



**Asia-Pacific
Economic Cooperation**

**APEC TOURISM IMPEDIMENTS STUDY
STAGE III (TWG 01/2006T)**

APEC Tourism Working Group

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TWG01/2006T

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Table of Contents

ACRONYMS	4
1 Executive Summary	5
2 Introduction	9
2.1 Background to the study	9
2.1.1 Tourism and Sustainable Economic development	9
2.1.2 APEC Commitments to Tourism liberalization	19
2.2 Scope of the Study	21
2.3 Work Plan	22
2.4 Acknowledgements	22
2.5 Limitation of the Report	23
2.6 Structure of the balance of the report	24
3 Impediments to Tourism Growth	24
3.1 The Nature and definition of the impediments	24
3.2 Tourism and its interconnected aspects	28
3.3 Tourism and GATS	33
3.4 Trade in service under FTA and EPA	34
4 Field Research	43
5 Finding	44
5.1 Report on participating APEC Economies	44
5.1.1 The nature of impediments in the participating APEC economies	44

5.1.1.1 Tourism and national policy and regulations	44
5.1.1.2 Safety and Security Issues	46
5.1.1.3 Administrative Practices	46
5.1.1.4 Infrastructure	46
5.1.1.5 Environment and Culture	47
5.1.1.6 Taxes	50
5.1.1.7 Travel Advisories and the Media	51
5.1.2 Finding from individual member economy	51
5.1.2.1 Papua New Guinea	51
a. Visa Program	57
b. Employment	58
c. Business development	58
d. Reserved industries	59
e. Tariffs	59
f. Visitors safety	59
g. Results from the stage III workshop in PNG	60
h. Summary	62
5.1.2.2 Vietnam	75
a. Introduction	75
b. Present legal framework governing FDI	75
c. The improvement of legal framework	76

d. Concrete measures to promote FDI	77
e. Improvement of institutional framework	88
f. Improvement of infrastructure	90
g. Support to existing investors	93
h. Summary	95
5.2 Legal analysis of tourism liberalization	96
5.2.1 National Treatment Principle	96
5.2.2 Most – Favored – Nation Principle	100
5.2.3 Movement of natural person	106
5.2.4 Mutual Recognition informed to GATs	113
5.2.5 Commercial presence and investment liberalization	114
5.3 Economic aspects of liberalization	124
5.3.1 Strategic liberalization for APEC economies	124
5.3.2 The problems of market – and policy – failure	127
5.3.3 A market economy	129
5.3.4 The factors contribute to a competitive national Economy	130
5.3.5 Actors in sustainable development	132
5.3.6 Conclusion	133
5.4 Tourism Impediments Matrixes	135
6. Conclusion	136
Appendix	142

Appendix

ACRONYMS

APEC	Asia – Pacific Economic Cooperation
ASEAN	Association of Southeast Asian Nations
CAP	Collective Action Plan
DDA	Doha Development Agenda
FDI	Foreign Direct Investment
FTA	Free Trade Agreement
EPA	Economic Partner Agreement
GATS	General Agreement on Trade in Services
GIS	Geographic Information System
GDP	Gross Domestic Product
GST	Goods and Services Tax
IAPs	Individual Action Plans
INTERPOL	International Police Organization
MEAs	Multilateral Environment Agreements
MERCOSUR	Mercado Comun del Sur
MFN	Most – Favored Nation
NT	National Treatment
SARS	Severe Acute Respiratory Syndrome
SMEs	Small and Medium-sized Enterprises
TWG	Tourism Working Group
VAT	Value - Added Tax
WTO	World Trade Organization

1. Executive Summary

The Tourism Working Group plans to achieve long-term environmental and social sustainability of the tourism industry and its economic impact, through human resources development, an enlarged role for the business/private sector in policy formulation, removing barriers to tourism movement and investment by liberalizing trade in services associated with tourism, and using tourism as a means to achieve sustainable economic development and mutual understanding among APEC member economies. Thus the Tourism Working Group (TWG) has commissioned research consultants to study the tourism impediments in various member economies to reflect the tourism impediments and propose the strategies for removing such impediments in order to facilitate mobility of tourism industry factors and enhance economic sustainable development.

The APEC Tourism Impediments Study Project has been divided into 3 stages under the overseeing of Tourism Authority of Thailand (TAT) reporting to the Tourism Working Group (TWG). The first two stages of the project have been successfully done in 2001 and 2004 respectively. They focused on fact finding and factual elements of tourism impediments. The stage III, the current project focuses mainly on legal analysis of tourism impediments and it has also studied tourism and environment issues to highlight the diversity of circumstances and best practices among APEC economies between tourism growth, and the natural and cultural environments. It studies impediments to tourism growth in the region as a step towards identifying challenges to be addressed in building an efficient infrastructure sector that would benefit the development of the tourism sector.

This project is to identify, update, analyze and prioritize impediments/measures to tourism development. Those impediments identified and published by the OECD in 1990 in “Inventory of obstacles to international tourism in the OECD area” and those in the commitments submitted by members of the World Trade Organization (WTO) including relevant domestic rules and regulations have been seriously taken into consideration. As well, especially those of the significant trade partners of APEC members such as EU. It is thoroughly investigated and analyzed other related issues and aspects which include risks and new challenges to tourism industry of the APEC region. Under the stage III project, the participating economies studied are Papua New Guinea and Vietnam.

This project has provided significant, substantive and comprehensive study. Based on this, member economies studied: Papua New Guinea and Vietnam, will be able to strategically plan and manage well enough to gain the advantages both in opening up themselves to attract foreign investments and promote local employment; and in driving exports which include the export of labor across the world especially to those highly potential markets such as Europe and America.

The result of this research provides a framework within which to enhance possible ways to remove or reduce tourism impediments for APEC member economies, especially the participating members: Papua New Guinea and Vietnam. It is therefore obvious that this leads to encourage liberalization of trade in tourism services and investments in tourism businesses under the GATS to benefit the participating economies and all APEC economies.

The liberalization of tourism industry of APEC economies could not limit in measures and strategies pursued by each individual economies or collectively done by them based on the action plan in the field of tourism per se. The changing global economic infrastructure, legal and institutional framework results in an interactive and cooperative action of APEC economies in a multi-layered perspective to achieve the ultimate goal of sustainable development using tourism as a vehicle to attain such aim. Tourism liberalization could be done at the national, regional, multilateral and unilateral level through domestic laws and regulations, treaty regime, and commitments made under WTO.

The changing global legal and institutional framework governing economic relations of the nation states results from multilayered regulations made among them at different spheres and levels. They have been enhanced by the ideology of neo classical economic theory facilitating the global liberalization process propelled by the rapid advancement of technology and science. The failure or suspension of the Doha Trade Negotiation Round has influenced developed countries resort to the creation of FTA networks to maintain their economic ties based on preferential trading arrangement with their developing trading partners. This phenomenal reflects on one hand the inter-dependence between developed and developing countries, and the need to strengthen legal development of developing countries to accommodate such changes on the other hand. APEC economies, both developed and developing members, also move on this direction to ensure that the developing APEC economies can survive in the competitive global market. Also

developed APEC economies can further enhance their economies. Strategic development is an essential issue for challenging ahead of the APEC member economies. The focal points are what strategies employed and how to achieve the goal.

The results of the project on fact finding and the factual elements of tourism impediments are restrictions on entry or visa requirement, restrictions of the movement of people, Taxes and fees, transportation, infrastructure, mobility of capital, human resources, telecommunication, technology transfer, technology and information system, hotel and accommodation, business center, language barriers, cultural differences, inefficient tour operators and tour guides, political insecurity, health control and legal impediments.

The legal impediments are mainly the obstacles of investment entry and operation, regulatory differences, performance requirements, limitation of ownership or restriction of equity ratio, limitation of management, ownership or uses of land and immovable properties, restrictions on investment, restrictions on capital repatriation, restrictions on industrial sectors, restrictions on bureaucratic procedures, restrictions on TRIMs – Trade-related investment Measures, restrictions on investment protection, restrictions on Taxation and fees, market access, and treatment to foreign investors, and restriction on areas of investment.

The research also focuses on the interaction of tourism liberalization and environment protection. Development – related issues and sustainable development have focused on eco-system, climate change, ozone layer, air pollution control, noise abatement, water protection and water management, waste and waste management, soil protection, chemicals and environment Risks, preservation of natural resources, bio diversity, gene technology and environmental risks, social and economic environment, regulatory environment, warning system for environment problem, production process, sustainable consumption and the effective environment measures

Tourism liberalization among APEC economies has been facilitated by the implementation of the ASEAN Framework Agreement on Trade in Services (AFAS) by ASEAN members under which the Mutual Recognition Arrangement has been adopted and it is under the negotiation process among ASEAN member countries. However, the ASEAN members have committed themselves to liberalize some specific professionals to mobilize across the borders among them. Also the

FTA networks created by several APEC economies have complementarily liberalize service trade and tourism in the region.

In conclusion, tourism liberalization needs the removal of the impediments in the four categories, namely: direct and facially discriminatory barriers to trade in services, indirect but facially discriminatory to trade in services, direct but facially neutral barriers to trade in services, and indirect and facially neutral barriers to trade in services. The models and policy options are proposed to APEC economies to employ them in an appropriate way ranging from investment control, selective liberalization, regional industrialization regime, mutual national treatment, combined national treatment and most-favored-nation treatment and hybrid model to suit each APEC economy, including the participating economies: Papua New Guinea and Vietnam.

The participating economies also need to analyze the negative impacts of the combined enforcement of FTAs that they have entered into with their economic partners in conjunction with the implementation of domestic laws and regulations. They shall also have an effective competition laws and policy, and also effectively implement the laws in order that the market shall work efficiently. The abuse of market dominance by the enterprises employing restrictive business practices can occur, if there is no effective measure monitoring behavior of market players. The liberalization of tourism industry by removing the impediments shall not be replaced by the restrictive business practices of the private enterprises and the powerful transnational corporations operating across the borders worldwide. The two ways liberalization of people, labor, and tourism professional shall be urgently considered. Environment problem is required to be dealt with both at national and international level. The Multilateral Environment Agreements (MEAs) shall be adopted and fully implemented supporting the sustainable development. Both Papua New Guinea and Vietnam have launched new policy, and carefully planned the Master plan and implementation stages for tourism development.

2. Introduction

Section 2 describes the background of this project stage III and provides the observations of the factual elements and legal aspects of the tourism impediments, which is dynamic. The new challenges of tourism industry development have been proposed. This section also presents the objectives and analysis of the project.

2.1 Background to the study

2.1.1 Tourism and sustainable Economic development

Tourism and Sustainable Development is very relevant in the present context of the global economy. In APEC economies, Tourism has already become a core competency sector and is becoming tourism driven economy.

Tourism development is a result of technological advancement and improvements in communications. It has become one of the fastest growing industries today. Global tourism is expected to continue to expand because people are beginning to discover more and more new destinations, and the travel industry is becoming more and more organized.

Both APEC developed and developing economies promote tourism as a means of generating foreign exchange, increasing employment opportunities, attracting development capital and enhancing economic interdependence and cooperation. The unawareness of some forms of mass tourism development are unsustainable in terms of the negative impacts on the environment, local way of life, indigenous wisdom, the way in which it corrupts local cultures and the manner in which any potential economic benefits are frittered away. It is from this negative premise that the thought of “sustainable tourism” takes its position to redress the impact of tourism and establish forms of new tourism that are environmentally, economically and culturally sustainable.

APEC economies¹ are together the largest economic group of the world with immense possibilities of growth in the tourism sector with vast cultural and religious heritage, varied natural attractions. APEC economies have 62,831,970 sq.km² of area with a population of 2,925 million as per 2008 census³. The member economies are claimed to account for approximately 45% of the world's population, approximately 56% of the world GDP and about 49% of the world trade.⁴ The APEC region has consistently been the most economically dynamic part of the world. In its first decade, APEC Member Economies generated nearly 70 percent of the global economic growth and the APEC region consistently outperformed the rest of the world, even during the Asian financial crisis. The economic success of APEC economies has resulted from various factors ranging from strategic development policy, trade and investment liberalization in an effectively proper way, political security, comparative advantages, and natural and created endowment of APEC economies.

Tourism has been regarded as a means to enhance sustainable development. APEC economies stand unique in the matter of their rich tourism experiences keeping the customs and traditions of the economies intact, at the same time receptive to new ideas and alien culture, between the Western and the Eastern world. APEC economies are blessed with unmatched natural diversity that provides immense scope for tourism. Within the vast area of APEC, this virtual paradise holds almost all the tourist attractions of the world – serene beaches, enchanting multicolored-waters, mist clad hill stations, lush forests, exotic wildlife, exciting trekking trails, scintillating waterfalls, extensive plantations, tropical islands, invigorating monsoons, Alternative medical and health centers, historic monuments, sacred pilgrim centers and temples, magical festivals, spectacular art forms, splendid cultural heritage, spectacular boat races, spicy cuisine and everything else that enthralls a visitor. A physical quality of life, even in developing APEC

¹The participating APEC economies are: Australia, Brunei Darussalam, Canada, Chile, China, Hong Kong-China, Indonesia, Japan, Republic of Korea, Malaysia, Mexico, New Zealand, Papua New Guinea, Peru, Philippines, Russia, Singapore, Chinese Taipei, Thailand, United States, and Vietnam.

² Central Intelligence Agency, USA.

³ So far, APEC has 21 members whose population contributes 45 percent of the world's total. Its GDP and trade volume account for 56 percent and 49 percent of the world's total

⁴ APEC Secretariat, Singapore.

economies that are comparable to developed nations, and almost fully literate population in these beautiful lands are important factors that helped transform developing APEC economies into the important tourist destination.

Important Tourist Centers

The important tourist destinations in the APEC economies, for example, Ha-long Bay of Vietnam-a world renowned bay resort, Islands paradise of Papua New Guinea, Thailand - a land of smile, Bali of Indonesia, Great Coral reef of Australia, Fujiyama of Japan, St Petersburg of Russia, the Great Lakes of United State of America, The Great Wall of China, etc and all APEC economies. They are among the most important tourist destinations. There are modern international airports, good railway networks and reasonably well knit road networks to facilitate easy movements of the tourists within and from outside the APEC region. All the destinations are developed with quality basic amenities like drinking water, power and communication, general infrastructure.

International and National Acclaims

APEC economies have long established as the most acclaimed tourist destinations of the world for a long time. World Travel and Tourism Council has selected many APEC economies as Partner States. National Geographic Travel has chosen many APEC economies, as the 50 must see destinations of a lifetime. Many APEC economies have been stated as ones of the 10 paradises of the World.

Growth in Tourist Arrivals

APEC economies Tourism have recorded remarkable growth in the past years. For example, Vietnam, the participating APEC economy in this project, has attracted a great number of tourists especially tourists from APEC members. As a matter of fact, in most recent years, tourists from 21 APEC member economies make up over 70% of foreign tourists visiting Vietnam. In 2004, the percentage was 75% among 2.9 million foreign tourists. In 2005 it was respectively 72% and

3.47 million. In the first eight months of this year (2005), among 2.46 million foreign tourists visiting Vietnam, 1.77 million are from APEC member economies or 74%. This shows the intra-regional movement of tourists that enhances the regional liberalization of tourism industry⁵.

Also in the case of Papua New Guinea, the inward tourist number has increased gradually. Tourism arrivals in the year went up to 77,730 reflecting an increase of 12.2% over 69,251 visitors in 2005. This was attributed to number of developments and favorable happenings in the tourism industry in PNG, reflecting increases also on the number of holidaymakers and business visitors from most of the source markets. The arrivals comprised 37 percent (27,994) holidaymakers including VFR and the remainder 63 percent (49,547) business travelers, consisting of short-term employees, conventioners and investors. The holiday segment, with additional 4,804 arrivals over 2005 figure showed increase by 26.5 percent and the business segment by 9.9 percent respectively. ⁶ This statistic has shown the increment of inward visitors to PNG that comprise of various groups of visitors with many purposes. This reflects the increased important of PNG as an attractive destination of the visitors.

The number of foreign tourists visiting APEC economies has generally increased. In 2007 it shows an average annual growth of 40-50%. APEC economies are predominantly visited by tourists interested in holidaying, Business, sightseeing and relaxation. Over 80% of the foreign tourists are found to be pleasure tourists.

The Vision of APEC Tourism

The Vision of APEC Tourism is to make the member economies, the tourism paradise, both for general and an up market high quality tourist destination through rational utilization of resources with focus on integrated development of infrastructure sector conserving and preserving the heritage and environment and that enhance productivity, income, creating employment opportunities, alleviating poverty thereby making tourism the most important sector for the socio-economic development and environment protection of member economies.

⁵ Vietnam Authority for Tourism

⁶ Papua New Guinea Tourism Promotion Authority

The Plan of Action for Sustainable Tourism Development in Asia and the Pacific Phase II (PASTA 2006-2012) and Regional Action Programme have provided the forum to consider major issues related to sustainable development of tourism, the High-level Intergovernmental Meeting on Sustainable Tourism Development was held in Bali, Indonesia in December 2005 to review achievements resulting from the implementation of Phase I (1999-2005) of the Plan of Action for Sustainable Tourism Development in the Asian and Pacific Region and adopted the Bali Declaration on Sustainable Tourism Development, including Phase II (2006-2012) of the Plan of Action and its Regional Action Programme for Sustainable Tourism Development.

The concept of sustainable development has been used to advocate a general rethinking of economic development. The Plan of Action and its Regional Action Programme set general requirements for sustainable tourism development and propose actions at the national and regional levels in five theme areas:

- (a) Enhancing the role of tourism in socio-economic development and poverty reduction.
- (b) Facilitation of travel and development of transport and other tourism-related infrastructure.
- (c) Socio-cultural and environmental management of tourism.
- (d) Crisis and risk management in tourism.
- (e) Human resources development in the tourism sector.

According to Hoi AN Declaration on Promoting APEC Tourism Cooperation, the APEC Leaders have recognized tourism as one of the prioritized areas for regional co-operation. Tourism is playing an ever-greater role in boosting socio-economic development, contributing to poverty reduction and hunger elimination, raising awareness of the importance of respect and the preservation of the natural environment, creating more jobs for local communities, enhancing communities' participation, exchange of cultural heritage and bridging the gaps through mutual friendship among APEC member economies and other affiliate members for the world peace and harmony.

Also, TWG reaffirmed the role of tourism as an independent APEC Forum with a strong focus on facilitating tourism as an important driver of economic and social development.

The Declaration appreciated initiatives aimed at materializing the priorities set for APEC tourism co-operation, these include measures to:

- **Encourage** holding, on a voluntary basis, the APEC Tourism Fair back-to-back with important APEC events in order to ably create unique and specific branding of APEC tourism, which would help optimize the use of valuable and diversified tourism assets and resources, promotions of inter and intra APEC tourism flows as well as to increase APEC's share in the world tourism market.
- **Encourage** the hosting of the APEC Tourism Investment Forum, on a voluntary basis, on the sidelines of the APEC Tourism Ministerial Meeting to create favorable avenues and opportunities for business matching and promotion of investments in tourism infrastructure within APEC member economies for the benefits of both the investors and local communities.
- **Encourage** the undertaking of travel facilitation measures for tourists by studying the possibility for tour packages and new direct air linkages among cultural heritage sites and major tourism destinations in member economies in order to further promote tourist flows into and within APEC region.
- **Organize** joint activities for youth exchange as well as sister cities' cooperation with a view to enhancing mutual understanding and nurturing appreciation for the cultural values, customs and traditions of member economies, hence creating a firm foundation and the pre-conditions for regional tourism development.

The declaration also encouraged the TWG to identify impediments to growth of travel and tourism and develop policies that foster the development of a positive business climate. This resulted in furthering of the study and research on tourism impediments.

Development of Tourism Infrastructure

Tourism infrastructure in the APEC economies has been developed mainly through private sector

participation. Government is taking the leading role in development of basic amenities, information dissemination, regulation of the quality of tourism products, development controls and promotion and marketing of the destinations. Government also acts as catalyst and facilitator for private sector investments.

Marketing

APEC economies have already established its brand name 'Tourism Paradise' in the world tourism industry. APEC economies have emphasized in the marketing of the destination during the last few years. The strategy for marketing has been to position APEC economies as a liberalized tourism market and paradise for all tourists seeking peace and difference. In marketing the APEC economies employ the latest developments in Information Technology. Electronic media is effectively used for publicizing the products. APEC economies Tourism Authority have been participating in major international and domestic tourism trade fairs along with the private sector. Tourism industries have been enhanced and strengthened. Human resources are developed. Tourism impediments have been removed. However, strategic liberalization has been employed in an appropriate way balancing globalization and localism, indigenous wisdom, and the valuable way of life.

