies involved, their relationship, and the desired outcomes of the agreement under negotiation. RTAs/ FTAs around the Region are unlikely to become completely uniform in style and content in the near future.

It is noted that the model measures are specifically intended as a guide and they are deliberately not expressed in the legal language that might be used in an agreement.

It would be of substantial assistance to regional business, however, if agreement were reached upon the possible wording of commonly included provisions, with variations to allow for choices where necessary.

While the trade in goods chapter is typically a complex one in that it either includes specific reference to individual sectors or refers to schedules or annexes dealing with specific sectors, or related issues such as rules of origin, customs procedures, tariff schedules, certification requirements, anti dumping,

countervailing or safeguard measures, it would still be possible to provide examples of core provisions that may be easily included in all RTAs/FTAs.

For example, while variation in detail exists, the provision establishing application of the principle of national treatment, is similar in a number of RTAs/FTAs between APEC economies, and an agreed model may be possible:

In the North America Free Trade Agreement - Article 301:

1. *Each Party shall accord national treatment to the goods of another Party in accordance with Article III of the general Agreement on Tariffs and Trade (GATT), including its interpretative notes, and to this end Article III of the GATT and its interpretative notes, or any equivalent provision of a successor agreement to which all Parties are party, are incorporated into and made part of this Agreement.*
2. *The provisions of paragraph 1 regarding national treatment shall mean, with respect to a state or province, treatment no less favorable than the most favorable treatment accorded by such state or province to any like, directly competitive or substitutable goods, as the case may be, of the Party of which it forms a part.*

In the Free Trade Agreement between Chile and Korea – Article 3.3:

1. *Each Party shall accord national treatment to the goods of the other Party in accordance with Article III of GATT, including its interpretative notes, and to this end, Article III of GATT and its interpretative notes, or any equivalent provisions of a successor agreement to which both parties are party are incorporated into and made part of the Agreement.*
2. *For the purpose of paragraph 1, each Party shall grant to the goods of the other party a treatment no less favorable than the most favorable treatment granted by that Party to its own like or directly competitive or substitutable goods of national origin.*

In the Free Trade Agreement between Singapore and Australia – Article 2:

National Treatment on Internal Taxation and Regulation

Each Party shall accord national treatment to the goods of the other party in accordance with Article III of the GATT 1994. To this end the provisions of Article III of the GATT 1994, are incorporated into and shall form part of this Agreement.

In the Free Trade Agreement between Thailand and Australia – Article 202:

Each Party shall accord national treatment to the goods of the other Party in accordance with Article III of GATT 1994.

Not all provisions may be as consistent in application as this one, however there are a significant number for which a model could be agreed.

Provisions such as those covering general considerations of the agreement, or those relating to elimination and reduction of customs duties, anti dumping measures, subsidies and countervailing measures, temporary admission of goods, duty free entry of commercial samples, non tariff measures, goods re entered after repair or alteration, establishment of a review body, could all be relatively uncontroversial in composition.

More complicated provisions such as those providing for export taxes and export duties, may be simply drafted with reference to annexes for greater detail to suit individual circumstances.

This would be of assistance to drafters, particularly in those economies with less negotiating experience or resources to devote to RTA/FTA processes.

It would also provide significant predictability and clarity for business participating in the process and in operating throughout the Region, should some degree of uniformity follow.

The practical effect for business of the ultimate adoption of even some uniform provisions would be a less complicated regulatory environment in which to work. The meaning and interpretation of individual provisions would be more predictable, and easier for business to apply.

The model chapters as drafted provide a checklist, and a guide, which is useful in itself, but their limitations result in an opportunity lost for business.

ABAC could urge Leaders to request the future development of model measures that are more than guidelines and are truly draft RTA/FTA provisions.

- **Sectoral annexes and side letters**

Existing RTAs/FTAs rely heavily upon the incorporation of annexes and side letters to either deal with issues that remain unresolved but of continuing negotiation and effort or to accommodate the natural evolution of trade issues between the parties as time passes. In many cases, significant aspects of the agreement are covered through such mechanisms.

Many of the issues dealt with through these annexes relate to the trade in goods chapter, and many relate to specific goods sectors.

In some cases this mechanism allows dealing with detailed information or listing that would be inappropriate or cumbersome within the text of the main agreement.

