

## UNCLASSIFIED

Alison  
Burrows/People/DFATL  
11/07/2008 10:18 AM

To Ric Wells/People/DFATL@DFATL, Michael  
Growder/People/DFATL@DFATL, Michael  
Mann/People/DFATL@DFATL, Adam  
cc  
bcc

Subject ASR on mode 3 [SEC=UNCLASSIFIED]

ODIN Topic: TRADE

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MM - please file.

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ceo  
<ceo@servicesaustralia.org.  
au>  
10/07/2008 02:40 PM

To <alison.burrows@dfat.gov.au>  
cc  
Subject FTAs [SEC=UNCLASSIFIED]

**Alison, Attached is the relevant extract form our submission to Mortimer. Jane**

### **Principle 3: Caution in departing from the GATS Architecture with respect to Investment and People Movement**

There have been two schools of thought with respect to how to handle Services mode 3 (commercial presence) in a bilateral agreement which also covers Investment. The two basic models are;

- A GATS style chapter (or set of chapters) on Services which covers all modes of delivery including mode 3 plus a chapter on Investment which updates/replaces/attempts to go beyond traditional bilateral investor protection agreement (BIT)
- A NAFTA style chapter of Services mode 1 alone (often called a chapter on Cross-Border Trade in Services), extracting mode 3 and putting it into what then looks like a more ambitious Investment chapter. Modes 2 and 4 are similarly extracted and put (hopefully) into a chapter on temporary movement of natural persons (whether they are employed in services or goods producing sectors).
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In theory , the US (NAFTA) approach might be preferred, despite its greater departure from the WTO architecture, because it is more ambitious on the goods front, attempting to cover investment and people movement for goods producers as well.[1] <#\_ftn1> This approach seems more likely, therefore, to achieve WTO-plus outcomes.

In recent years, the Australian Services Roundtable has argued that what matters is not necessarily the architecture but rather the quality of the liberalising content achieved. And the jury has still been out on whether the architecture might affect the liberalising quality of the contents.

The architecture might not be likely to impact on quality, for example, in the case of the Australia/Japan FTA. But because that agreement will set an example in the APEC region, we need to pay close attention.

Our experience, meanwhile, in relation to the Australia/New Zealand ASEAN FTA negotiations, is that when dealing with developing country trading partners, the architecture may indeed significantly influence the quality of the liberalisation achieved.

The fact is that all WTO members ultimately have to accept that disciplines on trade in services are part and parcel of the negotiating environment. And they have to accept that all 4 modes of delivery are relevant. So developing countries which are otherwise unwilling to engage on non-WTO issues such as Investment (for example India) are obliged to accept that they must engage at least on mode 3 (commercial presence) for services providers. Services providers are more likely to achieve new and reaffirmed commitments with respect to commercial presence if the GATS architecture is retained. The proof of this pudding will be the AANZFTA.

Commitments on People Movement are as sensitive as Investment. But all WTO members, including the developed country members, ultimately can not avoid some discipline with respect to mode 2 and mode 4.

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[1] <#\_ftnref1> Some also argue that the NAFTA approach is to be preferred because it is more commonly associated with a negative list approach to scheduling of market access commitments. This argument is

spurious because the GATS style architecture can also be associated with negative listing of commitments, as Japan's hybrid approach has demonstrated.

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