Tourism and Culture

Tourism has played a major role in reviving and protecting culture in the APEC economies. Many a traditional art form would have fast disappeared from the scene but for the patronage of Tourists and Tourism agencies. It is also encouraging to note that more young people are rediscovering their heritage and culture due to the efforts of tourism. Annual events like Tourism Week celebrations, Festivals and regular programmes in tourist resorts and hotels also sustain many cultural forms. Many traditional buildings, which were either neglected or discarded, are being rediscovered and put to alternate use thanks to the growth of tourism and the interest foreigners are showing in these products. Handicrafts industry and antique markets are also active due to tourism. While almost all the host communities are affected by tourism in one way or the other there is a general fear, that tourism can adversely affect the cultural fabric of the host

community. APEC economies also are highly concerned about this aspect and in fact there are a large number of groups within APEC economies that are highly concerned about the impact of tourism on culture and keeping a watchful eye on tourism development. Art forms are collective expression of a society, its reflection on the day- today lives of the people and a social form of communication. The greatest fear of purists is that many of the art forms developed and preserved by the people of APEC economies due to their sheer love and affection for that art or craft are being turned into gross commercialization. Oil massage using aromatic herbs have become extremely popular among foreign tourists in some APEC economies such as Thailand. Temples are places of worship in many APEC economies. The presence of large number of visitors visiting the places only as a tourist attraction results in the commercialization of these places of worship. Government, by understanding the changes taking place in the society as above, is trying to restrict the number to quality tourists by not focusing on mass tourism. By educating the tourists to respect the local customs and culture and by enforcing strict regulations government hopes to minimize the negative impact of tourism on the host communities.

Unique Tourism Products

APEC economies have developed a large number of unique tourism products based on our culture and tradition. The most important ones are, for example, Thai *massage and spa*, Japanese *On sen*, Australian *Cowboy show*, New Zealand *sheep shearing*, Chinese *Opera show*, etc.

Eco – Tourism

Another area, which is becoming popular in APEC economies, is eco-tourism. Eco tourism contributes to the conservation of the natural areas by providing economic incentives and revenue for the Government to preserve and manage natural areas. It utilizes the natural resources and provides employment to the local people. The built in environment education programmes raises the awareness of the local people and helps in conservation of the natural resources. Activities such as trekking through rain forests and wild life sanctuaries, staying in tree top huts etc are also gaining popularity. United Nations has declared the year 2002 as the year of ecotourism. APEC economies have already geared up to meet the challenges of

converting the entire tourism trade in the member economies to eco-friendly tourism. Generally tourism is a fairly large consumer of power. But the tourism trade in APEC economies is motivated to promote power conservation by encouraging natural ventilation instead of artificial air conditioning. It aims to create the absolute minimum impact on forests, wild life sanctuaries, farms and other environmentally sensitive region. Tourism has resulted in an encouragement of environment preservation. An attempt is being made to reduce the pollution by replacing existing boat engines with natural energy from wind or human energy. Indiscriminate use of chemicals, fertilizers such as chemical manure in gardens, chemicals for cleaning and washing etc. are discouraged. Government is in the process of developing an eco-guide for all tourism products in the APEC economies, which could become a general handbook for all tourism products to follow.

Local entrepreneurship

Tourism becomes a people's activity only if it benefits the local population. Many APEC economies are well known for their physical quality of life. They need also to be enhanced for their efforts in promoting trade and commerce to be great entrepreneurs. One of the major problems the developing economies are facing is poor image as a not so friendly place for business. However in the field of tourism many local entrepreneurs are coming forward to invest in this field. Most of them are local and small start up firms. In hotels, resorts, tour operation, houseboat ownership, home stays etc. large number of small enterprises is coming into the APEC economies. The Government is also making earnest efforts to promote investments in the field of tourism by offering many incentives. All these in the long run will result in tourism boom in these APEC economies. In other words, the participation of local people in tourism industry will benefit them directly both in short term and long term. Local people should be the stakeholders of economic boom in tourism development.

Tourism Awareness Campaigns

APEC Tourism has launched a region wide Tourism awareness campaigns intended to impart awareness to the public, persons directly dealing with the tourists etc on the impact of tourism on

economic, social and physical development of the local population and on the need to welcome the tourists in a cordial manner. A multidimensional project with people's participation to ensure a cleaner, healthier and hygienic environment, with special emphasis on tourism has also been initiated.

Focus on economic Sustainability

Even though tourism is contributing much in the APEC economies in terms of economic, social and physical development, it is also having certain negative impacts. Unbridled and indiscriminate growth of tourism leads to problems of pollution, environmental and ecological hazards and cultural degradation. The developed tourist destinations are affected by haphazard developments all around including unauthorized constructions, solid and liquid waste problems, traffic congestion etc. Developing tourism in a sustainable manner is the greatest concern of the Government and the players in the tourism field. APEC economies are taking all steps in promoting sustainable tourism development with focus on conservation and preservation of heritage. APEC economies have embarked on law reform such as stipulation of new legislation, the so called Tourism Conservation, Preservation and Trade Act. They have been formulated to control the development in a kind of the Special Tourism Zones with specific guidelines for developmental activities including architectural controls. Whenever a new product is developed in the tourism industry Government is very cautious on ensuring quality of that product. For example, to ensure quality in facilities and services offered by the new products such as houseboats and river cruise, Tourism Authority of each APEC economies has come out with system of classifications to grade the units based on their qualities.

As seen, APEC economies are the examples on how the benefits due to tourism are percolating into the member economies and benefit the local population. The challenge now faced by the member economies is to sustain these benefits by minimizing the negative impacts on the destinations. Government is taking all care for the sustainable development of the region by learning from the mistakes of some destinations in the world. APEC feels that it will continue to be a tourism driven economy due to the focused and concerted efforts of the Government with the private sector participation and involvement of local population in the development process.

2.1.2 APEC Commitment to Tourism liberalization

The Bogor Declaration established the target of free trade and investment in the Asia-Pacific region by 2010 for developed economies and by 2020 for developing economies. The framework for implementing the Bogor Declaration was established in the 1995 Osaka Action Agenda (OAA). The first part of the OAA sets out the Bogor liberalization and facilitation goals in fourteen specific policy areas which are expected to be achieved through a combination of individual and collective actions. IAPs contain a chapter for each of these specified policy areas and report the steps that each member is taking to fulfill the objectives set out in the OAA for each action area. Under which APEC TWG Collective Action Plan has been implemented and The CAP stressed that APEC economies will identify impediments to tourism growth and formulate strategies that will improve tourism movements and investment in the Asia – Pacific region. The APEC TWG has commissioned Dain Simpson Associate (Australia) in 1996 to conduct a study on impediments to tourism growth in the APEC region followed by another study done by Dain Simpson Associate in 2001 discussing the trends and forecasts of tourism in the APEC region, impediments to tourism growth, the inventory of impediments to tourism growth, impediments to individual travelers, impediments to business, and emerging issues. Field researches and workshops were conducted in Australia, Papua New Guinea, Mexico, New Zealand, Thailand and Chinese Taipei to develop in – depth profile of tourism impediments in the participating economies

APEC commitments in liberalization of tourism industry have been implemented and reaffirmed the commitment to the Policy Goals contained in the Seoul Declaration on the APEC Tourism Charter, and to support the work of the TWG in developing specific mechanisms to achieve them. The APEC Tourism Ministerial Meeting adopted the four goals of key delivery for tourism sector as followed:

Goal 1: Remove impediments to tourism business and investment by

- a. promoting and facilitating the mobility of skills, training and labor;
- b. promoting and facilitating productive investment in tourism and associated sectors;
- c. removing regulatory impediments to tourism business and investment; and

- d. encouraging liberalization of services trade related to tourism under General Agreement on Trade in Services (GATS).

Goal 2: Increase mobility of visitors and demand for tourism goods and services in the APEC region by

- a. facilitating seamless travel for visitors;
- b. enhancing visitor experiences;
- c. promoting inter- and intra-regional marketing opportunities and cooperation;
- d. facilitating and promoting e-commerce for tourism business;
- e. enhancing safety and security of visitors; and
- f. fostering a non-discriminatory approach to the provision of visitor facilities and services

Goal 3: Sustainably manage tourism outcomes and impacts by pursuing policies that:

- a. demonstrate an appreciation and understanding of our natural environment and seek to protect that environment;
- b. foster ecologically sustainable development opportunities across the tourism sector, particularly for small and medium sized enterprises, employment and providing for open and sustainable tourism markets;
- c. protect the social integrity of host communities with particular attention to the implications of gender in the management and development of tourism;
- d. recognize, respect and preserve local and indigenous cultures together with our natural and national cultural heritage; and,
- e. enhance capability building in the management and development of tourism.

Goal 4: Enhance recognition and understanding of tourism as a vehicle for economic and social development by

- a. harmonizing methodologies for key tourism statistical collections, consistent with activities of other international tourism organizations;
- b. facilitating the exchange of information on tourism between economies;
- c. promoting comprehensive analysis of the role of tourism in member economies in promoting sustainable growth; and,
- d. expanding our collective knowledge base on tourism issues in order to identify emerging issues and assist implementation of the Charter.

Thailand, the leader of Goal 1, proposed the APEC Secretariat to commission and update the study on impediments to tourism growth within the APEC region. The Conference Board of Canada was selected to conduct the research to update the tourism impediments and study on tourism liberalization in more specific APEC economies. The research was completed in 2004. Following the first two phases of the project, Tourism impediments study stage III has been

proposed to identify, update, analyze and prioritize impediments/measures to tourism development. Dr. Lawan Thanadsillapakul, the Director of the Institute for International Economic and Business Law Study, Sukhothai Thammathirat Open University was selected to conduct the research in the project stage III. This current project has been conducted in 2007 and was completed in 2008. APEC tourism impediments Matrix were updated and the OECD inventory on tourism impediments, commitments of APEC economies in GATs of WTO, and the analysis of regulatory impediments to tourism industry were provided. The main areas of study were focused on legal analysis of the tourism impediments in tourism investment and development furthering the fact finding and factual elements of tourism impediment. The participating economies are Papua New Guinea and Vietnam.

2.2 Scope of the Study

The objectives of this project are to:

- Facilitate the development of APEC individual and Collective Action Plan recognized and required under Goal 1 of APEC Tourism Charter through a consultation workshop process involving industry, government and academic stakeholders, and through advice to the responsive agency in tourism sector.
- Facilitate liberalization of tourism trade and investment in APEC region by identifying tourism impediments and proposing strategies for removing such impediments, and providing strategic enhancement of tourism sustainable development.
- Propose a favorable environment for sustainable tourism industry, strengthening market structure and institutions, balancing modern and cultural tourism, urging APEC economies to implement appropriate policies and actions to promote sustainable and sound macroeconomic policy framework, sustained structural reform, an effective competition regime, good financial and corporate governance, etc. and actions to promote sustainable growth in tourism.
- Enhance human capacity building and entrepreneurship development in tourism industry. Propose mutually liberalization of people movement in tourism market

- Facilitate the exchange of tourism information among APEC member economies
- Facilitate legal and institutional framework governing tourism activities, trade and investment.

2.3 Work Plan

The participating APEC economies in this stage III are Papua New Guinea and Vietnam. The study of this project includes the following tasks:

- Identifying, updating, analyzing and prioritizing impediments/measures to tourism development from those identified and published by the OECD in 1990 in “Inventory of obstacles to international tourism in the OECD areas, and those in the commitments submitted by APEC economies, which are members of the World Trade Organization (WTO);
- Conducting survey and workshops in Papua New Guinea and Vietnam to get detailed information of tourism impediments in the participating economies, and proposing strategies for the removal of tourism impediments to enhance tourism sustainability;
- Conducting research on domestic law and regulations of the economies studied relating to impediments of tourism industry, analyzing the legal and institutional framework governing tourism services and investment, providing strategic tourism liberalization and sustainable development for APEC economies;
- Reporting an interim report and progress report to the 31th APEC TWG Meeting in Gold Coast, Australia in May 2007
- Reporting the final report to the 32nd APEC TWG Meeting in Lima, Peru in April 2008.

The project stage III was conducted during June 2006 through March 2008 and the workshops were conducted in Portsmosby, Papua New Guinea in April 2007, and Hanoi, Vietnam in June 2007.

2.4 Acknowledgements

This research project stage III would not have been possible without the assistance of the APEC Program Director, Mr. Benyamin Carnadi, during 2006-2007 and Mr. Toni Widhiastono, during

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2.5 Limitations of the Report

The fact finding and analytical finding of this report have been done based on the provided and collected information from the participating economies, Papua New Guinea and Vietnam, the results and output of the workshops conducted in both economies, also from the interview with the participants, travel agencies, tourism – related officers, The OECD inventory of tourism impediments, the commitment of APEC economies, which are also members of WTO and the matrix of tourism impediments studied in stage I and II were updated. The legal analysis of the interaction of laws and regulations and the FTA, JTEPA entered into by APEC economies has been done in the case of economies studied. All these studies are accurate only as of the date of the report.

2.6 Structure of the balance of the report

Session 3 defines the tourism impediments; discuss the liberalization of trade in services under GATs, legal and institutional framework governing service trade and investment.

Session 4 of this report provides an overview of the work plan followed for this project.

Session 5 presents the finding of the report, commencing with a summary of the general findings, providing the profiles of each participating economies, Papua New Guinea and Vietnam. Updated tourism impediments matrixes for the APEC economies

Session 6 presents the legal analysis of tourism impediments and provides the strategic sustainable development, recommendations for APEC economies.

Finally, the PowerPoint presentation slides used in the two workshops are presented in the Appendix.

3 Impediments to Tourism Growth

This section of the report focuses on the definition of impediments and the factors affecting liberalization of tourism industry and tourism services.

3.1 The nature and definition of impediments

Tourism is a sector of services and it is useful to clarify the definition of barriers to trade in services that also reflects the impediments to tourism growth. The question of what is an impediment to tourism growth has been studied and defined. For example in the 1996 study of OECD, the consultants have defined the impediments to tourism liberalization as followed.

Any factor, real or perceived, such as a regulation, capacity constraint, policy or operating practice which limits the growth of tourism to or within the APEC Region.

It includes constraints which limit the freedom of the individual to travel to or from economies within the region or affect their decision to travel to economies in the region.

It also includes those factors which limit the operation, promotion, establishment or development of tourism – related businesses within the APEC region. This includes

constraints such as infrastructure capacity, regulatory environments, the financial system, the labour market, the marketing and promotion network and introduction of technology

This definition has been applied to this study and also used as the guideline for observing the tourism impediments in the economies studied.

Moreover, the criteria for judging the impediments to service liberalization in order to remove such barriers have been adopted as per the following categories

Direct and facially discriminatory barriers to trade in services

Indirect but facially discriminatory to trade in services

Direct but facially neutral barriers to trade in services

Indirect and facially neutral barriers to trade in services

Direct and facially discriminatory barriers to trade in services

These are explicit barriers to trade specially directed at services industries for example domestic content regulations for television and radio broadcasting, prohibitions on the practice of law by foreign nationals, restrictions on the ownership and establishment of financial institutions by foreigners. The elimination of these barriers can be done by extending the principles of National Treatment or non-discrimination to services either on a conditional or unconditional MFN basis. The application of National Treatment can be subject to the exemption where discriminatory measures can be justified as necessary to achieve legitimate domestic objectives through reservations on NT with respect to particular industries or even particular regulatory measures that apply to an industry in that country.

Indirect but facially discriminatory to trade in services

These barriers are forms of discrimination against foreigners, or barriers to international movement of factors in service production (such as people, information and capital). They are not targeted at, or limited to specific service sectors. Examples of this category of barrier are general limitations on immigration or temporary entry into a country for work purposes, limitation on foreign investment not specific to service industries, controls on remittances and

payments abroad. (e.g. for liquidity reasons). These kinds of some measures go beyond domestic or international regulation of services industries as such. The elimination of these kinds of barriers can be done in international agreements that approach the barriers in a general measures for example, the (OECD) Code on invisibles or the general principle of personal mobility within the EU that is entrenched in the Treaty of Rome. (Treaty of Rome establishes free movement of people as a basic principle or norm) To negotiate removal or relaxation of these barriers with respect to specific service sectors or service industries (Approach to mobility of people taken in Canada-US FTA) is an example. The Canada-US FTA contains some specific (and very limited) mobility guarantees that apply to provision of particular services (mainly professional or technical services).

Direct but facially neutral barriers to trade in services

Domestic regulations of service industries are not directly impede the service trade and investment per se as they are neutral and non – discrimination but indirectly obstruct the flow of service industry. The example is that the government maintains the railway or telecommunication networks as a national monopoly directly impedes market access by foreign providers, but is non-discriminatory with respect to foreigners because would-be domestic competitors are excluded as well. The elimination of this kind of barrier can be done by fundamentally changing domestic laws and regulations: regulatory approach. For example, US demands for removal of these kinds of barriers through GATT/WTO in order to achieve “free market access”

Indirect and facially neutral barriers to trade in services

These barriers arise out of domestic regulations. They include the additional costs to foreign providers of adapting to distinctive national regulatory standards and requirements

Barriers of this nature can be described as indirect because they do not limit or prohibit competition as such but impose some disadvantages on foreigners who must adapt their activities and practices to the idiosyncratic regulatory structure of the country concerned.

For example, barrier with respect to professional service, such as a country has distinctive requirements for training and certification of professionals and does not recognize licenses, diplomas or other credentials acquired abroad.

Ultimately, removal of these barriers would require harmonization of regulatory regimes (as in the EU blueprint for liberalization of financial services) or home country regulation whereby a service provider is given the right to enter a foreign market provided it complied with its home country's regulatory requirements.

In the case of professional services, the equivalent to home country regulation is mutual recognition of qualifications or licenses, whether in accounting, engineering, law or architecture.

A country specific knowledge base may often be seen as a legitimate pre-condition for professional competence. These kinds of condition can be the substantive requirement or procedural requirement. Such requirements are not contrary to the non-discriminatory principle. They are applicable to both nationals and foreigners based on the National Treatment principle. Mutual recognition of degrees, licenses, diplomas, certificates and other papers or documents certifying quality, ability, and professional competence is the method for elimination of the barriers to services trade and investment.

Mutual recognition arrangement is now under the negotiation process among ASEAN members that will reflect the strategy for removal of tourism impediments among APEC economies as well.

The definition of impediments is a key function leading to the action plan strategies for removal of such impediments and be addressed through policy and regulatory initiatives, including actions aiming at improving favorable environment for enhancing tourism industry and sustainable development.

The matrix on tourism impediments (from the stage I and II) and the OECD inventory on tourism impediments including the commitments made by APEC economies under GATs of WTO were updated and formatted

According to the above mentioned impediments to service trade and investment and the matrix, the removal of tourism impediments have to be done in the multilayered framework that interactively operated at international, regional and national level, and it also involves the horizontal and vertical dimensions of liberalization of service trade and investment, including the tourism - related industry. The well developed infrastructure, efficient telecommunication network, business center, good transportation system, wide variety of hotel and accommodation, restaurants, qualified service providers, all are factors for enhancing tourism growth.

3.2 Tourism and its interconnected aspects⁷

Tourism is one of the world's largest industries and one of its fastest growing economic sectors. It has a multitude of impacts, both positive and negative, on people's lives and on the environment.

"Sustainable tourism development guidelines and management practices are applicable to all forms of tourism in all types of destinations, including mass tourism and the various niche tourism segments. Sustainability principles refer to the environmental, economic, and socio-cultural aspects of tourism development, and a suitable balance must be established between these three dimensions to guarantee its long-term sustainability. Thus, sustainable tourism should:

- 1) Make optimal use of environmental resources that constitute a key element in tourism development, maintaining essential ecological processes and helping to conserve natural heritage and biodiversity.
- 2) Respect the socio-cultural authenticity of host communities, conserve their built and living cultural heritage and traditional values, and contribute to inter-cultural understanding and tolerance.
- 3) Ensure viable, long-term economic operations, providing socio-economic benefits to all stakeholders that are fairly distributed, including stable employment and income-earning

⁷ Based on the world Tourism Organization

opportunities and social services to host communities, and contributing to poverty alleviation.

Sustainable tourism development requires the informed participation of all relevant stakeholders, as well as strong political leadership to ensure wide participation and consensus building. Achieving sustainable tourism is a continuous process and it requires constant monitoring of impacts, introducing the necessary preventive and/or corrective measures whenever necessary. Sustainable tourism should also maintain a high level of tourist satisfaction and ensure a meaningful experience to the tourists, raising their awareness about sustainability issues and promoting sustainable tourism practices amongst them." (WTO, 2004).