Annexes cover issues such as certification processes, quarantine, horticultural and food products, treatment of pharmaceuticals (*AUSFTA)*, rules of origin (*SAFTA*), trade in textiles and apparel goods or the automotive sector (*NAFTA*), agreements in relation to wine or steel or modified application of the agreement (*ANZCERTA*), schedules of commitments for each individual economy and side letters on issues such as telecommunications, intellectual property rights, foreign bank branches (*CAFTA).*

The model chapter makes no reference to the inclusion of such annexes, other than in relation to the scheduling of tariff commitments.

In reality the likely coverage of annexes could be extensive and varied in nature. While these agreements are individual in content, establishing some common format in relation to the treatment of additional subject matter to be dealt with by side letter or annex, would contribute significantly to clarity and make the agreements easier for business to use.

ABAC could recommend the inclusion of reference to the type of areas that might be covered by an annex to an agreement rather than specific provision within the agreement itself and suggested referencing and formatting for such annexes.

2. Enabling Clause:

Although reference has been made to "other relevant WTO provisions" specific reference should be made to the *Enabling Clause*, under "General considerations relevant to the chapter".

Given the diversity of APEC economies, and the real possibility that RTAs/FTAs may be negotiated by two or more developing economies in the Region, some reference should be made to the particular provisions of the *Enabling Clause (the Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries).*

The WTO Agreements provide for two types of RTA/FTA in relation to trade in goods. (Agreements in relation to trade in services are covered by the same rules regardless of the development status of the parties: *GATS Article V*.)

Generally applicable rules in relation to trade in goods in RTAS/FTAs are found in Article XXIV of the *General Agreement on Tariffs and Trade (GATT).*

The *Enabling Clause* covers preferential trade in goods in RTAs/FTAs between developing countries. This GATT Decision allows divergence from MFN obligations where agreements are between developing economies only. It does not cover agreements between developed and developing economies and does not permit trade preferences from developed to developing economies.

ABAC could recommend that reference to the Enabling Clause and its effect be included in this chapter.

3. Rules of Origin:

A significant issue for trade throughout the world, has been the inability of Members of the WTO to agree upon a common approach and universal rules to determine origin.

Potentially all RTAs/FTAs may adopt different approaches and rules in relation to origin, creating a complex business environment regardless of other removal of trade barriers.

Rules of origin are of central importance to a Trade in Goods chapter, and will presumably be the subject of a stand alone model chapter to be agreed at a later date.

Nevertheless, some reference to the role of rules of origin and the manner in which they will be dealt with would be useful here. Indeed, some existing RTAs/FTAs group issues such as rules of origin, customs procedures, agriculture and sanitary and phytosanitary measures together under a section heading "Trade in Goods" (eg *NAFTA*).

The *Common Declaration with Regard to Preferential Rules of Origin*, attached to the *WTO Agreement on Rules of Origin,* acknowledges that some Members apply preferential rules of origin (as may be included in RTAs/ FTAs) and sets out WTO requirements for such preferences.

Members are required to notify the WTO Secretariat of their preferential rules of origin and any modifications that they make to them, for circulation to other Members. The model provision should acknowledge this requirement to ensure that information regarding the existence of preferences is made available for business as promptly as possible. Changes to preferential rules of origin may not be made retroactively.

ABAC could recommend that reference be made to WTO requirements in relation to rules of origin and the intended treatment of rules of origin in the APEC model measures.

4. **Country of Origin markings:**

Some RTAs/FTAs specify requirements for country of origin markings (eg *NAFTA*).

This may be useful in ensuring that common rules apply and that business is aware of the applicable requirements.

ABAC could recommend that provisions be included in relation to country of origin marking requirements.

5. **Tariff phasing out arrangements:**

Provision is made for the adoption of a schedule for the elimination and reduction of tariffs, however no mention is made of the requirement that the phase out period be no greater than 10 years unless exceptional circumstances apply (as set out in *GATT Article XXIV* and *the Understanding on the interpretation of Article XXIV).*

GATT Article XXIV paragraph 5 provides:

Accordingly, the provisions of this Agreement shall not prevent, as between the territories of contracting parties, the formation of a customs union or of a free-trade area or the adoption of an interim agreement necessary for the formation of a customs union or of a free-trade area;

Provided that:

(a) with respect to a customs union, or an interim agreement leading to a formation of a customs union, the duties and other regulations of commerce imposed at the institution of any such union or interim agreement in respect of trade with contracting parties not parties to such union or agreement shall not on the whole be higher or more restrictive than the general incidence of the duties and regulations of commerce applicable in the constituent territories prior to the formation of such union or the adoption of such interim agreement, as the case may be;