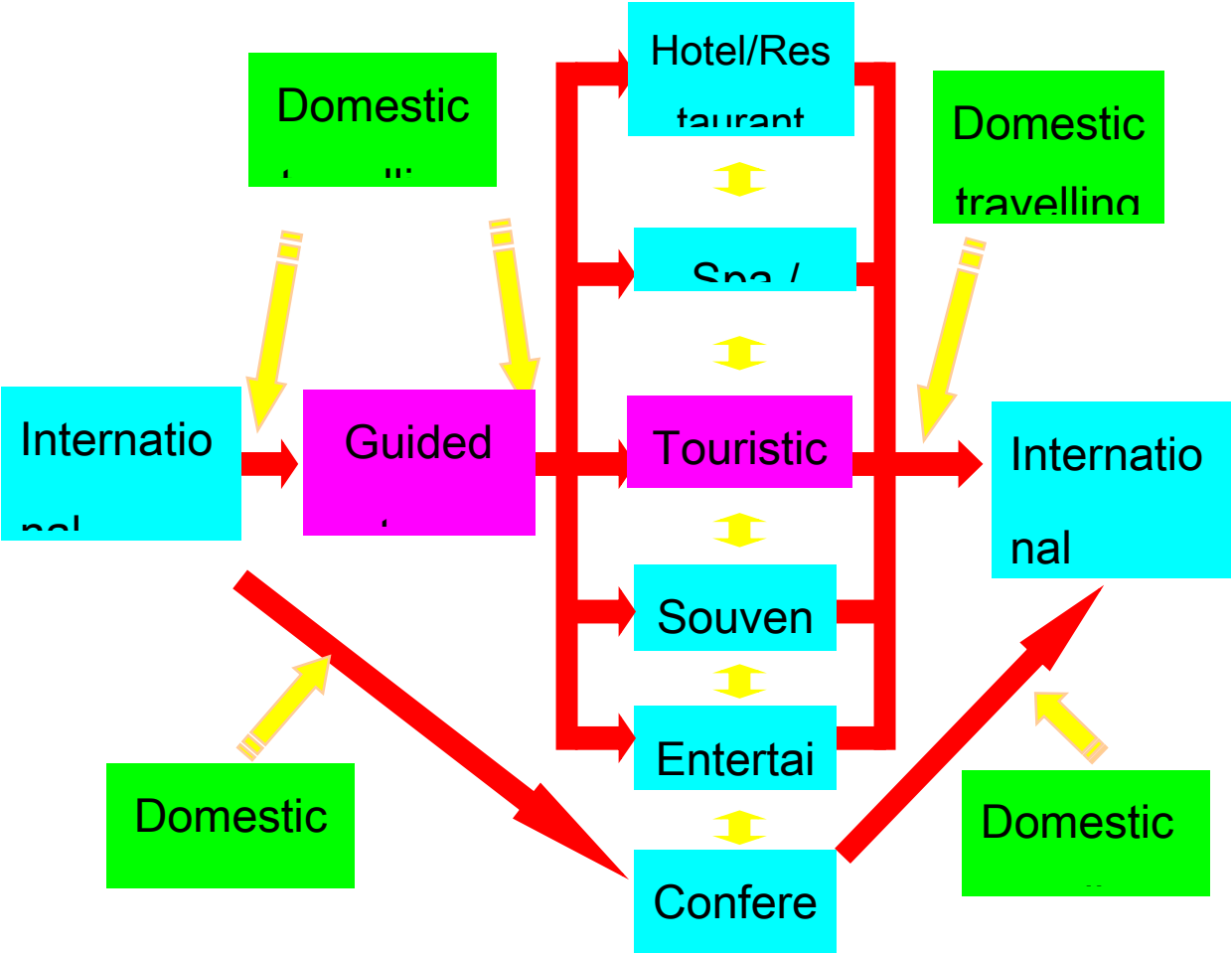
Sustainable Tourism focuses the three interconnected aspects: environmental, socio-cultural and economic

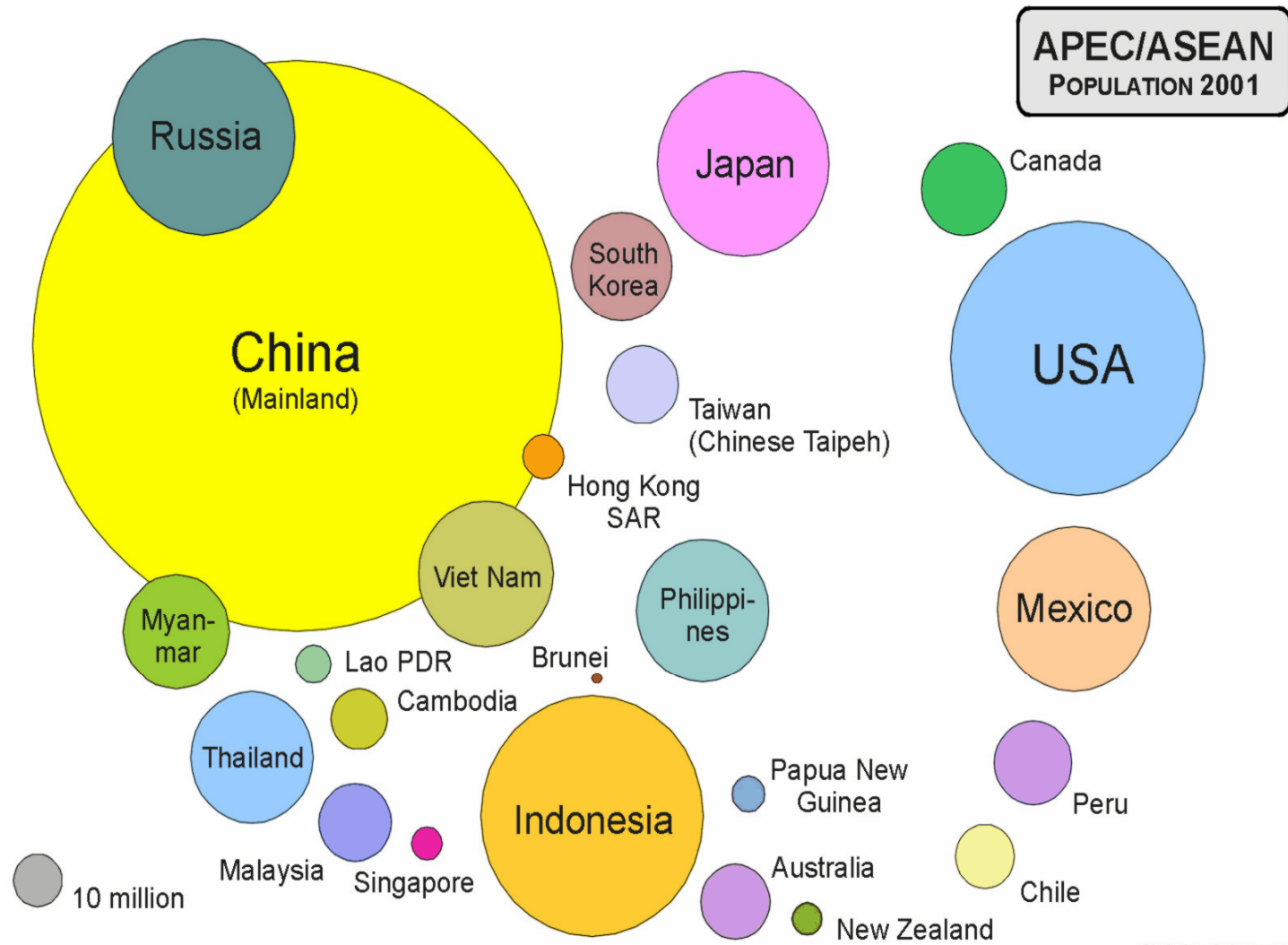
Impacts of Tourism are as follows:

1. Environmental Impacts of Tourism: negative and positive effects of tourism on the environment.
2. Socio-Cultural Impacts of Tourism: the effects of tourism on host communities.
3. Economic Impacts of Tourism: the role of tourism in economic development.

These interconnected aspects of tourism are basis for the study of this research on the impacts of tourism to the local economy and people thus the liberalization of tourism industry has to take into consideration of these impacts so that economic sustainability can be attained.

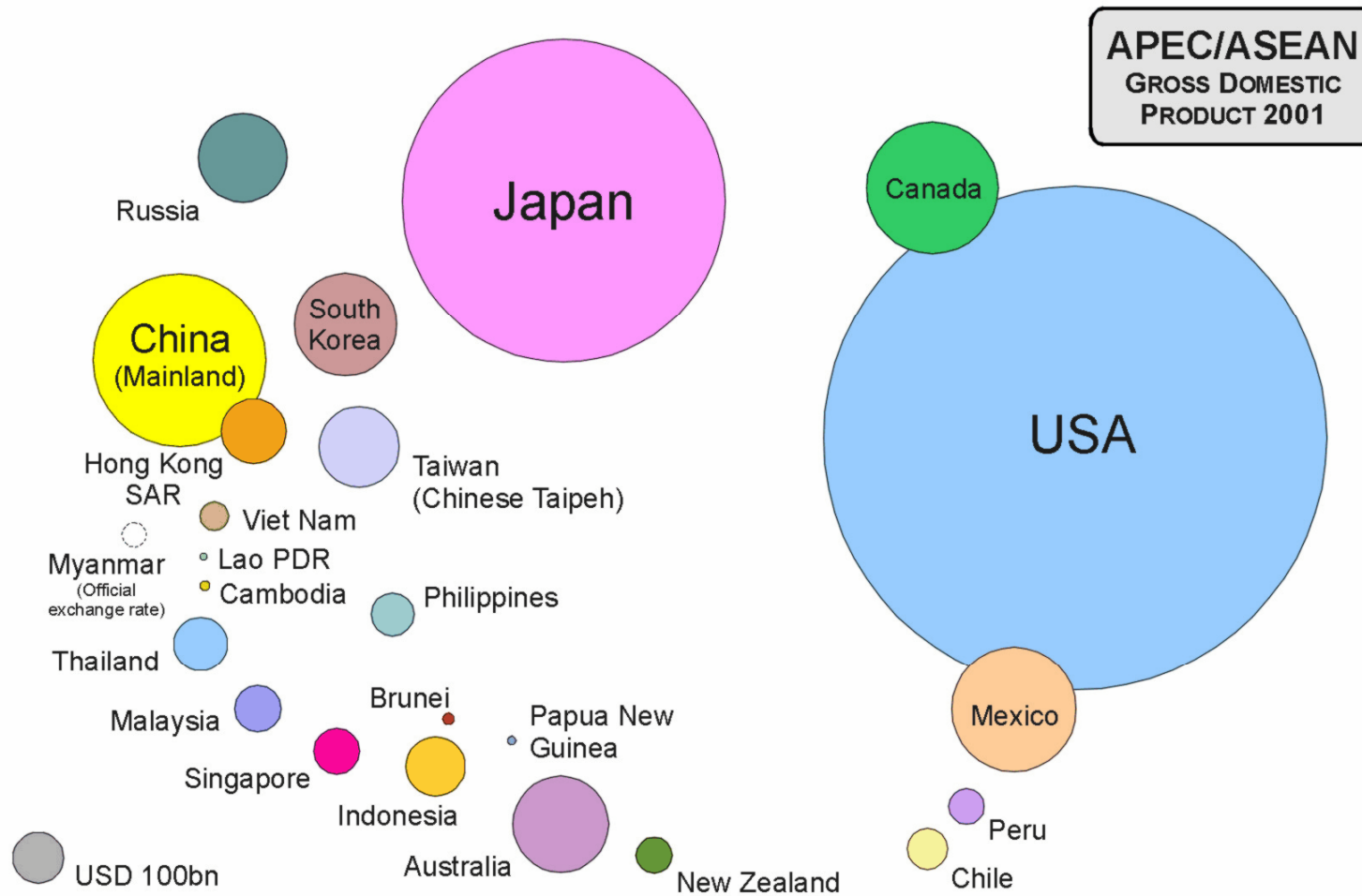
Supply Chain of Tourism Services





Source: IMF: International Financial Statistics

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Source: IMF: International Financial Statistics, UNESCAP
 GDP at market exchange rate, 2001 (Brunei, Cambodia: 2000; Papua New Guinea: 1999; no data available for Myanmar)

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3.3 Tourism and GATS

GATS defines four modes of cross-border trade in services as follow:

- 1) Cross-border Supply (CB) – when the service provider and service receiver are in different countries and the trading is carried out via media such as the Internet.
- 2) Consumption Abroad (CA) – when the service receiver travels outside his/her country to use the service of another country, e.g. a foreigner travels to Vietnam and Papua New Guinea for vacation.
- 3) Commercial Presence (CP) – when an investor from one country invests in another country. For example, a foreigner makes investment in tourism business in Vietnam and Papua New Guinea.
- 4) Presence of a natural person – when personnel from one country are engaged in professional practice in another country temporarily, e.g. a tour guide from one economy works in a travel agency in another economy.

The liberalization of the trade in services embraces several sectors. The scope of GATT/WTO negotiations under the General Framework Agreement on Trade in Services (GATS) includes 12 classifications, namely:

1. Business Services
2. Communication services
3. Construction & Engineering services
4. Distribution Services
5. Educational Services
6. Environmental Services
7. Financial Services
8. Health Related & Social Services
9. Tourism & Travel Related Services
10. Recreational, Culture & Sporting Services
11. Transport Services
12 Other Services

Tourism is under Section 9 in the above table.

Summary of Most Common Limitation on Horizontal of APEC economies are

Limitation on Foreign ownership

Limitation on the type and number of foreign personnel and their duration of stay

Limitation on ownership of land

Requirement that domestic residents be part of board of directors

These restrictions have directly affected tourism businesses in terms of mobility of tourism investment and people movement. However, the surge of new model of FTAs and EPA (Japanese economic partner agreement) has facilitated the enhancement of service trade liberalization.

Currently, many APEC economies also have entered into FTA and EPA with their economic partners that result in the multilayered legal framework governing trade in services.

3.4 Trade in services under FTA and EPA⁸

Background of the Rules

The purpose of the disciplines regarding trade in services under FTAs/EPAs is, as under the General Agreement on Trade in Services (GATS), to enhance trade liberalization by eliminating barriers to trade in services and increasing the transparency of governmental measures affecting trade in services in the contracting parties' countries. In that sense, all FTAs/EPAs share a similar framework. However, provisions on specific matters have been gradually developed and advanced, and on some matters, the text of the relevant provisions greatly varies from FTA/EPA to FTA/EPA. This variation reflects certain distinctions between the contracting party countries, such as their policies on liberalization in service areas, negotiation history regarding the relevant FTA/EPA (for example, issues in respect of multilateral negotiations or political situations of the negotiating countries), etc.

⁸ Based on 2007 Report on compliance by major trading partners with trade agreements – WTO, FTA/EPA and BIT, Industrial structure Council, METI, Japan

Unlike trade in goods, with respect to which negotiations concern the maximum tariff rate stated in the relevant schedule of concessions, the liberalization commitment approaches, including those with respect to the liberalization of trade in services in individual sectors, deal with domestic regulations in such individual sectors, and with respect to which it is difficult to indicate the effect of trade restrictions in numerical values. These liberalization commitment approaches can be generally classified into the following two categories: (i) the "negative list approach" (also referred to as either the NAFTA approach or the top-down approach), under which commitments toward a general liberalization obligation are made and those measures and sectors which are exempted from that obligation are explicitly indicated; and (ii) the "positive list approach" (also referred to as either the GATS approach or the bottom-up approach), under which the subject sectors of liberalization and the conditions and restrictions of liberalization are specifically and explicitly indicated. The basic structure and text of provisions in each agreement on trade in services largely depends on whether such agreement adopts the negative list approach or the positive list approach.

The FTA/EPA framework in respect of major disciplines is analyzed below.

Legal Disciplines

Modes of service supply

As under GATS, provisions regarding trade in service under FTAs/EPAs cover the following four modes of supply: cross-border supply ("Mode 1"), consumption abroad ("Mode 2"), commercial presence ("Mode 3") and presence of natural persons ("Mode 4"). In the case of a NAFTA style negative list, Mode 3 (i.e. supply of services through commercial presence) is generally dealt with in the chapter on investments of the relevant FTA/EPA.

Definition of Service Supplier

FTAs/EPAs normally provide for definitions of basic terms in order to clarify the coverage of such basic terms. One such basic term is "service supplier." Entities which are eligible to be a service supplier include both natural persons and juridical persons. In addition, FTAs/EPAs usually provide for definitions of a "juridical person of the other party," and under such definitions, such persons are entitled to the benefit of the agreements through, *in te ralia*, a liberalization commitment in respect of trade in services. A "juridical person of the other party" is usually defined as (i) with regard to Mode I and Mode 2, a juridical person established within the territory of the other contracting party, and (ii) with regard to Mode 3, a juridical person that is established within the territory of the other contracting party country, or owned or controlled by (a) a natural person in the other contracting party country or (b) another juridical person established within the territory of the other contracting party country. Some FTAs/EPAs require as a criteria for such definition engagement by the "juridical person of the other party" in substantial activity in the territory of the other contracting country, while the others not. FTAs/EPAs normally define "ownership" and "control" as follows

a juridical person is deemed to be "owned" by persons if more than fifty percent (50%) of the equity interest in it is owned by such persons. Under GATS, the term "owned" is construed to mean direct ownership. Under the aforesaid definition of a "juridical person of the other party" for Mode 3 such person could mean a juridical person (a "subsidiary") established within the territory of one contracting party country and directly owned by another juridical person (a "parent company") established within the territory of the other contracting party country, but would not include a sub'-subsidiary (a company that is indirectly owned by a parent company through subsidiary established within the territory of the other contracting party). In contrast, the chapter on investments in the relevant FTA/EPA normally define "investment" (which is the subject of protection granted pursuant to that chapter), as

an asset of an investor in one contracting party, and such includes any "enterprise" owned, whether directly or indirectly, by such an investor or investors.

Under the chapter on services in the relevant FTA/EPA, a juridical person is "controlled" by persons if such persons have the power to name a majority of its directors or otherwise to legally direct the actions of the juridical person.

Most-Favored-Nation ("MFN") Treatment

Under Article II of GATS, WTO member countries are to mutually accord to each other MFN treatment (described below). However, under paragraph 1 of Article V of GATS, the preferential treatment accorded under any FTA/EPA entered into between certain member countries of GATS may be exempted from MFN treatment in relation to the WTO member countries which are other than contracting party countries to such FTA/EPA, provided that certain requirements (such as substantial sectoral coverage) are satisfied.

The MFN treatment provided in FTAs/EPAs is required to be treatment no less favorable than the most favorable preferential treatment accorded to a non-party country by one contracting party country. NAFTA and the U.S.A.-Singapore FTA are examples of such FTAs/EPAs providing for MFN treatment as a general obligation.

Certain agreements include review provisions aimed at effectively according MFN treatment while not specifically providing for the MFN treatment. Such provisions are peculiar to FTAs/EPAs. That is to say, pursuant to a review provision, if country B newly enters into a B-C FTA/EPA with country C and if such new B-C FTA/EPA accords a more favorable treatment to country C (which is a non-party country from country A's perspective), then the A-B FTA/EPA, which contains a review provision, may obligate the contracting party country B to consider whether it should revise such A-B FTA/EPA in order to accord to country A treatment no less favorable than that provided to country C under the new B-C FTA/EPA. The India-Singapore FTA is an example of an FTA/EPA providing an MFN provision of this type.

Market Access

As under GATS, FTAs/EPAs provide market access provisions, primarily in order to liberalize restrictive measures imposed on market entries due to economic factors. Following the GATS approach, most such agreements are structured in the positive list format described above. However, NAFTA, which is a negative list format agreement (which entered into force before GATS), also contains disciplines on "quantitative restrictions" on trade in services.

National Treatment

As under GATS, national treatment under FTAs/EPAs is a concept whereby the treatment accorded by a contracting party to the services and the service suppliers of the other contracting party country shall be no less favorable than the treatment accorded to its own like services and service suppliers.

Under the positive list approach, the sectors in respect of which national treatment obligations are committed and the conditions and restrictions therefore are inscribed in the "Schedule of Commitments" of the relevant FTA/EPA . On the other hand, under the negative list approach, both the sectors for which national treatment obligations are not committed and the measures which are exempted from such commitments i.e. conditions and restrictions in respect of the remaining sectors are inscribed in the "Schedule of Reservations" of the relevant FTA/EPA. Under either approach, the scope of commitments or reservations, as the case may be, is to be explicitly specified in order to enhance transparency and promote liberalization of trade in services.