(b) ***with respect to a free-trade area****, or an interim agreement leading to the formation of a free-trade area, the duties and other regulations of commerce maintained in each of the constituent territories and applicable at the formation of such free–trade area or the adoption of such interim agreement to the trade of contracting parties not included in such area or not parties to such agreement shall not be higher or more restrictive than the corresponding duties and other regulations of commerce existing in the same constituent territories prior to the formation of the free-trade area, or interim agreement as the case may be; and*

(c) ***any interim agreement referred to in subparagraphs (a) and (b) shall include a plan and schedule for the formation of such a customs union or of such a free-trade area within a reasonable length of time.***

The *Understanding on the Interpretation of the GATT 1994* provides an explanatory note on the meaning of the term "*reasonable length of time"*, prescribing a period of not longer than 10 years to effectively establish a free trade area.

3. The "reasonable length of time" referred to in paragraph 5(c) of Article XXIV should exceed 10 years only in exceptional cases. In cases where Members parties to an interim agreement believe that 10 years would be insufficient they shall provide a full explanation to the Council for Trade in Goods of the need for a longer period.

This is a significant issue for business given the adoption of much longer phase out periods in some agreements in recent years, severely affecting the ultimate benefits delivered and introducing complicated regimes going forward some time into the future.

ABAC could recommend that reference be included to the requirement that phase out periods for tariff reductions and elimination not exceed 10 years unless exceptional circumstances exist.

6. **Conformity assessment:**

A significant issue for business in the region is the need to conform to varying standards in relation to trade in a wide range of goods. While regional bodies are moving towards harmonization with appropriate international standards, this remains a long term goal.

In the meantime, there is great variation between economies in relation to both applicable standards and conformance assessment procedures.

Inclusion of a provision in the model chapter to mutually recognize conformance assessments where possible, would be a welcome step toward certainty in determining trade requirements and significantly reduce costs for business in the region.

ABAC could recommend the inclusion of a model provision to allowing parties to mutually recognize standards conformance assessments in relation to agreed goods

7. **Anti dumping measures**:

Provision is made in the model measures for three main options parties may choose from in setting up anti dumping regimes. These are, in effect, that the parties rely exclusively upon the WTO Agreement, that they apply anti dumping measures that are consistent with the WTO Agreement, or that they choose not to use any anti dumping measures against one another.

In practice the third choice would be a rare one to make, with the trend being greater use of anti dumping measures rather than less.

It is acknowledged that Australia and New Zealand have operated efficiently upon the basis of not applying anti dumping measures in trade matters between them, however that arrangement is possible because of the very close relationship between the two economies and the significant similarities between the regulatory regimes operating in each country. In that case competition law is relied upon to address any uncompetitive pricing behaviour, which would otherwise have been addressed by anti dumping arrangements. It is noted however that even given the close alignment of the competition laws and regimes in these two economies, difficulties do arise where competition laws do not adequately cover some situations.

Over a long period several APEC economies have made extensive use of anti dumping processes and increasingly others have followed suit.

It is acknowledged that inappropriate use of such regimes for protectionist purposes is disruptive of the Region's business environment.

Given the diversity of the economies involved and varying degrees of development, however, it would be of great concern to business should RTAs /FTAs be negotiated in which it was agreed that reliance upon existing competition regimes would provide sufficient protection against anti competitive pricing practices.

In particular, such an option would introduce a degree of imbalance, risk and unpredictability that has been diminished with the introduction of the WTO rules and the widespread adoption of such regimes around the Region.

ABAC could recommend that note be made that the option of removing access to anti dumping procedures from RTAs/FTAs should not be taken unless adequate competition rules and processes are in place, all economies involved have adequate access to the procedures and the resources to utilize them, and a level of close legal cooperation exists between the economies.

8. **Safeguards:**

Safeguards are an important trade remedy to guard industry against import surges that may cause a severe threat to local business. These are provided for in *GATT Article XIX* and the *WTO Agreement on Safeguards*.

Some RTAS/FTAs provide for the application of safeguard measures and others do not.

It is presumed that this subject, and the various options available, will be covered by a subsequent model chapter, and within a chapter dealing with agriculture in particular, however, given their importance to industry, it would be useful to make some reference to them as a potential remedy in relation to trade in goods and the intended treatment of them later in the model measures.

ABAC could note the significance of safeguards as an available remedy for business in trade in goods and recommend the inclusion of reference to safeguards in this chapter and further elaboration of options in a separate later chapter.

Lisa Barker
February 2007

Document: LWG 27-012C
Draft: **FIRST**
Source: ABAC Australia
Date: 23 May 2007
Meeting: Tokyo, Japan

Analysis of APEC Model Measures on Transparency

1. BACKGROUND

Leaders adopted *"Best Practices for RTAs/FTAs in APEC"* in 2004, to address issues arising from the proliferation of RTAs and FTAs in the APEC Region in recent years.

In 2005 it was agreed that APEC would develop model measures for as many commonly accepted RTA/FTA chapters as possible by 2008.

At their meeting in Hanoi in November 2006, Leaders agreed to six chapters in relation to *Trade in Goods, Technical Barriers to Trade, Transparency, Government Procurement, Cooperation and Trade Facilitation* as part of that process. An additional Chapter in relation to *Dispute Resolution* has also been drafted.

The APEC Business Advisory Council ("ABAC") wishes to provide advice to Leaders regarding the adequacy of these six chapters in meeting the needs of business in the Region.

2. BRIEF

To provide an assessment of the model chapter on transparency adopted by Leaders in 2006, to identify key aspects that may be missing or require elaboration to meet the needs of business, noting in particular issues of clarity, predictability and coverage.

This paper is prepared to assist discussion in the Trade Liberalisation Working Group of ABAC in May/June 2007.

3. CONTENTS

Summary of Recommendations

Summary of recommendations

(A) ABAC could recommend that every effort be made to ensure that the structure of the model agreement avoid unnecessary duplication and inconsistency in provisions relating to transparency in this chapter and throughout other chapters.

(B) ABAC could urge Leaders to request the future development of model measures that are more than guidelines and are truly draft RTA/FTA provisions.

(C) ABAC could recommend that the model provisions relating to transparency include reference to timely publication of new laws, regulations, administrative rulings and procedures affecting trade, and that such publication be made at a fair and equitable cost.

(C) ABAC could recommend that the model provisions include reference to use of English as far as possible in publication.

(C) ABAC could recommend that the model provisions include a requirement that Parties publish details of international obligations that they have that are related to the RTA/FTA.

(D) ABAC could recommend that review and appeal provisions throughout different chapters be consistent with each other to the extent that that is possible. This would enable business to access those provisions with ease, to determine their rights and avenues of redress and the obligations and possible penalties applicable to them.

(E) ABAC could recommend that the model chapter include a requirement that there be periodic review of compliance with the transparency obligations of the agreement.

A. Transparency provisions in RTAs/FTAs

Transparency is recognized as a key component in ensuring a fair, effective and open world trade environment, and the development and inclusion of paragraphs and chapters dealing specifically with the subject in RTAs/FTAs has become increasingly common.

Transparency concepts are central to the multilateral agreements of the WTO. Issues of notification of laws and regulations, review and appeal procedures, the provision of contact points, are all key components of those agreements, and indeed of more recent RTAS/FTAs.

Ensuring effective transparency, while delivering a more equitable field for all trade partners, is also integral to preventing the insidious effects of corruption in APEC economies.

APEC Leaders have repeatedly stressed the importance of transparency in combating corruption and building equitable and prosperous economies. APEC has taken significant steps to emphasise the fundamental importance of transparency in trade issues through implementation of ***APEC Transparency Standards*** which provide specific guidance in areas such as trade and investment liberalization, services, investment, competition reform, standards and conformance, intellectual property, customs, market access, business mobility and government procurement.

The RTAs/FTAs model chapter covers:

- General considerations
- Contact points
- Publication
- Notification and provision of information
- Administrative proceedings
- Review and appeal

In addition to the general transparency chapter, these subjects will also no doubt be dealt with throughout the text of a model agreement in relation to specific trade areas (such as trade in goods, services or intellectual property). This format risks duplication and inconsistencies but is necessary, given the diverse range of topics covered in a RTA/FTA. That said, it is important that every effort is made to ensure that inconsistencies do not arise, as the consequences and costs for business in attempting to interpret and apply the terms of the agreement could be substantial.

ABAC could recommend that every effort be made to ensure that the structure of the model agreement avoid unnecessary duplication and inconsistency in provisions relating to transparency in this chapter and throughout other chapters.