Additional Commitments

As under GATS, commitments which go beyond market access and national treatment obligations may be inscribed in the "Schedule of Commitments" of the relevant FTA/EPA. Some FTAs/EPAs adopting the positive list approach provide examples of additional commitments (such as disciplines promoting competition in the telecommunications sector and additional commitments in respect of domestic regulations in the financial sector) with a view to incorporating the outcome of the GATS negotiation. No example of additional commitments is found in FTAs which adopt the negative list approach.

Standstill Obligation

Under NAFTA, which adopts the negative list approach, if the contracting party country makes reservations on any obligation under the agreement (such as with respect to the national treatment obligation, the MFN treatment obligation with regard to existing measures in certain sectors etc.), it owes an obligation to maintain the *status quo* in respect of such reservations as of the entry into force of the agreement (that is, it owes an obligation not to adopt any measure which is more restrictive than existing measures). This is referred to as a "standstill obligation." A contracting party country may make a reservation not only on existing measures, but also on the relevant service sector, where the country does not owe any such standstill obligation with respect to existing measures, and thus may adopt any measures and maintain existing measures to an extent not inconsistent with any generally applicable obligation (such as the national treatment obligation).

In cases where standstill obligations are provided in an FTA/EPA which adopts the positive list approach (for example, under paragraph 3 of Article 75 of the Japan-Philippines EPA, and with respect to the sectors marked as "SS" (the abbreviation of " short for standstill") in the Schedule of Commitments attached thereto (such sectors are referred to as the "SS sectors")), the conditions and restrictions therefor maybe inscribed therein only in relation to existing measures which do not conform to either market access obligations or national treatment obligations. Without regard to whether or not the relevant sector is marked "SS", any commitment inscribed in the Schedule of Commitments for a certain sector is binding. Further, the contracting party countries would be obligated to maintain the *status quo* of existing measures as of the entry into force of the agreement in connection with the SS sectors. The Japan-Philippines EPA is the first agreement that adopted this approach with respect to services.

Authorizations, Licenses and Qualifications

With a view to ensuring that measures relating to qualification requirements and procedures, technical standards and licensing requirements do not create unnecessary barriers to trade in services, most FTAs/EPAs obligate contracting party countries to establish objective and transparent criteria: (i) so as to ensure that any such requirements, procedures and standards are

not more burdensome than necessary to ensure the quality of the service, and(ii) so as to ensure that licensing procedures are not in and of themselves a restriction on the supply of the services. In addition, some FTAs/EPAs (for example, the U.S.A.-Singapore FTA, the U.S.A.-Australia FTA, and the India - Singapore FTA) explicitly provide that the parties thereto shall review the relevant disciplines in response to the progress, if any, in working programs concerning qualification requirements and procedures, technical standards and licensing requirements contemplated by paragraph 4 of Article VI of GATS.

Mutual Recognition

Mutual recognition provisions effectively provide that contracting party country may recognize authorizations, licenses or certifications to service suppliers of the other party country, depending on the education, experience, etc. which such service suppliers have obtained in such other contracting party country. A similar provision is provided for in Article VII of GATS.

Many FTAs/EPAs contain such provisions on mutual recognition. Some agreements go a step further and explicitly provide that the contracting parties negotiate on the framework of mutual recognition by professional associations, and some even require such negotiation to be completed by specific deadlines and/or in respect of certain sectors (see, for example, the India-Singapore FTA). Furthermore, some FTAs/EPAs effectively provide that, where an A-B FTA/EPA exists and contracting party country A and a non-party country C have entered into an agreement containing a framework for mutual recognition, contracting party country A shall provide contracting party country B the opportunity to participate in the mutual recognition framework between country tries A. and C {sec, for example, the EFTA-Singapore FTA and the U.S.A.-Singapore FTA).

Transparency

As under GATS, in order to ensure transparency, contracting party countries have obligations to (or obligation us to make efforts to) promptly publish domestic measures in connection with the disciplines regarding services, establishment of enquiry points, etc. In addition, some agreements effectively provide that a contracting country party may change any existing measure, or introduce any new measure, but only after the expiration of a certain period of time

after publishing a draft of such measure, and that it shall receive comments from the other contracting party country during such period. Some agreements even effectively provide that the parties thereto should adopt such comments to the greatest extent possible.

Safeguards

While most FTAs/EPAs lack specific provisions on safeguard measures for service sectors (as there has been little progress in respect of negotiation on safeguards contemplated in Article X of GATS), some FTAs/EPAs do contain provisions in this regard. These agreements effectively provide, *inter alia*, that (i) the contracting party countries shall refrain from taking safeguard measures against the other contracting party; (ii) shall not initiate investigations therefor (see, for example, the Australia-Singapore FTA, and the India-Singapore FTA); and/or (iii) the parties thereto shall review the issue of safeguard measures in the context of developments in multilateral negotiations (see, for example, the India-Singapore FTA).

Denial of Benefits

Denial of benefit provisions under FTAs/EPAs effectively provide that a contracting party country may, under certain conditions, deny the benefits provided to service suppliers of the other party (i.e. resulting in better market access opportunities). A contracting party country may deny such benefit to a service supplier of the other contracting party country, for example, if such service supplier is a juridical person that is owned or controlled by a juridical person in the territory of a no-contracting country and is not engaging in substantial activities in the contracting party country's jurisdiction. Whether benefits will actually be denied is left to the discretion of the contracting party country.

Under GATS, member countries may deny benefits of services, to non-member countries, maritime transport services provided by vessels of a non-member country, etc.

(Article XXVII).

Payments and Transfers

As under GATS, while restrictions on payments and transfers for current transactions relating to trade in services are generally prohibited, restrictions on payments and transfers for the purpose of protecting the balance of international payments are permitted under FTAs/EPAs.

Some FTAs/EPAs limit the coverage of this prohibition to the sectors committed by the contracting party country in the Schedule of Commitments, as under GATS, while others apply this prohibition to all sectors as a general obligation.

Exceptions

Most EPAs/FTAs contain provisions equivalent to those of Articles IV and IV*bis* of GATS, and exempt (as general exceptions) measures to protect public morals, to maintain public order, health and safety, and measures in respect of national security interests.

Review of Commitments (Review Provisions)

While GATS provides that Members shall enter into successive rounds of negotiations for progressive liberalization (Article XIX), many FTAs/EPAs provide that reviews of commitments shall be made several years after the entry into force of the agreement for the purpose of further liberalization of trade in services.

FTAs/EPAs include a variety of provisions in this regard. Some agreements follow the GATS model, and advocate efforts toward progressive liberalization (see, for example, the India-Singapore FTA), some do not contain any special provisions in this respect (see, for example, the U.S.A -Singapore FTA, and the U.S.A.-Australia FTA), some provide for biannual review of the agreement (see, for example, the EFTA-Singapore FTA), etc.

APEC economies studied have to carefully and cautiously study the legal text of these economic agreement for their liberalization of trade and investment including tourism industry development and liberalization as the interactive implementation of the commitments made under these multilayered legal frameworks may result in the counteract of each other implementation, especially with the local laws and regulations such as environment protection measures, performance requirements, indirect expropriation of foreign property and

compensation, labor laws and regulations, working condition, intellectual property rights protection, which is tighter and higher standard than the domestic law.

4. Field Research

The two workshops and interviews with government officials and representatives of private sector were conducted in Papua New Guinea and Vietnam. The selection of workshop participants and of the individuals who were personally interviewed was the responsibility of each economies studied. The number of participants and interviews are shown in the following table.

Table 1: Number of participants and interviews for Economies participating in the stage III study

Member economy	Workshop Participants	Private Interviews
Papua New Guinea	40	6
Vietnam	60	8

PowerPoint Presentation and background materials were prepared and sent to the officer representing the tourism authority or agency in each economy. The materials were presented in the workshops and meeting. The information included:

1. Workshop agenda;
2. Power Point Presentation slides
3. Highlights of the stage I and II
4. Matrix of the tourism impediments
5. Legal issues relating to tourism liberalization

Materials and information collected were the results of the workshops and interviews, investment laws and regulations, tourism – related laws and regulation, tourism master plan of Papua New Guinea, tourism sustainable policy of each economy.

5. Finding

This section discusses the principal findings of the study, updating the tourism impediments surveyed in stage I and II, and analyzing legal aspects of tourism impediments. The first part of this section is a review of the factual elements of tourism impediments in various aspects. The second part devotes to the legal analytical finding of the liberalization of tourism industry and the strategic tourism sustainable development.

5.1 Reports on participating APEC Economies

The summary and reviews of the nature of impediments in the two participating economies are based on the results of the workshops, observation, and reviews of secondary sources, reports, and other sources of media. The impediments matrixes are presented in a subsequent section of this report.

5.1.1 The nature of impediments in the participating APEC economies

Almost if not all of the impediments identified in the participating economies are generally in common ranging from national policy and regulations, safety and security issues, administrative practices, infrastructure, environment and culture, taxes and fee, travel advisories and media, transportation, telecommunication, currency exchange, and language barrier. However, the participating economies have improved the national policy and regulations, also have developed some measures facilitating mobility of tourism industry and tourists, such as visa policy, administrative practices, and investment promotion.

5.1.1.1 Tourism and national policy and regulations

Tourism is an interactive business and relating to a wide scope of industries. Tourism is connecting to investment and service provision. Therefore the removal of impediments to tourism growth has to consider and survey the impediments at all levels of the related business and investment. This includes general infrastructure, investment regime, investment laws and regulations, substantive and procedural requirements of human resources. Many impediments and issues identified reflect national policy and regulations in a broader context than just tourism. These national policy and regulations can have a substantive impact on tourism sector

both interns of ability of visitors to enter or leave the APEC economy and of tourism – related businesses to growth. These include:

Visa policies and related laws and regulation governing entry of people and enterprises

According to international law, nation states have absolute sovereignty to screen, limit, and exclude foreigners from entry. They can also set quantitative restriction on entry of foreigners or provide substantive requirements, qualitative requirement, and other requirement of services providers to render services in the host country. Regarding tourism sector, the national tourism organization; whether it is a ministry, a sub ministry or an arm's length organization, it has the power and authority to influence and co-ordinate tourism policy and development initiatives among various ministries and departments. The nature of the impediments can be summarized as follows:

- Regulations governing the temporary employment of foreign national in tourism services
- Restrictive equity ratio of foreign ownership of tourism businesses and prohibition or limitation of land ownership
- Policies and regulations governing airline service to and within a nation such as monopoly in airline operation by national airline.
- Discrimination on visa application for entry among foreign nationals that results from political and economical policy of the host economies
- Different visa fee and procedure for different nationalities applied for entry visa
- Duration for the approval of entry visa is different depending on political relation and other policy influences
- Limitation on Foreign ownership
- Limitation on the type and number of foreign personnel and their duration of stay

- Limitation on ownership of land
- Requirement that domestic residents be part of board of directors

5.1.1.2 Safety and Security Issues

The spread of terrorism in various parts of the world, especially in the US, Europe and Southeast Asia, results in the introduction and implementation of stricter security measures screening the entry of foreigners at the entry points along the borders of economies. This causes the delay in crossing borders.

General security measures protecting foreign travelers from various form of risk exposing to crimes, rape, murder, injury, property loss, cheating, and other risks have been informed and advised to foreign visitors to APEC economies. Tourist polices have been trained to protect and help foreigners in certain circumstances and general precaution measures have been introduced.

Moreover, for safety purpose, screening process for bio-security hazards restricting the importation of many food, animal, and plant products has been imposed. Plant and animal quarantine zone has been set for the investigation of imported products by foreigners

5.1.1.3 Administrative Practices

Administrative practices that may cause delays and inconveniences to foreigners can be the results from obtaining visa extension or application for visa, approval of business and development, obtaining certificate or services licenses, arbitrary interpretation of some policies and regulations, corruption among officials who approve and award contact or business proposals or licenses, inappropriate official time for submitting application, irregular time table for visiting places.

5.1.1.4 Infrastructure

Participating economies have expressed concern about the improvement of infrastructure supporting tourism that need long term investment from both the government and private sector. Both Papua New Guinea and Vietnam need the development of Airports, border crossing facilities, highways and bridges, public transportation, public telephone, mobile phone network,

electricity, ferries and ports, water and sanitation system urban streets and sidewalks, pollution control systems, telecommunication network, internet connection, postal services, sufficient business centers, technological facilities,

5.1.1.5 Environment and Culture

Sustainable tourism development, eco – tourism, environment friendly tourism industry, and cultural preservation are main concerns for local people. Participation of local people in tourism businesses for improving their life's condition and income generation are important factors for tourism growth in term of local economy. Preservation and sustainable use of natural resources, and environment protection need national policy to enhance and develop the effective laws and regulations, especially the enforcement and implementation of environment protection laws and policy.

Both Papua New Guinea and Vietnam are members of some Multilateral Environment Agreements (MEAs). There are over 250 multilateral environmental agreements (MEAs) dealing with various environmental issues which are currently in force. About 20 of these include provisions that can affect trade. For instance, they may contain measures that prohibit trade in certain species or products, or that allow countries to restrict trade in certain circumstances. At the 2001 Doha Ministerial Conference, members agreed to negotiate on the relationship between WTO rules and the multilateral environmental agreements, particularly those that contain “specific trade obligations” (STOs). These negotiations take place in special sessions of the Trade and Environment Committee. Members have agreed that the scope of these negotiations would be limited to applicability of WTO rules to WTO members that have signed the multilateral environmental agreement under consideration. There are linkage between the United Nations Environment Programme (UNEP) and the core MEAs. The significant multilateral environment agreements are Basel Convention, Convention on Biological Diversity (CBD), Convention on International Trade in Endangered Species (CITES), Montreal Protocol, Rotterdam Convention, Stockholm Convention, United Nation Framework Convention on Climate Change (UNFCCC).

Such MEAs relate to GATT/WTO measures, e.g.GATT 1994 — Articles I and III on Non-Discrimination. Non-discrimination is the main principle on which the rules of the multilateral

trading system are founded. It ensures that national environmental protection policies cannot arbitrarily discriminate between foreign and domestically made products, or between products imported from different trading partners. Most-favored-nation treatment means all member countries are on an equal footing. All share the benefits of any moves towards lower trade barriers. The MFN principle ensures that developing countries and others with little economic leverage are able to benefit freely from the best trading conditions whenever and wherever they are negotiated.

Article XI on General Elimination of Quantitative Restrictions addresses the elimination of quantitative restrictions introduced or maintained by countries on the importation or exportation of products. It prohibits such restrictions to encourage countries to convert them into tariffs, which are more transparent and less-trade distortive instruments. This Article has been violated in the context of a number of environmental disputes in which countries have imposed bans on the importation of certain products, and is thus relevant to trade and environment discussions.

Article XX on General Exceptions: “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 Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: “... (b) necessary to protect human, animal or plant life or health; “... (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption; ...”

Paragraphs (b) and (g) are designed to allow WTO members to adopt policy measures that would normally be inconsistent with GATT, when “necessary” to protect human, animal or plant life or health, or if related to the conservation of exhaustible natural resources.

The opening paragraph (the “chapeau”) of Article XX is designed to ensure that the GATT— inconsistent measures do not result in arbitrary or unjustifiable discrimination and do not constitute disguised protectionism.

The WTO Agreement on Technical Barriers to Trade seeks to ensure that product specifications, whether mandatory or voluntary (known as technical regulations and standards), as well as

procedures to assess compliance with those specifications (known as conformity assessment procedures), do not create unnecessary obstacles to trade. In its preamble, the Agreement recognizes countries' rights to adopt such measures to the extent they consider appropriate — for example, to protect human, animal or plant life or health, or the environment.

Environmental concerns are also addressed in a number of different WTO agreements and decisions: the General Agreement on Trade in Services (GATS), the Agreement on Technical Barriers to Trade, the Agreement on Sanitary and Phytosanitary Measures, the Agreement on Trade-Related Aspects of Intellectual Property Rights, the Agreement on Subsidies and Countervailing Measures, the Agreement on Agriculture, Ministerial Decision on Trade and Environment, Decision on Trade in Services and the Environment . A ministerial Decision on Trade and Environment, created the Committee on Trade and Environment (CTE) with the aim of making international trade and environmental policies support each other. The decision contains the work programme of the CTE.

Ministers also adopted a Decision on Trade in Services and the Environment. It instructs the CTE to examine and report on the relationship between services trade and the environment, including the issue of sustainable development, in order to determine if any modifications of GATS Article XIV are required. The CTE has taken up this issue as part of its work programme.

In conclusion, APEC economies are entitled to employ the environment measures but they can be used only in good faith to protect environment but cannot be used as disguised protectionism instruments (See Matrixes on MEAs in the Annex presenting the countries, which are parties to the MEAs)

5.1.1.6 Taxes

Taxes are sources of income. Therefore, in principle, in many economies, different forms of tourism-related taxes are collected, such as airport tax, safety equipment fees, facilities fees, fuel surcharges, air navigation charges, and other travel related taxes. This causes the multiple tax burden to tourists.

On the other hand, for investment aspect, APEC economies including Papua New Guinea and Vietnam have attracted foreign investment by granting tax incentives and non – tax incentives as follows:

An inducement offered in the form of an abatement of taxes such as:

Tax holiday from corporate income tax

Exemption from income tax, custom duty, corporate tax,

Business levy, withholding tax on remittance of profit, dividends and other distribution

Tax holiday from dividends tax

Tax allowance

Concession from duty/levy

Abatement of adjusted income

Double deduction

Tax credit

Deduction for labour cost

Deduction cost of construction

Capital Loss Carry forward

Loss write-off provision

Any kind of tax exemption

Concern for domestic investors is that in some cases only foreign investors are entitled to such tax incentives while local enterprises are not eligible for such preferences due to the amount of investment capital made is below the requirement of the investment promotion regulations. This is ironically discriminate against local investors.

5.1.1.7 Travel Advisories and the Media

Economies studied have expressed the problem of sensationalistic media stories arising out of travel advisories. They need the visitors to be informed the accurate information. Government of each member economy strive to find the right balance between acknowledging risks to visitors and conveying accurate information about the level of risk. Currently, each economy has developed the risk warning system and seek cooperation with other economies experienced risks including the spread of SARs, avian flu, mad cow disease, and other risks as well as tsunami attract.