B. Model provisions

The most significant issue for business in relation to all the model chapters as drafted, is the form that they have taken. The chapters are similar in style and substance to the ***"Best Practices for RTAs/FTAs"*** that preceded them, and while they offer more detail as to the type of provisions that might be included in specific chapters, no attempt has been made to provide true model measures, capable of adoption in whole or part by drafters of future agreements.

It is understood that the detail of individual provisions will always depend on the particular circumstances of the economies involved, their relationship, and the desired outcomes of the agreement under negotiation. RTAs and FTAs around the Region are unlikely to become completely uniform in style and content in the near future.

It is noted that the model measures are specifically intended as a guide and they are deliberately not expressed in the legal language that might be used in an agreement.

It would be of substantial assistance to regional business, however, if agreement were reached upon the possible wording of commonly included provisions, with variations to allow for choices where necessary.

This would be of assistance to drafters, particularly in those economies with less negotiating experience or resources to devote to RTA/FTA processes. It would also provide significant predictability and clarity for business participating in the process and in operating throughout the Region, should some degree of uniformity follow.

The Transparency model chapter is perhaps one that lends itself to quite extensive uniformity of provisions. While it is to be expected that individual arrangements would apply in relation to review and appeal mechanisms for instance, the wording of provisions dealing with publication, contact points, notifications and provision of information could be relatively similar for all jurisdictions and economies.

Many of these provisions in existing RTAs/FTAS are close in construction, suggesting that there is little that is controversial in the subject matter.

For example, provisions in relation to *"Publication"* in three different Agreements include the following:

New Zealand – Thailand Closer Economic Partnership Agreement: Article 14.1

1. ***Each Party shall ensure that its laws, regulations, administrative rulings, procedures and policies and any amendment thereto of general application pertaining to trade in goods, services and investment are promptly published or otherwise made available in such a manner as to enable interested persons from the other Party to become acquainted with them.***
2. ***For the purposes of the Chapter, "administrative ruling of general application" means an administrative ruling or interpretation that***

applies to all persons and fact situations and that is relevant to the implementation of this Agreement.

3. *When possible, a Party shall publish in advance any measure referred to in Paragraph 1 that it proposes to adopt and shall provide, where applicable, interested persons with a reasonable opportunity to comment on such proposed measures.*
4. *Each Party shall endeavour promptly to provide information and to respond to questions from the other Party pertaining to any measure referred to in Paragraph 1.*

Trans – Pacific Strategic Economic Partnership (Brunei, Chile, New Zealand and Singapore): Article 14.2

1. *Each Party shall ensure that its laws, regulations, procedures, and administrative rulings of general application with respect to any matter covered by this Agreement are promptly published or otherwise made available in such a manner as to enable interested persons and Parties to become acquainted with them.*
2. *When possible, each Party shall:*
   a. *Publish in advance any measure referred to in Paragraph 1 that it proposes to adopt; and*
   b. *Provide, where appropriate, interested persons and Parties with a reasonable opportunity to comment on such proposed measures.*

Japan-Republic of the Philippines Agreement for Economic Partnership:Art. 3

1. *Each Party shall promptly publish, or otherwise make publicly available, its laws, regulations, administrative procedures and administrative rulings and judicial decisions of general application as well as international agreements to which the Party is a party, respecting any covered by this Agreement.*
2. *Each Party shall make publicly available the names and addresses of competent authorities responsible for laws, regulations, administrative procedures and administrative rulings, referred to in paragraph 1 above(hereinafter referred to in this Chapter as "the competent authorities').*
3. *Each Party shall, upon request by the other Party, within a reasonable period of time, respond to specific questions from, and provide information to, the other Party, to the extent possible in English, with respect to matters referred to in paragraph 1 above.*

The practical effect for business of the adoption of even some uniform provisions would be a less complicated regulatory environment in which to work. The meaning and interpretation of individual provisions would be more predictable, and easier for business to apply.

The model chapters as drafted provide a checklist, and a guide, which is useful in itself, but their limitations result in an opportunity lost for business.

ABAC could urge Leaders to request the future development of model measures that are more than guidelines and are truly draft RTA/FTA provisions.

C. Publication

- ***Timely publication and costs of publication***

Access to published trade related laws, regulations, administrative rulings and procedures and provision for business input to the introduction of new measures is critical for the conduct of efficient and fair trade. The provisions of the model chapter seek to ensure this happens.