5.1.2 Finding from Individual Member Economy

This sector reviews the findings emerging from the individual APEC member economies which participated in the program

5.1.2.1 Papua New Guinea

Papua New Guinea (PNG) is a developing economy endowed with rich natural resources and nature, touristic attraction and friendliness of PNG people. PNG is the target of tourists coming from around the world both for travelling and business. PNG with a small tourism sector currently has high potentiality to growth if the economy employs strategic action plan to attract foreign tourists and develop tourism – related business. The national tourist organization, the Tourism Promotion Authority of Papua New Guinea welcomes the opportunity to engage in constructive dialog with the other agencies of Government. Foreign direct investment has been promoted, preferential treatment, investment incentive, tax and non – tax incentives have been granted to FDI. Basic infrastructure, telecommunication, transportation, business center, hotel and re-creation center, professional and human resources are needed to developed and improved. Tourism – related business and service providers are supporting factor to tourism growth. PNG still has various sectors to be encouraged and enhanced. These include the following areas:

Visas or restrictions on entry

- Difficulties in obtaining Visa
- Expensive
- Variety of visa types
- Discrimination

Taxes or charges which affected visitors

Airport taxes, Departure taxes, airport charges

Complex procedures for starting new businesses

Difficulties in importing capital equipment

Difficulties in accessing technology

Constraints on recruiting skilled staff from abroad

Taxes or charges which discriminate against tourism businesses

Infrastructure

- Water supply
- Electricity
- Postal & mail
- City Planning

Transportation

- **Air**

Airport capacity

Airline capacity

Direct flight availability

Air fare affordability

- **Sea, inland water**

Sufficient Service providers

High Standard/capacity

Frequency of services

Expensive fare

– **Rail & road**

Standardization

Capacity

Services

Public transportation

Insufficient Business Centers

Insufficient Commercial/Department Stores

Require Human resources/Development

Need Logistic operation and business

Hotel & Accommodation

– Professional services/standard

– Quality

– Capacity

– Quantity

– Location

– Costs

Telecommunication

– Telephone

– Internet

– Fax

– Satellite

– Mobile phone

Travel agencies and tour operations

Tourist guide

Tourism Policy

Visa restrictions

Currency or fx restrictions

Health concerns

Relative travel cost to

Relative travel cost within

Customs or barrier controls

Communication barrier (Language Barrier)

Accommodation availability/standard

Scale of airport exit or related taxes

Insurance cost

Tourism as a tax base – new taxes and charges

Consumer protection legislation and litigation risks

Access to payment systems and transaction costs

Environmental legislation

Tourists' health problem

Logistic

Impediments affecting people traveling abroad

Restriction on overseas travel

Currency or fx restriction

Airline capacity

Relative costs to travel abroad

Communication barriers

Restriction on entry

Security

Health requirement (Host & Home Countries)

Regulations and controls which limit business

Licenses and approvals to operate

Screening Process/measures

Restriction on the import of goods or capital equipment

Level of taxes and charges

Limitations on foreign ownership of land and property

Restriction on equity ratio

Restriction on Management

Regulations and controls which limit growth

Conflicts between tourism and environment

Land tenure

Hotel and related taxes

Controls or inefficiencies in the development process

Bureaucratic procedures

Insufficient Public relation/Advertisement

Tourism related infrastructure issues

Airport capacity or congestion

Airline capacity

Airspace congestion

Ground transport issues

Airport curfews

Bilateral and restrictive aviation policies

Financial regulations or control affecting tourism

Limitation on repatriation of profits

Shortage of investment capital

Limits on foreign equity participation

Foreign exchange controls

Discriminatory taxes and charges

Foreign investment controls

Taxation Measures

Labor issues in the tourism sector

- Shortage in skilled staff
- Lack of experienced managers
- Control on employment of non-nationals
- Lack of training facilities
- Services quality
- Language skills

Issues in marketing and promoting tourism

- Costs of promoting in main markets
- Access to distribution systems in main market
- Restriction on import of advertising materials
- Quotas or licenses for travel agencies
- Taxes on import of promotional materials

Technology and information systems

- Incompatible technology between systems
- Communication difficulties between economies
- Disparity in telecommunication charges or cost
- Cost of developing, acquiring or operating systems
- CRS access and costs

Strategic liberalization

Neutral Approach

- Natural resources
- Cultural preservation

Active liberalization approach

- Welcome tourism and tourism-related investment
- Create commercial center & business hub
- Establish travel agencies abroad all around the world

- Strengthen public relation and tourism promotion
- Welcome film, broadcasting, television, etc

Passive Liberalization approach

- Open tourism at home

Tourism related infrastructure issues

Airport capacity or congestion

Airline capacity

Airspace congestion

Ground transport issues

Airport curfews

Bilateral and restrictive aviation policies

a. Visa Program

The principal and the practical application of PNG's universal visa program were identified as an issue. There are anomalies in both the system and the way it is applied which impede the development of tourism. Specific issues include

- The differential between visas for tourists and for business visitors, with business visitors required to obtain their visa in advance.
- The impact of the high cost media fees on visiting tourism journalists and film crews
- The procedure for issuing visas on arrival, and the requirement for visitors to pay in local currency.
- An airport service charge on departure payable in cash of U.S.\$ 7.50 had been introduced without consultation.
- Difficulty in obtaining visas for some countries to enter PNG
- The Master plan suggested the introduction of a waiver to specific groups of visitors from visas, in this case it would be inappropriate due to the non-discrimination principle for service liberalization, and it is against the MFN principle. If PNG would like to encourage the entry of

visitors and facilitate free mobility of inbound tourists, the waiver of Visa for tourists should be implemented based on the MFN basis to comply with the market access and MFN principle.

b. Employment

The Papua New Guinea tourism is dependent on high proportion of expatriate managers. All expatriates require an employment visa which can be granted for up to three years. The problem lie in the process, there are two agencies involved in the approval procedure and the delays can be up to eight weeks for Australian residents and considerably longer for other countries. This can make it difficult to secure new contract staff.

There are plans to develop a one-stop shop for labor approvals, certification of new businesses and foreign investment approvals.

Suggestion can be made here for PNG to adopt the Mutual Recognition Arrangement (MRA) to negotiate principle, standard, requirements, and regulations governing the MRA procedure with other countries. The national substantive and procedural requirement can be altered to be an international standard requirement with the approval from national Authority mutually recognized to each other economy and countries. Visa requirement for professional in tourism business entered into PNG shall be facilitated and granted for a long term period provided that foreign professional have complied with the domestic laws and regulations regarding national security and public order.

c. Business development incentives

Papua New Guinea has an established system of business development incentives across most sector industry, including agriculture, manufacturing and fishing. Benefits can include income tax concessions for pioneer industries and accelerated depreciation for plant. There are wages subsidies, duty free entry for oil and gas production, concessions for training expenditures. Companies involved in the export of manufactured goods can obtain 100% income tax exemption for 4 year on net export income.

The tourism sector only benefits from concessions for diving sector. Tourism does not access the export market development concession. Compares with other sectors of the economy the tourism sector receives little direct assistance or concessions.

Promotion of industry development can be made locally to enhance and develop local human resources through cooperation program with the more developed economies. The encouragement of domestic investment helps promote technological advancement supported by the government and foreign trade and

investment. The globalization process needs economy to strengthen its own capacity building and capacity to benefit from the global liberalized market not just open market access for the exploitation from outsiders. It needs the balance between openness and penetration to global market.

d. Reserved industries

PNG has a policy of reserving certain sectors for PNG citizens and certain activities for National Industries, with a minimum 51% local shareholding. Activities reserved for PNG citizens accommodation with less than 10 rooms, airport business concessions and kiosks. Activities reserved for national enterprises include tourist- related activities, tourist guides, wholesale tour operators and travel agents.

Foreign investment involving land outside for the major cities is difficult, as 97% of land in PNG is owned by traditional owners and cannot readily be alienated. Developments do occur in partnership with local owners. The encouragement of FDI that requires land use can be made through the long term leasing agreement instead of selling land to foreigners. This can help promote FDI in tourism industry while maintain land ownership of local people.

e. Tariffs

There is discriminatory tariff on promotional material (formerly 40%, now 25%)designed to protect local industry but which impacts heavily on the tourism industry with its use of quality promotional materials which are normally use outside PNG. Recovery of duty paid on re-export is difficult, as material is often mailed in small quantities.

The commitments made under several economic agreements between PNG and its trading partners may quicken the removal of tariff and grant market access in combination of the provision of national treatment and most – favored – nation treatment. These principles ensure the fair and equal competition between nationals and foreigners, and among foreigners. Tariff reduction has been made under the umbrella of GATT/WTO, APEC, and other bilateral commitments between PNG and its economic partners.

f. Visitor safety

The issue of visitor safety is a major concern for Papa New Guinea, with an under resourced police force and limited understanding at community level of the benefits of tourism. The police are establishing a Tourism Police Squad within the community Policing System, (a community based extension of existing

service). The objective is to develop links between tourism operators and police to minimize the risk to visitors traveling in isolated areas.

g. Results from the stage III workshop can be summarized as follows:

- Encourage increase in competition of we address the impediments affecting the growth of the Economy by promoting/marketing on the overseas markets of internally we should also promote PNG in a more positive manner to encourage more tourists to visit the country
- Casinos to attract rich tourists & encourage building more hotels
- Deregulate airlines – internal & external
- Beautification & clean facilities
- Roads
- Everything else will follow

Economic, Socio-cultural Operational & Legal

Economic

- Casinos & gambling could be included for attracting rich tourists but not for local people
- According to the PNG Internal Revenue Commission
 - Have Concession rates for big investment
 - Repatriation of profits is easy
- Air transport – currently a monopoly & cost of coming into the country very expensive
- Backpacker Market – They generate a lot of volume despite low expenditure & hence should be an important market. Also their volume can generate accommodation establishments fitting their needs
- Competition is good for PNG
- PNG Investment Promotion Authority (IPA) has changed its internal accreditation process. The accreditation process is now more efficient to help speed up certification of business
- Lack of adequate public infrastructure
- Incentives are now in place in PNG such as
 - GST now abolished only for travel bought overseas
 - However fiscal incentives are not enough

Socio-cultural

- Negative media image
- Law & order (perceived & real) issues
- Attitude in Rural areas – Tall Poppy Syndrome
- Lack of perceived equitable distribution of benefits
- Security of tourists in rural areas
- Fair pricing especially for cultural goods
- Communication barriers especially in the remote areas with little English spoken
- Taboo places which may/may not be open for tourists to visit

Operational

- Regulation of Tourism Industry – TPA Act 1993 does not allow TPA to regulate tourism operations
- Lack of skilled labor & professionals
- The Government's Medium Term Development Strategy (MTDS) now recognizes Tourism as an Economic Sector
- Cruise Ships
 - Increase in numbers & benefits
 - However these vessels often are a 1 stop shop hence visitors may not frequent local shops to buy goods
 - Lack of berth & general facilities
- Visa Fees
 - Process is difficult especially in Europe

h. Summary

The work shop and interviews identified a number of issues where the development of new tourism businesses was constrained, or did not receive the same advantages as other sectors. The concerns at inefficient processes and procedures emphasize the need for facilitation of the investment and employment processes. There were a number of issues identified during the program which are an opportunity for the TPA negotiate for improved conditions to assist the development of stronger tourist sector in PNG.

Mutual Recognition Arrangements are suggested to facilitate the mobility of tourism professional and investment. FTA and other form of economic agreements can be made to liberalize service trade and tourism industry provided that local stakeholders fully participate in the market and benefit from the liberalized market.

Environment protection and cultural preservation are main concerns for sustainable tourism industry. Reserved industries and sensitive areas of business need to be cautiously liberalized and also need an effective implementation of laws and regulations that monitor restrictive business practices in order to balance liberalization and maintaining traditional value of life and local wisdom, especially dignity of local people.

Major Impediments to tourism growth in PNG

The following are the major impediments to tourism development and growth in PNG. Most of them can be rectified with the assistance of Government Policy initiatives and inter-agency support and collaboration.

The following matrix shows the impediments and the sectors/agencies who can directly or indirectly assist to rectify it.

	ISSUES	IMPEDIMENTS	ACTION REQUIRED	RATIONAL	EXPECTED OUTCOME	RESPONSIBLE AGENCIES
1	VISA FEES VISA APPLICATION PROCESS	<ul style="list-style-type: none"> Charging of Different Visa Fees. The process and lead time to get a visa to come to PNG is time consuming and tedious in most countries. 	<ul style="list-style-type: none"> Waive all Visa Fees <ul style="list-style-type: none"> *Business *Film Crew *VJP *Tourist etc Review visa application process so that most countries can get visa upon arrival 	<p>The visa fee charged is insignificant compared to the amount the visitors are planning to spend in PNG. The visa fees deters tourist from coming to PNG. They choose other pacific islands that have no visa fees at all.</p> <p>The lead time and process to get the</p>	<ul style="list-style-type: none"> Increase in Tourist numbers Increase in Foreign Currency Increase in economic activities 	<ul style="list-style-type: none"> Foreign Affairs & Immigration Treasury

				visa makes the potential tourists look for alternative destinations.		
2	TAX ISSUES & INCENTIVES	<ul style="list-style-type: none"> No industry tailored/specific tax incentives No specific tourism tax concessions to attract tourism investments. 	<p>Implement the following;</p> <p>*Double tax Deduction for promotional & marketing products overseas</p> <p>*Duty free goods for certain goods imported which are not produced in PNG.</p> <p>*Different brackets of Tax Holidays for different ranges of capital investment. eg SLIP Concept in</p>	Tax incentives and concessions is the only way to entice/attract investors in the tourism sector. That is the main catalyst for the tourism industry growth	<ul style="list-style-type: none"> Increase FDI in tourism sector Motivate existing industry members to expand. Encourage local participation 	<ul style="list-style-type: none"> IRC Treasury <p>*Note: Gov't must immediately implement the incentives recently announced during 2006 Budget Speech</p>

			Fiji (Short Life Investment Package).			
3	EXPENSIVE AIRFARES ON BOTH INTERNATIONAL & DOMESTIC ROUTES	<ul style="list-style-type: none"> • Expensive airfares • No favourable packages • No tourist Incentive Passes • Very High tax component built in ticket prices 	<ul style="list-style-type: none"> • Reduce/subsidies airfares • Develop tourist tailored airfare packages • Develop Incentives pass for an extra destination in PNG more than 2 destinations are being paid • Economies of Scale – Air Niugini must focus on making profit on volume and not individual sales 	<p>PNG is tagged as The Most Expensive Destination. Reduction of airfares and favourable packages/incentives will see an increase in arrival figures.</p>	<ul style="list-style-type: none"> • Reasonable airfare attracts a lot of tourists • Most prefer cheap airfare packages • 	<ul style="list-style-type: none"> • Air Niugini • Airlines PNG • Air Link • IRC
4	CHARGING OF FEES AT THE WHARVES, DOCKS, JETTY ETC	<ul style="list-style-type: none"> • Charging of landing fees for cruise ships • Charging of other related fees 	<ul style="list-style-type: none"> • Waive all forms of fees and charges applied to cruise ships and tourist boats. 	<ul style="list-style-type: none"> • More cruise ships brings more tourist to boost our economy • Most cruise ship passengers 	<ul style="list-style-type: none"> • More cruise ships means more wealthy people will come and spend in our economy 	<ul style="list-style-type: none"> • PNG Harbours Board • Provincial Gov't • Treasury

				are wealthy people who have the capacity to spend more.		
5	LACK OF/POOR PROVINCIAL TOURISM OFFICES	<ul style="list-style-type: none"> No Provincial Tourism Offices Lack of Funding for PTOs Lack of Support 	<ul style="list-style-type: none"> Establishment of PTOs/PTBs Adequately finance PTOs Prioritize the sector 	<ul style="list-style-type: none"> Majority of the people benefit from tourism. 95% of tourism products are found in the villages/communities. 	<ul style="list-style-type: none"> Tourism industry has its roots in the villages and communities, Everyone will benefit tourism directly or indirectly 	<ul style="list-style-type: none"> Provincial Governments
6	PROMOTION OF TOURISM INVESTMENT AND PROJECTS LACK OF FDIs (Foreign Direct Investment)	<ul style="list-style-type: none"> No promotion for tourism investment No incentive for tourism sector No incentives specifically to entice brand/chain hotels like Hilton, Sofitel, Sheraton etc Longer 	<ul style="list-style-type: none"> Effectively promote tourism sector investment Develop tourism tailored incentives Develop incentives to attract brand hotels investment 	<ul style="list-style-type: none"> Effective promotion will attract FDI in tourism sector Attractive investment incentive packages will attract FDI in tourism. Brand/chain hotel group will assist market/promote PNG via their 	<ul style="list-style-type: none"> FDI in tourism sector will serve as the catalyst for growth & development of tourism sector More benefits will trickle down to everyone. 	<ul style="list-style-type: none"> IPA Dept of Trade & Industry Treasury

		business approval period		established networks.		
7	POLICE TOURISM CONCEPT	<ul style="list-style-type: none"> • There is no direct link between Police & Tourism activities • Police does not view things from the tourism perspectives. 	<ul style="list-style-type: none"> • A special directorate must be responsible to train policeman who can work closely with tourists, tour operators, guides etc 	<ul style="list-style-type: none"> • Policeman can enforce law & order whilst be a tour guide • Provides comfort to the visiting tourists 	<ul style="list-style-type: none"> • Police involved will minimized negative image perception • Reduction in law & order encourages tourists to visit PNG • More tourists boost our economy. 	<ul style="list-style-type: none"> • RPNGC (Police)
8	SEED CAPITAL & SMALL TO MEDIUM ENTERPRISE (SME) LENDING	<ul style="list-style-type: none"> • No financial incentive to support tourism projects • No financial support for existing tourism operations. 	<ul style="list-style-type: none"> • Create lending facilities tailored to support tourism industry • Make available some money 	<ul style="list-style-type: none"> • Motivates locals to venture into tourism. • Provide quality tourism products and services • Stimulates 	<ul style="list-style-type: none"> • More people venture into tourism industry and a lot of communities will benefit since tourism products and services are community 	<ul style="list-style-type: none"> • RDB • Treasury • DNPRD

			to facilitate for SME businesses in tourism sector	interest for existing operators to expand	oriented	
9	LACK OF DONOR FUNDING, INTERNATIONAL AGENCY ASSISTANCE ETC	<ul style="list-style-type: none"> • Tourism Projects is not recognized for funding from these agencies • Huge tourism projects can not be funded under Recurrent/PIP 	<ul style="list-style-type: none"> • Tourism must be included as the key agency eligible for such funding • Tourism Industry must be identified as the catalyst for development 	<ul style="list-style-type: none"> • Major projects which can not be funded under Recurrent/PIP can be funded via these agencies • In order to boost the industry, huge impact projects must be funded 	<ul style="list-style-type: none"> • Development of impact projects/programs results in the boost of the tourism sector • Receive adequate assistance from AUSAID, NZ AID, 9th EDF (EU) etc 	<ul style="list-style-type: none"> • DNPRD • Treasury • Finance
10	BEATIFICATION & IMAGE IMPROVEMENT OF PORT MORESBY CITY	<ul style="list-style-type: none"> • Port Moresby gives the Bad Impression of PNG • City is untidy • Uncoordinated informal sector markets 	<ul style="list-style-type: none"> • Port Moresby must have strict little control regulations in place • Properly coordinate the informal sector businesses • Develop 	<ul style="list-style-type: none"> • Port Moresby gives the first impression of PNG • Port Moresby is the gateway to other exotic PNG destinations. 	<ul style="list-style-type: none"> • Improvement of Port Moresby city directly promotes other provinces. 	<ul style="list-style-type: none"> • NCDC • Dept of Community & Social Services

		<ul style="list-style-type: none"> Poor landscaping and gardening 	beatification programs			
11	EXCESSIVE GROUND COST/FEES	<ul style="list-style-type: none"> Unregulated Tour Operators fees Unregulated fees/charges of tourism service providers 	<ul style="list-style-type: none"> Regulate and establish fee structure for all tour operators Regulate all tourism service providers 	<ul style="list-style-type: none"> Reasonable fees/prices can be charged. Tourists get value for money Provision of uncompromising services. 	<ul style="list-style-type: none"> PNG is currently tagged as Expensive Destination Reduction and regulation of prices/fees will see an increase in tourist arrivals 	<ul style="list-style-type: none"> PNGTIA ICCC NISIT PNGTOA (Tour Operators Association)
12	INCREASE IN INTERNATIONAL CARRIERS/UNRESTRICTED ACCESS	<ul style="list-style-type: none"> Restrictive International Access Lack of competition Lack of implementation of Open Sky Policy 	<ul style="list-style-type: none"> Encourage other international carriers to come to PNG Develop incentives to attract other airlines eg. Pacific Blue Encourage greater competition 	<ul style="list-style-type: none"> Competition stimulate efficiency in service provision Competition will boost tourism industry Competition eliminates price monopoly. 	<ul style="list-style-type: none"> Airfares become reasonably priced Tourists tailored airfare packages are developed. Tourism flourishes 	<ul style="list-style-type: none"> OCA Treasury ICCC
13	SKILLED	<ul style="list-style-type: none"> Takes longer period to 	<ul style="list-style-type: none"> Develop fast and efficient 	<ul style="list-style-type: none"> Trained industry 	<ul style="list-style-type: none"> Trained work force 	<ul style="list-style-type: none"> Dept of

	LABOUR FORCE	issue work permit for professional tourism workers	mechanism to speed up work permit issuance procedure.	members will impart knowledge to the locals	provides the best tourism experience for the visits	Labour.
14	GOVERNMENTS UNWAVERING SUPPORT	<ul style="list-style-type: none"> Inconsistency in Budgetary allocation Change in Government policies 	<ul style="list-style-type: none"> Steady growth in budgetary support for tourism. Consistency in recognition of tourism as an economic sector 	<ul style="list-style-type: none"> Consistency in government support for the industry is the key factor in the growth of it. 	<ul style="list-style-type: none"> Increase government support creates an enabling environment for tourism industry to grow 	<ul style="list-style-type: none"> National Government
15	POOR TRANSPORTATION SERVICES	<ul style="list-style-type: none"> Old & filthy buses/taxis for tourist transfers/tourists Charging of excessive fees ALL taxis must have metres & address at the side 	<ul style="list-style-type: none"> Remove old bus and taxis. Impose heavy penalties on poorly maintained and unclean taxis. Insist on ALL taxis to install metres on it. 	<ul style="list-style-type: none"> Tourists get value for money Quality service compliment their PNG experience Tourists are treated professional 	<ul style="list-style-type: none"> The high quality of services provided gives them a positive impression of PNG 	<ul style="list-style-type: none"> Transport Department National Road Safety Council NCD Traffic Police Directorate NCDC

Major Tourism Impediments to tourism growth in Vietnam

	Issues	Impediments	Action required	Rational	Expected outcome	Responsible agencies
1	<p>Visa fees</p> <p>Visa application</p>	Still high and additional cost	More visa exemption for more source market	Receipts from tourist coming can be higher than visa fee	More benefits overall	Vietnam Ministry of Foreign Affairs
2	Tax issues and incentives					
3	Expensive airfare on both international and domestic routes	<p>Domestic monopolies</p> <p>Difficult booking</p> <p>Delays</p>	More competition	For better services	<p>Better services</p> <p>More tourist flows</p>	<p>Ministry of transportation</p> <p>Vietnam Airlines</p>
4	Charging of fees at the wharves, docks, jetty etc					
5	Lack of poor provincial tourism	Lack of competent	<p>More training</p> <p>More personnel</p>		Better operation and coordination	<p>VNAT</p> <p>Provincial</p>

	offices	personnel Weak coordination among provincial offices and VNAT	recruitment More budget allocation			tourism offices
6	Promotion of tourism investment and projects Lack of FDI	Lack of investment promotion Not enough information, potential projects	More money and organized investment promotional activities Develop full information potential projects	FDI is important => should be more promoted	More FDI	VNAT Provincial tourism offices Ministry of Planning and Investment Vietnam Chamber of Commerce and Investment
7	Police tourism concept	Not yet have Normal police: weak languages, not good communication	Should have tourism policies			VNAT Ministry of Police
8	Seed capital and small to medium	Difficult procedures for	Case requirements		More SME come	Banks

	enterprise lending	getting loans	and procedures		into operation	Ministry of Finance
9	Lack of donor funding, international agency assistance etc	Need more donor funding	More talks between VNAT and donors			
10	Beatification and image improvement of Vietnam					
11	Excessive ground cost/fees					
12	Increase in international carriers/unrestricted access					
13	Skilled labor force	Lack standardized curriculums and competencies standard	Standardizing skill, professional, curriculum and certification	Improving labor force, facilitate movement of labor		Ministry of Education VNAT Training establishment
14	Governments	Coordination with	More power to state steering committee		Better political	State steering

	unwavering support	other sectors More funding Suitable state management agencies	and VNAT		commitment Better coordination	committee VNAT Government
15	Poor transportation services	lack of standard transportation	Standardizing the transportation for tourist		Better quantity and quality	Ministry of Transportation VNAT Local authorities

5.1.2.2 Vietnam

a. Introduction

Vietnam is located in the center of the dynamic region: Southeast Asia and now is on the process of exploring such economic dynamism for the promotion of Vietnam's own economic development. Vietnam has long been praised as "a rising dragon of ASEAN" and has been viewed as a key player for further integration of ASEAN and APEC. Vietnam has endeavored to modernize and enhance market economy. Vietnam has liberalized trade and investment, reformed laws and regulations, improved general infrastructure, telecommunication, real estate, developed tourism sustainable industry, relaxed laws and regulations, eliminated barriers and impediments to economic growth. Vietnam has entered into a series of FTA and other economic agreements with its economic partners for example, US – Vietnam FTA, Vietnam-Japan Joint Initiative to Improve Business Environment with a view to strengthen Vietnam's Competitiveness. Moreover Vietnam has created favorable environment for international trade and investment, supported free mobility of economic factors across border.

The economy has great potentiality to foster economic development and has experienced economic growth at an impressive rate. The economic and legal survey of Vietnam can be summarized as follows:

b. Present legal framework governing FDI

Vietnam established its Doi Moi policy at the end of 1986 and has been making efforts to move from a planned economy to a market oriented economy, a so-called 'transition into a market-oriented economy'. The Vietnamese government has strengthened its policies which focus on promoting FDI and private sector development with a view to changing its economic structure which was previous led mainly by a structure of state-owned-enterprises. As a result of this shift and these policies, Vietnam has succeeded in attaining high economic growth levels since 1992, especially in comparison with other neighboring ASEAN and APEC nations, due to the growth of FDI and the private sector. During the middle of the 1990's, Vietnam achieved economic growth levels of 10%. This declined due to the impact of the Asian currency crisis in 1998 and in 1999. However, growth rates recovered to 6.7% in 2000, 6.8% in 2001 and 7.0% in 2002 thanks to an expansion in production by private enterprises enhanced by the enacting of Enterprises

Laws, and the recovery of foreign direct investments. After the Asian currency crisis, many East Asian countries introduced new and attractive incentives to attract FDI. In order to strengthen its industrial competitiveness edge and enhance its economic growth towards the future, Vietnam has adopted the following policy options which are very important from the viewpoint of exploring the Vietnam's existing merits. Vietnam also needs to strengthen its characteristics as an attractive venue for manufacturing companies amongst ASEAN countries and APEC economies, which are moving rapidly towards economic integration and interdependent economic relations.

- Further FDI promotion into areas Vietnam holds a competitive edge, through the drastic improvement of Vietnam's FDI environment.
- Intensive assistance for the private sector and SMEs in management, technology, and finance.
- Establishing strategic industrial development policies with a view to promoting FDI and developing the private sector and SME sectors efficiently
- Solving the problem of "good governance" including red tape, corruption, etc.

In this context, substantial and rapid policy change and action by the Vietnamese government to improve the investment environment in Vietnam is the key to ensuring sizable FDI recovery which is essential for Vietnam's nation building.

c. The improvement of legal framework

Strategies to increase FDI in Vietnam focus mainly on the following two components:

- (1) Investment promotion strategies which give potential investors attractive and favorable conditions and draw favorable attention to Vietnam
- (2) Investment environment improvement to remove a number of impediments which hinder investors' daily business operations

From the viewpoint of investment promotion strategies, it is the most important to propose attractive investment conditions that are to be able to compete with that of China and neighboring ASEAN and APEC economies for potential investors. As for investment environment improvements, the following problems should be mentioned.

- Streamline investment-related regulations which impede foreign company business

- Improvement of basic public services related to the daily business operations of investors'
- Improvement of policies introduced into each industry

Based on these ideas, issues are categorized as follows:

- (1) Reconsideration of regulations related to investment
- (2) Capacity building of implementing authorities (i.e. customs offices, tax offices, courts, IP related authorities and statistics related organizations)
- (3) Improvement of investment related institutions (i.e. judiciary and legal system metrology and industrial standardization system)
- (4) Improvement of economic infrastructure (i.e. issues of urban transport and functions, transport and distribution efficiency, the power sector, improvement of international telecommunications, issues of waste water and industrial solid waste, active use of JBIC's international finance)

With a view to attracting more FDI inflows to Vietnam, it is also important to address properly the problems and efficiencies facing the existing investors in Vietnam as potential investors are very interested in the business results of the existing investors.

d. Concrete Measures to Promote Foreign Direct Investment

Fundamental challenges of Vietnam to attract more FDI and foreign investors' have been made. A number of detailed and advisable proposals have also been submitted from private sector and government authority. Some of the actions included in the action plan may not be easy to implement. They will require a strong political commitment for implementation as domestic conflict and frictions are to be expected during the implementation process in Vietnam.

Acknowledging these points, the Government of Vietnam declares their strong determination and willingness to implement the following actions.

Establishment and implementation of FDI attraction strategy

Development, introduction and utilization of supporting industry in Vietnam

1. Development of Supporting Industry

Government of Vietnam will take the following measures immediately in order to develop a supporting industry in Vietnam.

- (1) Establishing a master plan for supporting industry development
- (2) Establishing business management & technological training centers and technical assistance centers for SMEs.
- (3) Establishing a data bases on local supporting industries
- (4) Developing some industrial parks particularly for supporting industry enterprises.
- (5) Applying preferential measures for supporting industries (assistance in finance, training and human resources development, receiving technical information, taking part in products introduction fairs)

Vietnam has been supported from economic partners as follows:

- (1) Policy advices for the development of supporting industries (i.e. establishing the master plan for supporting industry development)
- (2) Technical assistance (establishment of a Technical Assistance Center for SMEs, dispatching technical experts for round technical diagnosis)
- (3) Management diagnosis
- (4) Exchanges between SMEs (trade fairs, business talk missions, exchanges between foreign's SMEs and Vietnam's SMEs)
- (5) Providing technical information (list of local enterprises, organizing seminars for each sector, matching between FDI and local enterprises,"Reversal trade fair" which will provide foreign assemblers seeking local parts and material makers to meet assemblers' demands)

Attraction of FDI supporting industries

In order to strengthen tax incentives to investment by supporting industries, the Government of Vietnam will strengthen tax incentives to certain types of supporting industries through issuing a new CIT guideline decree. The Government of Vietnam will issue the new CIT implementing guideline decree as soon as possible.

Utilization of FDI supporting industries

(1) Calculate parts and materials supplied by EPZ/EPE status enterprises into local content ratio. Even in the case where assembly companies purchase parts or materials from enterprises with an EPZ or EPE status, the Government of Vietnam should allow them to calculate such parts or materials into local content ratios the Government of Vietnam has issued the guidelines for calculating local content ratios in such cases in 2004.

(2) Simplify procedures for EPZ/EPE status enterprises in domestic sales

In the case where EPZ/EPE status enterprises sell their products to assembly companies that sell their products to the domestic markets, the Government of Vietnam will apply simplified procedures

(3) Import tariffs applied to EPZ/EPE status enterprises on the occasion when they sell their products to domestic market. The Government of Vietnam will provide regulation for application of CEPT/AFTA to domestic sales of EPZ/EPE enterprises as far as the products meet the conditions for CEPT application

Clarification of corporate income tax incentives for FDI Companies

Keeping tax incentives in accordance with the Law on the Foreign Investment: The Government of Vietnam affirms that the coming revision of the CIT law doesn't have any adverse effects on the current preferential tax treatment articulated in the Law on the Foreign Investment, in sum 10%, 15%, and 20%. (Immediate execution).

2. Securing current tax incentives for existing investors: The Government of Vietnam affirms that the coming revision of corporate income tax does not have any adverse impact on the current tax incentive scheme given to existing investors. (Immediate execution).

Improvement of Personal Income Tax

Recognizing the important role of PIT as a basic tax, the Government of Vietnam should firmly put into practice the following action plans as well as increasing the minimum tax basis and enlarging tax coverage.

Reducing the maximum tax rate: In 2004, the Government of Vietnam has submitted the draft amendment on the Ordinance on Higher-income Earners to the National Assembly, which has reduced the highest tax rate in view of enhancing Vietnam's competitiveness of investment attraction against neighboring countries

The Government of Vietnam submitted the draft of the new PIT Law to the National Assembly in 2006, which introduced a personal allowance or deduction system suitable for Vietnam.

Strengthening of FDI promotion activities (One stop service for FDI)

The Government of Vietnam will take the following action plan in enhancing the newly established FDI related agencies and departments.

The Government of Vietnam takes necessary budgetary measures for FDI promotion activities from the annual budgets of relevant ministries and peoples committees. In the cases of conflicts related to licensing or trouble-shooting, MPI as the contact point will co-ordinate with related ministries to ensure the legal and practical application of measures consistent with FDI laws or international agreements.

1. Dispatching regular investment missions to Vietnam in cooperation with MPI
2. Assistance to the Vietnamese side in organizing FDI seminars in Japan for each sector (especially for supporting industries)
3. Capacity building to MPI (FDI agency and three Investment Promotion Centers in North, Central and South of Vietnam) related to FDI promotion activities and the one stop service agency.

Establishment of Strategy and M/P for Basic Industries

1. The Government of Vietnam commits itself to giving foreign investors room to make comments in the process of establishing “Strategy” and “MP” (immediate execution)
2. The Government of Vietnam establishes “Strategy” and “MP” for basic industries as soon as possible in accordance with import tariffs and tax policies.

Visa waiver for short-term stay

The Government of Vietnam has granted visa waivers for short-term stays, possibly including business purpose, for example to Japanese citizens in 2004.

Specific policies and measures for drastic investment environment improvement

Regulations related to investment

Schedule of establishment of commercial presence and deregulation for foreign trading companies

The Government of Vietnam will follow the road map described in the economic Agreement to approve the commercial establishment of FDI in the field of manufacturing, trade and distribution (including import and distribution by manufactures), finance, insurance, telecommunication and advertisement. The Government of Vietnam will issue implementing guidelines for the commercial establishment of FDI in the field of trade and distribution trade as soon as possible after enacting this agreement.

The Government of Vietnam will loosen the limited function of branch offices of trading firms, integrated general trading companies. The Government of Vietnam will submit the amended Commercial Law to the National Assembly in order that the number of commodities to be dealt with in imports and exports is enlarged and the rule of import-export balance is less restrictive according to regional and international economic integration schedule of Vietnam

Removal of the restrictive investment rule

The Government of Vietnam will eliminate 80% of export requirements (except in some sectors) and also unanimous or consensus rule. The Government of Vietnam will eliminate local content requirements and dual pricing systems according to the roadmap of the Investment Agreement.

Clarification of sectors where 100% FDI Companies are approved

The Government of Vietnam will take the following steps.

1. To submit to the National Assembly to stipulate that 100% FDI is approved in all sectors except those stated within a “negative list” on the next revision of the Foreign Investment Law.
2. To issue a more detailed “negative list” through a revision of Decree 27 on the occasion of the next revision of the Foreign Investment Law.

Labor Code

Indefinite term labor contract

The Government of Vietnam will continue to disclose more examples of labor disputes to FDI companies, and arrange seminars on labor issues at a central level with investors so that the relationship between employers and employees will further be improved.

The Government of Vietnam will examine the possibility to remove this restriction of indefinite contracts in the next amendment of the labor code by considering the cost of labor, the opinion of enterprises and the regulation of other countries.

Overtime compensation on annual leave

The Vietnamese government will report to the National Assembly concerning the necessity and appropriateness of the regulation (compensation for annual leave) in the next amendment of the Labor Codes.

Land Law

The Government of Vietnam revised the Land Law including the following points at the last session of the National Assembly in 2003.

1. All FDI companies may obtain land use rights with a lump-sum payment.
2. Land use rights and attached assets (buildings, etc.) which have been leased with a lump-sum payment may be leased, used as investment in kind or may be mortgaged against loans from credit institutions permitted to operate in Vietnam.
3. The assets (buildings, etc.) bought but attached to land which are being leased on annual payments may be assigned, or may be mortgaged against the types of loans mentioned above.
4. In cases where the land use duration is 50 years (70 years); it may be extended for another 50 years (70 years).

Abolishment of import plan registration for parts and raw materials

The Government of Vietnam will abolish the import plan registration system for parts and raw materials within 2 years

Promotion of Technology Transfer

As a result of the on-going work to revise the Decree 45 (related to technical transfer), the Government of Vietnam will abolish the ceilings on the value of technology transfer agreements applied to private companies [executes within one year] and loosen towards even abolishment of the ceilings on the value of technology transfer agreements applied to companies which have the participating interest of State-owned enterprises The Government of Vietnam will submit to NA the draft of Civil Law to loosen towards even abolishment of the ceilings on the period of technology transfer agreements on the next revision of the Civil Law.

The implementation of educational activities for relevant people in Vietnam concerns for the value of and the compensation for intellectual properties, such as technology and know-how.

Tax deduction for technology transfer

In order to encourage the technology transfer, the Government of Vietnam will consider introducing tax incentive schemes of a specified duration promoting technical transfer on the occasion of next revision of Decree 45.

Removal of the deductibility limit on marketing and advertising expenses

The Government of Vietnam will consider the possibility of removing the deductibility limits on marketing and advertising expenses during the amendment of the CIT law in accordance with the roadmap being implemented under international commitments in integrating into international economy.

The Government of Vietnam may examine the definitions of 14 expense items for taxable income in the CIT guideline decree.

Abolition of bidding requirements in the placement of orders for equipment, buildings, etc. by joint ventures in which the participating interest of a Vietnamese enterprise is 30% or more in the form of the value of the land use right

The Government of Vietnam will assign the concerned ministries to draft amendment of Bidding Ordinance and submit it to the Standing National Committee of the National Assembly to abolish bidding requirements in the placement of orders for equipment, buildings, etc. by joint ventures in which the participating interest of Vietnamese enterprise is 30% or more in the form of value of the land use right as soon as possible.

Regulations on fund operations abroad by foreign bank branches and insurance companies

The Government of Vietnam will abolish the restrictions on overseas fund operations by foreign bank branches, and insurance companies, as soon as possible in accordance with international commitments.

Abolishment of capital requirements according to the Foreign Investment Law

From a view point of assuring flexibility in business operations, the Government of Vietnam will submit a draft of the amended Foreign Investment Law to the National Assembly allowing FDI to decrease their capital under specified conditions during the next revision of the Foreign Investment Law.

The Government of Vietnam will submit the draft of amended Foreign Investment Law to the National Assembly relaxing minimum capital requirements (at least 30% at present) during the next revision of the Foreign Investment Law.

Definition of total investment in relation to imported fixed asset

The Government of Vietnam will promulgate the legal document to clarify that depreciation should be considered in relation with the import of a fixed asset. (Half year)

Capacity Building of implementing authorities

Ensuring transparency, reliability, harmonization and speed-up, the simplification of customs procedures

The Government of Vietnam will take the following measures.

1. Early ratification of the Revised Kyoto Convention
2. Smooth implementation of new institutions
3. Complete execution of suitable customs clearances
4. Establishment of enforcement institutions and inspection methods against illegal trade
5. Promotion of cooperation and coordination structures amongst administrative organizations
6. Improvement of customs office staff quality
7. Publishing information on custom procedures
8. Step-by-step implementation of customs value definitions according to GATT/WTO: gradually reducing the goods whose customs values are defined by minimum prices.

9. Study and promulgate regulations on customs procedures relating to protection of intellectual property rights at borders.

10. Implementation of Advance Classification Ruling System.

Tax administration system

The Government of Vietnam will proceed with continuous improvements in the tax administration (effectiveness, upgrade of tax system, level-playing-field between local enterprises and FDI etc). The Government of Vietnam will make a number of case studies to trouble shoot the problems felt with the participation of oversea experts'

Improvement of the administration of intellectual property rights

The Government of Vietnam will continue to advance the simplification of the procedures of application for IPR. The Government of Vietnam will set up a data reference and management system on the internet (website) in order to provide necessary information to enterprises (within two year). The Government of Vietnam will improve the function and capacity of NOIP as the contact point, where inquiries of all kinds regarding IPR coming from existing and potential investors will be responded to promptly (within half a year)

The Government of Vietnam will amend Decree No. 54/2003/ND-CP, so that the treatment of trademarks is kept under NOIP (immediately)

The Government of Vietnam will become a member of the Madrid Protocol as soon as possible, taking the priority of other international commitments including WTO-TRIPs into consideration.

Enforcement and protection of intellectual property rights

The Government of Vietnam will strengthen the investigation and exposure of counterfeit goods at three levels, such as the import, production and distribution (market) of goods. The Government of Vietnam will introduce concrete measures including strengthening of the Steering Committee 127 which is to conduct and monitor all the IPR enforcement activities and provide results of investigations on infringement cases (including suspected cases) upon investors' requests.

The Government of Vietnam has conducted a campaign to investigate and expose counterfeit goods at a national level in 2004. The Government of Vietnam will amend Decree No.12/1999/ND-CP regulating sanctions against IPR violations, so that penalties against IPR infringement will, in principle exceed the benefits gained by such infringement as soon as possible.

Corruption eradication

1. The Government of Vietnam will continue to implement an action plan for corruption prevention with numerous concrete measures.
2. Reinforcement of the hot-line between the business sector and the government
3. Continuation of efforts to promote fairness, neutrality, transparency and the accountability of tax, customs and other administrative procedure simplification

Restriction on the fraudulent import

The Government of Vietnam will continue to introduce effective measures and strengthen coordinating function of a focal point against fraudulent import of all kinds of products (including flat glass) within one year

e. Improvement of institutional framework

Improvement in the promulgation process of legal normative documents

The Government of Vietnam will, as early as possible, promulgate guidelines on the implementation of the amended Law on the Promulgation of Legal Normative Documents. The Government of Vietnam will consult foreign enterprises for their comments on the process of promulgating of Legal Normative Documents that related to foreign enterprises.

The Government of Vietnam will strengthen the functions and organization of newly established specialized departments (such as the “legal normative documents check department” and “international law department”) to examine the conflict of legal normative documents. (Within one year).