It is important however that publication occur in a timely way and at an appropriate and not prohibitive cost, to ensure that excessive burdens, particularly those associated with changes in regulation, are not unfairly placed upon business or used to discriminate between businesses.

ABAC could recommend that the model provisions relating to transparency include reference to timely publication of new laws, regulations, administrative rulings and procedures affecting trade, and that such publication be made at a fair and equitable cost.

- ***Language***

APEC is made up of 21 different economies, within which many different languages are spoken and laws, regulations and administrative procedures, when published, are done so in each of those languages. As has been acknowledged in many international organizations around the world, and in bilateral and multilateral trade negotiations, different interpretations of translations from language to language can prove controversial and introduce additional complexity into business activities.

While English is not the most widely spoken language within the APEC Region, it has been nominated by APEC as the official language for trade and commercial purposes in the Region. In a speech delivered in Auckland in March 2004, **Ambassador Mario Artaza** noted:

> *Within APEC, English is our official language for interaction and discussion. This is not to say that English is the most important or widely spoken language in the APEC Region. It is not, there are many more people speaking Chinese and Spanish and many other languages. But APEC recognized that for business and official interaction, English is the most commonly spoken language between economies and is the greatest facilitator of cross-cultural interaction.*
>
> *While there may be concern raised about a perceived lack of language diversity, reality is that we must communicate freely and openly in order to accomplish our tasks in the multilateral world.*
>
> *Ways to increase knowledge and understanding of the English language is an issue that will arise often throughout the year. The APEC process, and our hosts Chile, firmly believe that the expanded use of English for business and trade will deliver benefits to many sectors. Areas such as the tourism and finance industries are sectors where cross border interaction is high and there are potential language barriers. For Small and Medium Enterprises the expanded use of the English language opens opportunities to increase their competitiveness.*

The model publication provisions do not refer to any language requirement, although this does present a significant issue for business operating in this Region, with the diverse range of languages spoken and ultilised. RTAs/FTAs may attempt to address this issue, as in the ***Japan – Republic of Philippines Agreement for Economic Partnership*** (referred to in section B above) by encouraging use of English.

ABAC could recommend that the model provisions include reference to use of English as far as possible in publications.

- ***International obligations***

Increasingly the domestic regulation of an economy is extensively affected by international obligations. As these arrangements may affect an RTA/FTA, and in the interests of comprehensiveness, it would be useful to business if notice of related obligations (including those pursuant to WTO agreements) was also a requirement of publication.

ABAC could recommend that the model provisions include a requirement that Parties publish details of international obligations that they have that are related to the RTA/FTA.

D. Review and appeal

The provisions of this chapter refer to the arrangements in place for review or appeal in relation to administrative action or decision.

This involves individual businesses and rulings made in relation to particular transactions and trade. Similar provisions for administrative review and appeal in relation to specific trade areas (such as trade in goods, services or intellectual property) will arise in other model chapters.

These are of course different to the procedures in place in relation to settlement of disputes between parties to the agreement itself. In that case, issues may arise where one party (a government) has failed to provide a promised concession or failed to provide a promised regulatory reform.

In both instances it will often be actions taken affecting business interests that will attract the need to utilize all these mechanisms. In the case of review and appeal mechanisms it may be a single administrative decision in relation to a transaction, whereas in dispute settlement it is likely to be a failure to implement particular obligations in the agreement, such as introducing or repealing legislation, affecting one or more transactions, that will give rise to the complaint.

It is important that chapters dealing with these issues are consistent and to the extent possible cross referenced, so as to avoid any uncertainty for business in navigating the avenues of redress available to them, their obligations or the penalties applicable to them.

ABAC could recommend that review and appeal provisions throughout different chapters be consistent with each other to the extent that that is possible. This would enable business to access those provisions with ease, to determine their rights and avenues of redress and the obligations and possible penalties applicable to them.

E. Periodic review

The model chapter does not make provision for periodic review of transparency obligations, most particularly those obligations in relation to publication.

Given the constantly changing regulatory environments of most economies, including changes of governments, it is difficult if not impossible for business to stay fully informed about laws, regulations and administrative decisions or arrangements affecting their industries. This difficulty is greatly exacerbated if governments fail to publish those regulatory amendments in a timely and accessible manner.

ABAC could recommend that the model chapter include a requirement that there be periodic review of compliance with the transparency obligations of the agreement.

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May 2007