Improvement of the implementation of judgments

The Government of Vietnam will take appropriate measures to ensure the effective and sufficient implementation of civil judgments without delay.

The Government of Vietnam affirms that, according to the new Ordinance on Commercial Arbitration, foreigners may be appointed as an arbitrator in the case of disputes involving foreign invested enterprises within the territory of Vietnam. The Government of Vietnam affirms that, regarding the selection of foreign legislation to be applied to disputes with foreign elements, the judgment on the consistency with the basic principles of Vietnam laws should be based on international practices.

The Government of Vietnam will set up a legal information window at each relevant ministries, local people’s committees, and governmental organizations which are required quick, certain and publicized responses to investors’ inquiries about legal matters (within one year).

The Government of Vietnam will establish common rules and give strong guidance to relevant ministries and organizations in following points.

- To make public to FDI the criteria of permission and standard examining periods.
- To provide information of current procedure statuses.
- To quickly deal with applications from FDI

Human resource development in the legal field

The Government of Vietnam will issue “LSDS” as soon as possible and make the utmost efforts for human resource development of legal professionals and officials, as well as capacity building in courts, in accordance with the Action Plan of the LNA and the LSDS. The Government of Japan will review the possibility of action plans as stated above.

Promulgation of the Competition Law

The Government of Vietnam shall strengthen relevant organizations to realize the early promulgation of a Competition Law.

Introduction of International Accounting Standards

The Government of Vietnam will promulgate all accounting and auditing standards until 2005 to unify the VAS into IAS. The Government of Vietnam will implement educational activities concerning accounting systems in conformity with the Law on Accounting from 2004.

Introduction of the system of bills and checks

The Government of Vietnam will establish a working team to study alternative payment methods, including bills and checks according to a revision of Decree 30 related to checks (within one year).

Industrial standardization and metrology improvement

The Government of Vietnam will make a continuous effort to promote industrial standardization and metrology systems, especially the modernization of Vietnamese standards and harmonization with ISO standards, in accordance with the Master Plan.

The Government of Vietnam will work out specific measures for the improvement of services to the private sector, including a certification system, testing and inspection facilities, etc. (within one year).

Human Resources Development (vocational training and IT manpower)

The Government of Vietnam will enhance the system of vocational training and IT human resources development.

Improvement of economic statistics: capacity building of statistical organizations

The Government of Vietnam strives to enhance the capacity of the General Statistics Office, especially by improving its services to users, in the wake of the introduction of the new Law on Statistics. The General Statistical Office will have a system to promptly provide data in response to requests by investors, in cooperation with MPI.

f. Improvement of infrastructure

Urban traffic and urban functions

The Government of Vietnam will construct the urban traffic infrastructure steadily in accordance with the master plan, in Hanoi and HCMC, and will improve urban traffic management (especially traffic control and parking facilities in main cities).

The Government of Vietnam will implement urban function dispersion in the long and medium-term, and in this connection, clarify the central administrative authority for urban development.

The Government of Vietnam will take continuously concrete measures such as traffic rule obedience, education and dissemination of traffic appropriate traffic etiquette and the strengthening of the enforcement of traffic violations.

Transport efficiency

The Government of Vietnam will examine the approval of the further entry of FDI into the transport sector (more than 50% investment share). The Government of Vietnam will proceed in strengthening the functions of ports in the south and north and strengthen the road infrastructure between the cities and ports gradually.

Power sector (main power plant construction, FDI entry, tariffs and reliability)

The Government of Vietnam affirms that they do not apply the 20% restriction in FDI for the power sector and will exclude the prescription from the Electric Power Law. (Immediate execution)

The Government of Vietnam will continue to implement an electricity tariff policy based on targets to gradually reduce cross-subsidies from production to other customer group having in mind the importance to have the electricity tariffs for production competitive with neighboring countries.

The Government of Vietnam will abolish dual pricing in electricity by the end of 2004.

The Government of Vietnam will continue its efforts to supply stable and good quality power (fewer changes in voltage) to all customers including large demand companies.

The Government of Vietnam will implement power plant construction in line with the schedule of the master plan.

Improvement of the telecommunication environment

The Government of Vietnam will continue to keep pace of the course of average of telecommunication service tariffs of the region. It would continue to reduce international telecommunication service rates (including the international call rate, the international leased line service) by promoting the production effectiveness, decreasing cost of services of each enterprise that involves into the market.

From view point of maintenance, security and effectiveness, the capability of the Internet providers also need to be enhanced and this process would be supported by the Government. For these objectives, the Government of Vietnam would accelerate the FDI entry scheduled to telecommunication sector.

Waste water and industrial solid waste treatment

The Government of Vietnam will conduct surveys of industrial waste and start preparing a master plan for suitable recycling, treatment and disposal structures and institutions for industrial waste [within one year]. In addition, the government shall improve the disposal facilities of public waste companies for industrial waste disposal.

The Government of Vietnam will ensure to apply environmental standards and conduct enforcement and penalties equally to all the companies for the violation of water waste discharge.

Promotion of international finance use for infrastructure

The Government of Vietnam will disseminate and advertise the knowledge and use of international finance, cooperating with international organizations. The Government of Vietnam will survey the situation in ASEAN countries and APEC economies, study the merits and operation know-how and adopt these measures in actual infrastructure and plant projects.

The Government of Vietnam will flexibly assign government guarantees to large-scale economic infrastructure and plant projects.

g. Support to existing investors

Promotion of the Automobile Industry

Industrial promotion policy and taxation system (centering on passenger cars)

In preparing the development plan for the car and parts industry, the Government of Vietnam will listen to the views of foreign capital companies.

The calculation formula of the local content ratio and the deduction items will be applied as articulated in the Annex of Economic Agreement with partners. Requirements for local content has also been removed at the end of 2006. The maximum ratio of local content requirement is 5%.

Used Trucks

The Government of Vietnam will establish a road map within one year which will impose and enforce regulations banning the import of middle sized- trucks (more than GVW5 ton), which are more than five years old (since there was no regulation on the age previously), in line with restrictions on small sized trucks.

VR (Vietnam Register) will stop the issuing of inspection certificates for trucks which are more than 25 years old.

Promotion of the Motorbike Industry

Development policy

The government set the nature of feasibility studies (F/S), which foreign enterprises are usually requested to submit to the Vietnamese Government at an application stage for their investment licenses.

Abolition of the lowest investment ratio restriction (40%) for the Share of the Vietnamese Partner through Additional Investment in a Cement Joint Venture

The Government of Vietnam will remove the minimum 40% capital restriction described in the master plan of the cement industry (Prime Minister Decision No. 164 2001) and make it clear that the capital ratio should be entrusted to mutual agreement between joint venture parties. (immediate execution)

Problem regarding long term credit of the Vietcombank (VCB)

The Government of Vietnam will require VCB to solve the long-term credit problems and therefore instruct VCB to seek for immediate resolution and will also take all possible measures such as by organizing the opportunity to discuss among parties related to this problem. This was done in March 2004.

h. Summary

Currently Vietnam has improved and developed legal and institutional framework governing foreign direct investment, trade, and services in various aspect. Vietnam also has entered into economic agreement with trading partner especially with the US and Japan. The new model of such agreements has been adopted by Vietnam and thus strengthened substantive law reforms and development across the board. However, Vietnam should carefully study the legal texts of FTA and economic agreement, especially in the chapter of intellectual property rights protection

and environment as they are the crucial legal framework for sustainable development of Vietnam.

For factual elements of tourism impediments in Vietnam can be summarized as in the matrixes of tourism impediments to growth of Vietnam said that Visa fees, Visa application, tax issues and incentives, expensive airfare on both international and domestic routes, charging of fees at the wharves, docks, jetty etc lack of or poor provincial tourism offices, promotion of tourism investment and projects are needed, lack of FDIs police tourism, capital for small to medium enterprise lending, lack of donor funding, international agency assistance, beatification and image improvement of Vietnam, excessive ground cost/fees increase in international carriers/unrestricted access. All impediments are gradually improved and developed in conjunction with the improvement of legal and institutional framework.

5.2 Legal analysis of tourism liberalization

This section discusses the legal aspect of liberalization of trade and investment that encompasses the liberalization of service trade for better understanding of tourism liberalization that needs profound understanding and knowledge of laws and regulations relating to the principle of non – discrimination and the function of market. Liberalization cannot automatically generate wealth and provide even wealth - distribution but rather the economies need to be able to benefit from the liberalized market and have the ability to compete with the competitors in each sector that open for market access to competitors. APEC economies need to wisely open the sectors they are ready to compete and wisely reserve the sensitive sectors that might be vulnerable to domestic economy and local people resulting from the overwhelmingly flood in of trade and investment. This is due to the fact that market function can be distorted by the other factors such as market dominance of enterprises that employ restrictive business practices or the abuse of market dominance. The influence of advertisement, sophisticate technology, advanced innovation of intellectual property, and the abuse of laws and regulations may distort the market function. The following section discusses the fundamental principle of non – discrimination: National treatment and most – favored – nation treatment and their effects on liberalization of trade and investment.

5.2.1 National Treatment Principle

Overview

National treatment (GATT Article III) stands alongside MFN treatment as one of the central principle of the WTO Agreement. Under the national treatment rule, Member must not accord discriminatory treatment among imports and “like” domestic products (with the exception of the imposition of tariffs, which is a border measure). The GATS and the TRIPS agreement have similar provisions. The rule prevents countries from imposing discriminatory measures on imports and from offsetting the effects of tariffs through non-tariff measures. An example of the latter could be a case in which Member A reduces the import tariff on product X from ten percent to five percent, but imposes a five percent domestic consumption tax on only imported product X, effectively offsetting the five percent point tariff cut. The purpose of the national treatment rule is to eliminate “hidden” domestic barriers to trade by requiring WTO Member to accord imported products treatment no less favorable than that accorded to products of

national origin. Adherence to this principle is important in order to maintain a balance of rights and obligations, and is essential for the maintenance of the multilateral trading system.

Legal Framework

GATT Article II

GATT Article II requires that WTO Members provide national treatment to all other Members. Article III: 1 stipulates the general principle that Members must not apply internal taxes or other internal charges, laws, regulations and requirements affecting imported or domestic products in a manner that protects domestic production.

In relation to internal taxes or other charges, Article III: 2 stipulates that WTO

Members shall not apply standards higher than those imposed on domestic products between imported goods and “like” domestic goods, or between imported goods and “a directly competitive or substitutable product.” With regard to internal regulations and laws, Article III: 4 provides that Members shall accord imported products treatments no less favorable than that accorded to “like products” of national origin.

In determining the similarity of “like products,” GATT panel reports have relied on a number of criteria including the product’s end uses in a given market, consumer tastes and habits, the product’s properties, nature and quality, and tariff classification. WTO panels and the Appellate Body reports utilize the same criteria.

Exception to GATT Article III (National Treatment Rule)

Although national treatment is a basic principle under the GATT, the ATT provides for certain captions; the exceptions are outlined below.

Government Procurement

GATT Article III: 8(a) permits governments to purchase domestic products preferentially, making government procurement one exception to the national treatment rule. This exception is permitted because WTO Member recognizes the role of government procurement in national policy. For example, there may be security need to develop and purchase products domestically, or government procurement may, as is often the case, be used as a policy tool to promote smaller business, local industry or advanced technologies.

While the ATT recognizes government procurement as an exception to the national treatment rule, the Agreement on Government Procurement, resulting from the Uruguay Round, mandates that signatories offer national treatment in their government procurement. However, WTO Members are under no obligation to join the Agreement on Government Procurement. In fact, it has mostly been developed countries that have joined the Agreement. Therefore, in the context of government procurement, the national treatment rule applies only among those who have acceded to the Agreement on Government Procurement. For other, the traditional exception is still in force.

Subsidies to Domestic Producers

GATT Article III: 8(b) allows for the payment of subsidies exclusively to domestic producers as an exception to the national treatment rule, under the condition that the subsidy does not violate other provisions of Article III and of the Agreement on Subsidies and Countervailing Measures. The reason for this exception is that subsidies are recognized to be an effective policy tool and are basically within the latitude of domestic policy authorities. However, because subsidies may have a negative effect on trade, the Agreement on Subsidies and Countervailing Measures imposes strict disciplines on their use.

GATT Article XVIII: C

Members in the early stages of development can raise their standard of living by promoting the establishment of infant industries. This effort may require certain government support and the goal of establishing the industry may not be realistically attainable within the confines of the GATT. In such cases, countries can invoke the provision of GATT Article XVIII: C to notify WTO Members and initiate consultation. After consultations are completed and subject to certain restrictions, the developing country is then allowed to take measures that are inconsistent with GATT provisions, excluding Articles I, II and XIII. Unlike the trade restrictions for balance-of-payment reasons in GATT Article XVIII: B, the Article XVIII: C procedure allows both broader measures and violations of the national treatment obligation in order to promote domestic infant industries. In the case concerning Malaysia's import permit system for petrochemical products, Malaysia resorted to GATT Article XVIII: C as a reason to enforce import restrictions on polyethylene. Although Singapore filed a WTO case against Malaysia's practice, Singapore later withdrew its complaint. Thus, neither a panel nor the Appellate Body had an opportunity to rule on the case.

Other Exceptions to National Treatment

Exceptions peculiar to national treatment include the exception on screen quotas for cinematographic films under Article III: 10 and Article IV. The provisions of GATT Article XX on general exceptions, Article XI on security exceptions and WTO Article IX on waivers also apply the national treatment rule.

National Treatment Rules Outside of GATT Article III

With the entry into force of the WTO Agreements, the principle of national treatment was extended, although in a limited fashion, to agreements on goods, services and intellectual property. For instance, among the agreement on goods, Article 5.1.1 of the TBT Agreement also addresses national treatment. GATS Article XVII provides national treatment for services and service providers and Article 3 of the TRIPS Agreement provides national treatment for the protection of intellectual property rights. The plurilateral Agreement on Government Procurement also contains a national treatment clause.

In conclusion, from legal point of view, any economy commits to liberalize the market based on non – discrimination principle by complying to NT and MFN still has the room for waiving from the commitments, both NT and MFN treatment can be exempted on the ground of general exemption and specific exemption where the economy encounters difficulty from the liberalization provided that the exemption has to be used in good faith based on non – discrimination principle to the other members.

Economic Aspects and Significance

There is a tendency among importing countries to discriminatorily apply domestic taxes and regulations to protect national production, often protectionist pressures from domestic producers. This distorts the conditions of competition between domestic and imported goods and leads to a reduction in economic welfare.

The national treatment rule does not, in principle, permit these sorts of policies that are designed to protect domestic products. GATT Article II does permit of the use of tariffs as a means of protecting a domestic industry because tariff have certain high degrees of transparency and predictability since they are published and committed to in tariff schedules. On the other hand, domestic taxes and regulations are “hidden barriers to trade” that lack both transparency and predictability. Thus, they can have a large trade-distortive impact. The existence of GATT Article III generally impedes the adoption of policies and measures aimed at the domestic protection, thus promoting trade liberalization.

In addition, regarding tariff concessions, GATT Article II recognizes that tariff have been used as tools for domestic industrial protection. Consequently, it proves a course for achieving liberalization through gradual reductions. Even if tariff reduction were made as a result of trade negotiations, and if domestic taxes and regulations were to be applied in a discriminatory fashion o protect domestic industry simultaneously, then effective internal trade barriers would remain. The national treatment rule prohibits countries and is, therefore, a significant tool in promoting trade liberalization.

5.2.2 Most -Favored - Nation Treatment Principle

Overview of Rules

“Most-Favored- Nation” (MFN) treatment requires Member to accord the most favorable tariff and regulatory treatment given to the product of any one Member at the time of import or export of “like product” to all other Members. This is a founding principle of the WTO. Under the MFN rule, if WTO Member A agrees in negotiations with country B, which need not be WTO Member, to reduce the tariff on product X to five percent, this same “ tariff rate” must also be extended to all other WTO Members. In other words, if a country provides favorable treatment to one country, it must provide the same favorable treatment to al Member countries.

The concept of MFN has a long history. Prior to the GATT, an MFN clause was often included in bilateral trade agreements and, as such, contributed greatly to trade liberalization. However, in the 1930s, measures were taken to limit the MFN principle. It is generally believed that these limits divided the world economy into trade blocs. Lessons were learned from this mistake and, in the wake of WORLD War II, an unconditional MFN clause was included in the GATT on a multilateral basis contributing to global trade stability.

Considering this background, MFN in particular must be recognized as a fundamental principle for sustaining the multilateral trading system. Regional integration and related exceptions must be uniformly administered so as not to undermine the MFN principle.

Legal Framework

GATT Practice Regarding MFN Treatment As Stipulated in GATT Articles I, XIII, and XVII

GATT Article I: 1

GATT Article I: 1 requires WTO Members to extend MFN treatment to like products of other WTO Members with respect to tariffs, regulations on exports and imports, internal taxes and charges, and

internal regulations. In other words, “like” products from all WTO Members must be accorded the same treatment as the most advantageous treatment accorded by a Member to the products of any one state or territory under the jurisdiction of that Member.

Should an importing country extended differential treatment to “like products” of one exporting country over another-by setting different Tariff rates- it would clearly violate GATT Article I: 1. However, Article I: 1 violations can also occur when the discrimination against the product of another Member is less apparent, such as when an importing country accords differential treatment among products that are considered to be “like products.” This is often defined as de facto discrimination. For example, a country may apply a different tariff rate to a particular variety of unroasted coffee beans, the differential tariff may affect imports only from specific countries. This may be considered a violation of the MFN rule. The concept of like product was strictly interpreted in the SPF (“spruce, pine, and fir”) case involving Japan. The panel in that case recognized that each WTO Member might exercise considerable discretion as to tariff classifications and that the legality of such classifications would be established to the extent that it did not discriminate against the same products from different WTO Members.

Non-Discriminatory Administration of Quantitative Restrictions

GATT Article XIII stipulates that, with regard to like products, quantitative restrictions or tariff quotas on any product must be administered in non- discriminatory fashion. It also stipulates that, in administering import restrictions and tariff quotas, WTO Members shall aim to allocate shares approaching as closely as possible to that which might be expected in their absence. Article XIII provides for MFN treatment in the administration of quantitative restrictions, and supplements the disciplines under Article I.

State Trading Enterprises

GATT Article XVII defines “State Trading Enterprises” as those: 1) state enterprises established or maintained by a WTO Member; or 2) enterprises granted exclusive or special privileges by WTO Members that make purchase or sales involving either imports or exports. By making use of their monopolistic status, such enterprises could operate against the principles of international trade by discriminating against an importing country via quantitative restrictions. GATT Article XVII obliges WTO Members to act in accordance with the rules of non-discrimination, including the MFN rule.

Exception to the MFN Rule

Regional Integration (GATT Article XXIV)

Regional integration through custom unions or free trade areas liberalizes trade among countries within the regions, while maintaining trade barriers with countries outside the region or regions. Regional integration therefore may lead to result that are contrary to the MFN principle because countries inside and outside the region are treated differently. Thus, countries outside the region could be disadvantaged. Nevertheless, regional integration can complement WTO principles by encouraging free trade in areas where barriers are not creates against trade between countries inside and outside the region and where trade is facilitated by the elimination of trade barriers on essentially all trade in the region.

Therefore, GATT Article XXIV provides that regional integration may be allowed as an exception to the MFN rule only if the following conditions are met: first, tariffs and other barriers to trade must be eliminated with respect to substantially all trade within the region; and second, the tariffs and other barriers to trade applied to outside countries must not higher or more restrictive than they were prior to regional integration.

Generalized System of Preferences

The Generalized System of Preference (GSP) program is a system tat grants certain products originating in eligible developing countries preferential tariff treatment over those normally granted under MFN status. GSP is a special measure designed to help developing countries increase their export earnings and promote development.

GSP is defined in the GATT decision on “Generalized System of Preferences” of June 1971. Granting GSP preferences is justified by the 1979 GATT decision on “Differential and More Favorable Treatment, Reciprocity, and Fuller Participation of developing countries” or the “Enabling clause”.

To be permissible, GSP must have the following characteristics: first, preferential tariffs may be applied not only to countries with special historical and political relationship (e.g., the British Commonwealth) but also to developing countries more generally (thus the system is described as “generalized”); second, the beneficiaries are limited to developing countries; and third. It is a benefit unilaterally granted by developed countries t developing countries.

Non-Application of Multilateral Trade Agreements Between Particular Member States (WTO Article XIII)

The Marrakesh Agreement Establishing the World Trade Organization (The “WTO Agreement”) provides that “[t]his Agreement and the Multilateral Trade Agreement in Annex 1 and 2 shall not apply as between any Member and any other Member”, when any of the following two conditions are met: (a) at the time the WTO went into force Article XXXV of GATT 1947 had been invoked earlier and was effective as between original Members of the WTO which were member to GATT 1947 or; (b) “between a Member and another Member which has acceded under Article XII only if the Member not consenting to the application has so notified the Ministerial Conference before the approval of the agreement on the terms of accession by the Ministerial Conference.

In case of no- application, benefits enjoyed by other Member are not provided to the country of non-application, which leads to result that are contrary to the MFN principle.

The WTO Agreement Article XIII provisions were created to deal with accession related issues. Ideally, the MFN rule would be strictly applied so that when country B accedes to the Agreement, it is required to confer MFN status on all other Member, and they, in turn, are required to confer MFN status on country B. However, country A which is already a Member of the WTO, may have reason for not conferring all right and obligations of the WTO on new Member B. Because the WTO only the required the consent of two-thirds of existing membership for accession, it is conceivable that country A may, against its will, be forced to grant MFN status to country B. WTO Article XIII is a way to respect country A’s concerns by preventing a WTO relationship from taking effect between countries A’s and B. Conversely, WTO Article XIII also provide a means for accession of country B, even when more than one-third of the membership, like country A, has reasons for not wanting a WTO relationship with country B(in which case they will object the accession itself) by allowing for so called non-application.

In January 1995, the United States notified the General Council that it would not apply the Agreement and the Multilateral Trade Agreements in Annex 1 and 2 to Romania. In February 1997 the United States withdrew its notification. In addition, the United States notified that t would not apply the above – mentioned agreements to three other new Members: Mongolia, the Kyrgyz Republic, and Georgia. The United States withdrew is notification for Mongolia in July 1999, for the Kyrgyz Republic in September 2000, and for Georgia in January 2001.

Other Exceptions

Other exceptions particular to MFN include GATT Article XXIV: 3 regarding frontier traffic with adjacent countries, and Article I: 2 regarding historical preferences that were in force at the signing of the GATT, such as the British Commonwealth.

General exceptions to the GATT that may be applied to the MFN principle include GATT Article XX regarding general exceptions for measures necessary to protect public morals, life and health, etc., and GATT Article XXI regarding security exceptions.

It is also possible to obtain a waiver from the MFN principle. Under WTO Article IX: 3, countries may, with the agreement of other member, waive their obligations under the agreement. New waivers, however, can only be obtained under exceptional circumstances, and require the consent of three-quarters of the Member. Article IX: 3 stipulates that exceptional circumstances, the terms and conditions governing the application of the waiver, and the date on which the waiver will be terminated shall be clearly stated. These waivers are also subject to annual review under Article IX: 4

MFN Provisions Outside of GATT 1994

The MFN principle has been extended, although with certain exemptions, to trade in services and intellectual property under the WTO Agreements. Article II of the General Agreement on Trade in services (GATS) provides for MFN treatment of service and service providers; Article 4 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) contains the same requirements for the protection of intellectual property rights. The GATS provide exceptions where Member may waive their obligation provide MFN treatment for specific measures in specific fields by listing the measure in the Annex on Article II exemptions. The TRIPS Agreement also provides for exemptions regarding measures based on existing treaties in the area of intellectual property.

Economic Aspects and Significance

Increase Efficiency in the world Economy

MFN treatment makes it possible for countries to import from the most efficient supplier, in accordance with the principle of comparative advantage. For example, if country B can supply product X at a lower price than country C, country A can increase its economic efficiency by importing it from country B. If, however, country A applies higher tariff rates to product X from country B than to product X from country C, country A may be forced to import product X from country C, even though country C is not as efficient a

supplier. This distorts trade and reduces the welfare of country A and the economic efficiency of the entire world. However, under the MFN principle, country A must levy its tariffs equally with respect to country B and C and therefore necessarily will import product X from country B because it is cheaper to do so. The most efficient result is thus attained.

Stabilization of the Multilateral Trading System

The MFN rule requires that favorable treatment granted to one country be immediately and unconditionally granted to all other countries. Trade restrictions, too, must be applied equally. This increases the risk of trade restrictions becoming a political issue, i.e., it raises the costs and consequences of doing so, and therefore tends to support the liberalized status quo. By stabilizing the free trade system in this manner, MFN increases predictability and therefore increases trade and investment.

Reduction of the Costs of Maintaining the Multilateral Trading System

MFN reduces the cost of maintaining the multilateral trading system. The equal treatment demand by the MFN principle tends to act as a force for unifying treatment at the most advantageous level (for trade that means the most liberal level). The establishment and maintenance of the MFN rule enables WTO Members to reduce their monitoring and negotiating cost vis-à-vis disadvantageous treatment. In short, the MFN rule has the effect of reducing the cost of maintaining the free trade system.

Finally, as long as the MFN rule is honored, imports from all WTO members are treated equally, reducing the cost of determining an import's origin and improving economic efficiency.

Thus, the MFN rule is fundamentally important in improving economic efficiency. However, we must note that MFN rule is often misused. For example, some argue that bilateral trade negotiations not conducted under the auspices of the WTO can be justified by the MFN principle, since any trade benefits that result from these negotiations will be applied equally to all other WTO members, even if they are excluded from the negotiations. Bilateral negotiations are thus justified as a more efficient and effective means to remove "unfair" trade measures. However, this does not take into account the fact that, because bilateral negotiations lack transparency and the negotiations tend to reflect the power relationship between the two countries, there is a possibility that MFN may not be extended to all countries not part of the negotiations. Even if the results of the negotiations are extended to all countries, even those outside the negotiations, through the MFN principle, it must be noted that the end "result" of improved treatment in trade does not necessarily justify the means. Continued vigilance is required to ensure that the MFN

rule is not abused in a results-oriented manner to undermine the basic importance of the dispute settlement process in the WTO.

5.2.3 Movement of natural persons

Overview of the Rules

Background to the Rules

In chapters on the “movement of natural persons” in FTAs/EPAs the question of how, within the scope of trade in services, a contracting party country can oblige only another contracting party with respect to GATS (as well as other items) often becomes an issue. There is another type of such chapter, the EU-Swiss FTA/EPA provides for immigration policy exceeding the scope of trade in services.

Mode Four of GATS covers a wide range of persons, from high-level engineers to unskilled workers, in its commitment to liberalization. However, many member countries, including Japan, have only made “horizontal commitments” to date, and their Schedules of commitments generally indicates, with regard to market access regarding specific service sectors, “Unbound except for measures concerning the categories of natural persons referred to in the market access column.” In other words, such commitments made by members under GATS are generally of an extremely restricted nature. This is also the case with Japan, which has made horizontal commitments only in three areas: intra - corporate transferees, professional services and temporary stay.

Therefore, the extent to which the liberalization of trade in services provide for in an FTA/EPA will go beyond the market access commitments made on the movement of natural persons under GATS will generally become a point of negotiation. Each FTA/EPA can provide for a different level of commitments depending on the relationships of the contracting parties. For example, an FTA/EPA may go beyond the liberalization of covered workers. Reflecting the progress of the request-offer process in the Doha Round service negotiations, in some of the EPAs entered into by Japan, Japan made commitments in the five areas (the three areas mentioned above plus contractual service suppliers and investors). Japan liberalized these areas as required by

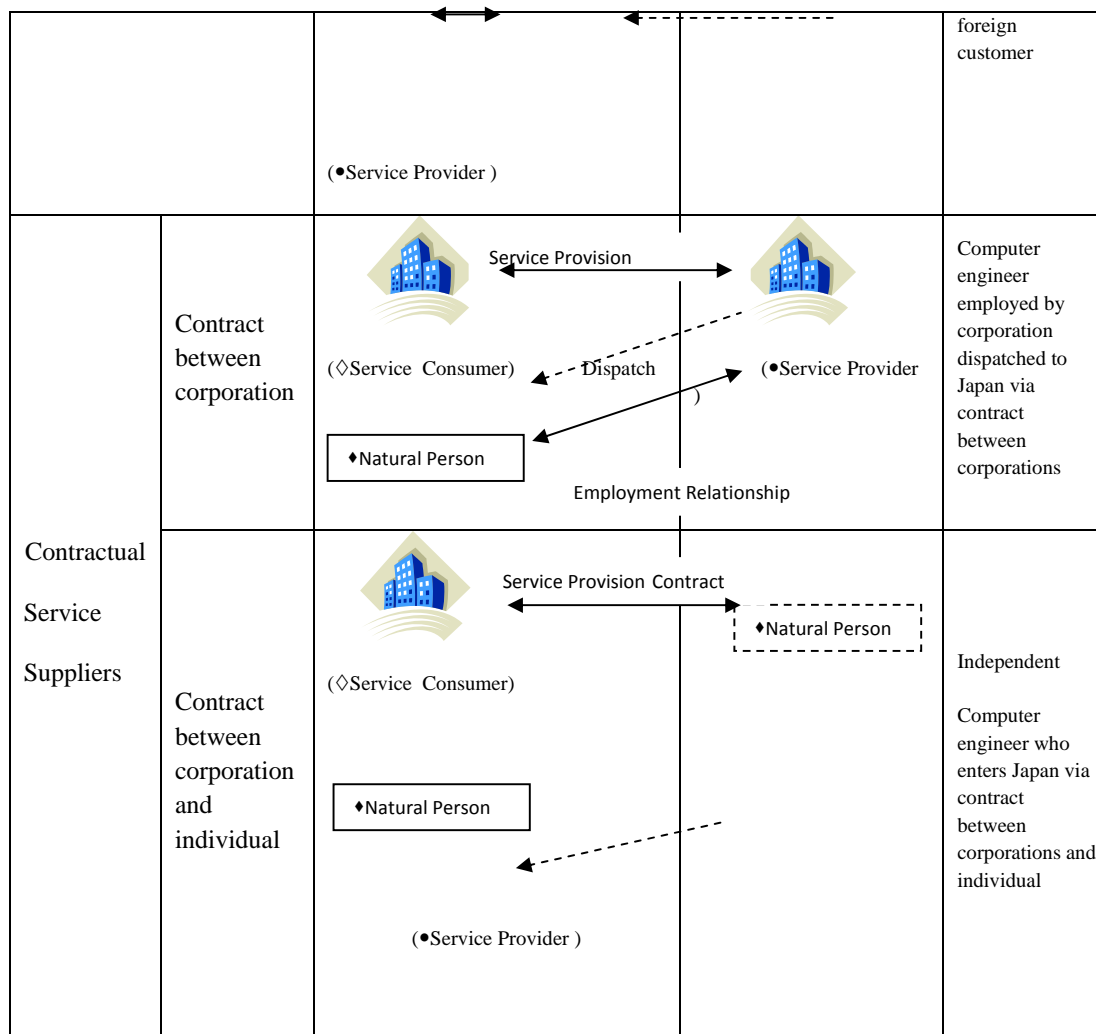
commitments made under the EPAs, but on an MFN basis rather than only in relation to the relevant EPA partners.

The immigration control system of Japan is operated according to the government policy of proactively accepting professionals and engineers, and accordingly, is vested with the discretion to allow non-Japan nationals to enter and stay in excess of its liberalization commitment under GATS. Therefore, if Japan extends preferential treatment, including at the practice level, to certain countries on a bilateral basis, the issue at negotiation would be the setting of the scope and conditions for entry of acceptable professionals within the extent of the aforesaid discretion (e.g., nurses and care works), in order to improve the level of commitment and/or to work out more favorable conditions for permitted entry and stay only with certain countries.

Main types of horizontal commitment of GATS

(Excerpt from Section II, Chapter 11 “Trade in Services”)

Main Types of Horizontal Commitments	Consumer Country	Source Country	Example
Intra-Corporate Transferees: ICT	<p>(•Service Provider Office)</p>	<p>Head Office Employment Relationship</p>	CEO, Manager, Professional
Business Visitor : BV	<p>Business Trip/Travel</p>	<p>Head Office (• Potential Service Provider Office)</p>	Business negotiations (no activities receiving compensation at that time)
Independent Professionals : IP	<p>Contract</p>	Temporary Stay	Independent lawyer who enters foreign country through contract with



Sources:

Overview of Legal Disciplines

The provisions of FTAs/EPAs concerning the movement of natural persons can be put into two categories. The first is a labor market integration model, like the EU, which authorizes or expressly pursues intra-regional labor movement, independently of service trade liberalization rules. The second category, as represented by the Japan-Singapore EPA and Japan-Philippine EPA, pursues deregulation of the movement of natural persons to the extent necessary for the liberalization of services (or liberalization of goods or investment) provided for as a part of a certain liberalization clause.

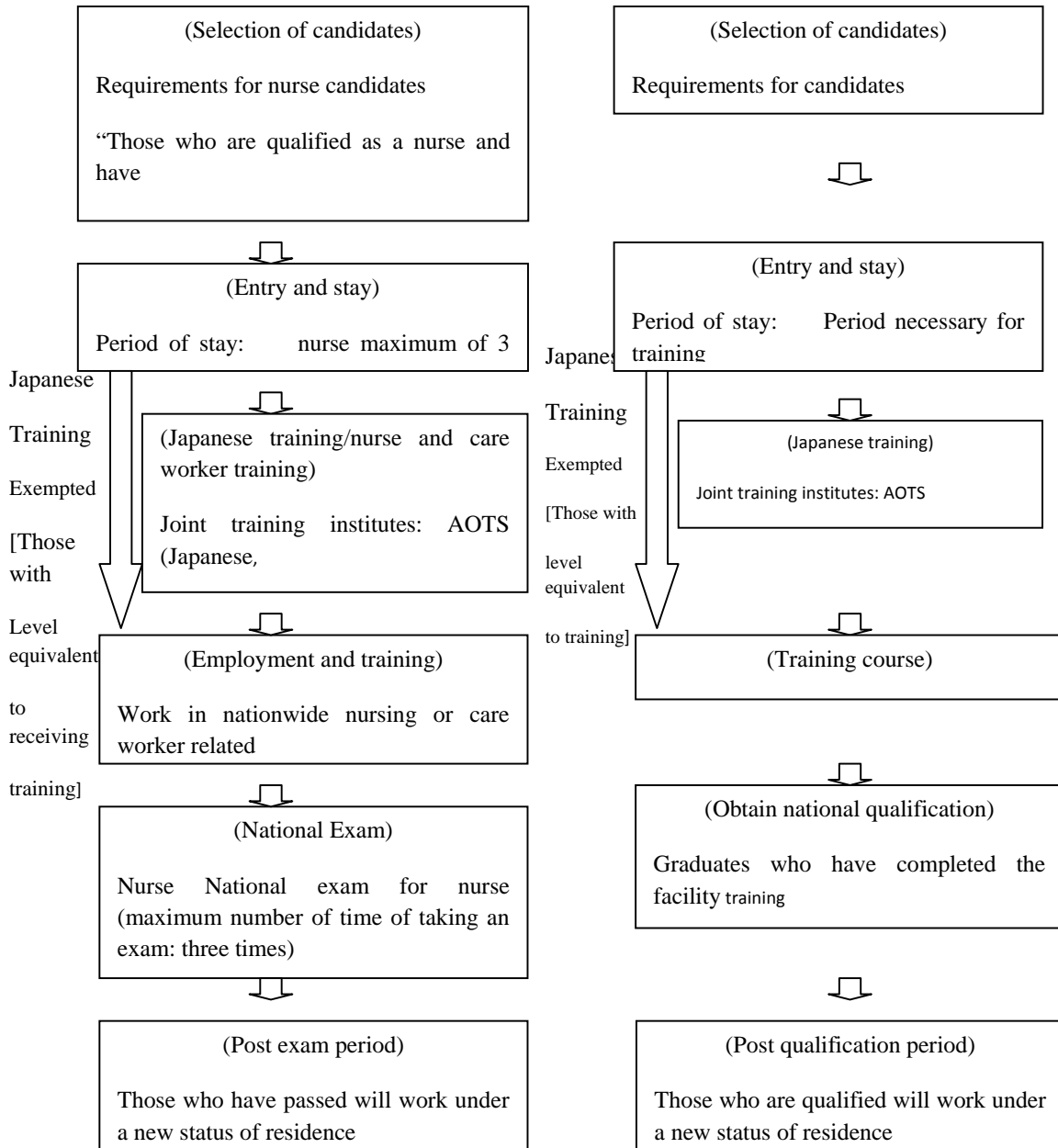
This section will summarize the provisions concerning the movement of natural persons included in the FTAs/EPAs entered into by Japan. The following section will review examples of FTA

provisions of other countries, primarily those of developed countries. It will go on to explain the simplification of passport control, which is provided for in some FTAs/EPAs. This section will also discuss the "mutual recognition of qualifications," an issue which is closely related to the movement of natural persons. The arrangements on a bilateral basis were notified to the WTO as required pursuant to Article 7 of GATS, and such arrangements are also included in multilateral and regional frameworks.

Framework for acceptance of nurses and care workers in Japan-Philippines EPA

[National exam course for nurses and care works]

[Facility training course for care workers]



Source:

Examples of facilitation of immigration control systems (APEC)

APEC Business Travel Card

At the APEC summit held in Manila in November 1996, agreement was reached between President Ramos of the Philippines, President Kim Yong Sam of Korea, and Prime Minister Howard of Australia on the experimental introduction of the APEC Business Travel Card (ABTC) proposed by the APEC Business Advisory Committee (ABAC) in order to promote and facilitate the intra-regional movement of business persons.

ABTC was put into experimental use in May 1997 in the Philippines, Korea and Australia. The number of member economies and regions adopting ABTC has been increasing since then and recently amounted to 17 economies and regions (Australia; Brunei; Chile; China; Hong Kong, China; Indonesia; Japan; Korea; Malaysia; New Zealand; Papua New Guinea; Peru; Philippines, Singapore; Chinese Taipei; Thailand; and Viet Nam). ABTC was put into use in Japan from April 1, 2003 after Japan's announcement of participation at the APEC summit held in Mexico in October 2002, reflecting strong demand from the Japanese business sector.

ABTC will be issued to applicants upon the permission of respective governmental or local bodies (in Japan, the Ministry of Foreign Affairs) after preliminary review and approval of such applicants by the other member country or region adopting ABTC. The basic requirements to be fulfilled are as follows:

- (a) The record must indicate that applicant has not committed any crime.
- (b) Applicant must have a valid passport.
- (c) Applicant is a genuine business person with necessity to make short-term and commercial purpose visits frequently within the region of APEC.

Utmost efforts are to be made to complete the preliminary review within two weeks from submission of the request of applicants. However, as it may take several months to put together

all responses from participating member economies and regions, there is a website to check the status of such preliminary review.

When an ABTC holder enters or stays in ABTC participating member economies listed on the back of the card issued to the holder for short-term commercial purposes, he/she is only required to submit a passport and ABTC (i.e. without visa) at passport control. Once his/her entry is permitted, a stay of approximately two to three months will be granted in accordance with the laws and regulations of respective participating member economies. ABTC will be valid for three years after issuance (if a passport is valid for less than three years, the validity period of passport will prevail). An ABTC holder is eligible for the lanes for ABTC holders only (in Japan, found in Narita International Airport, Kansai International Airport, and Chubu International Airport) and for expedited check at passport control.

Other examples of mutual recognition of qualifications

The Washington Accord

The Washington Accord was concluded among Australia, Canada; Hong Kong, China; Ireland, New Zealand; South Africa; England; and the United States in November 1989, and provides for the mutual recognition that bodies responsible for registering or licensing professional engineers in the member countries are equivalent in substance in respect of their qualification standards and examination procedures. Later, the following countries joined the accord: Hong Kong, China (1995), South Africa (1999), Japan (2001), Germany, Singapore and Malaysia (2003), and Korea and Chinese Taipei (2005). Russia and China are also preparing to join the accord. This accord has been notified to WTO under GATS.

The Washington Accord is an international agreement concerning the substantial equivalence of qualifications, which is the precondition for one country granting the same licenses or registration benefits to persons who completed the engineering education programs in another

country. This represents an attempt to secure the equivalence of qualifications and admissions, and thus does not automatically lead to the grant of a residence permit.

APEC Engineer

This method of mutual recognition of engineer qualifications was created in response to the resolution made in the APEC Summit held in Osaka in November 1995, to the effect that " in order to promote regional development in APEC, technology transfer is necessary, and to such end cross border movement of engineers is indispensable" On November 1, 2000, the requirements for APEC Engineers were established, and currently there are 13 official member economies: Japan, Australia,

Canada, Hong Kong, Korea, Malaysia, New Zealand , Indonesia, Philippines, United States, Thailand, Singapore and Chinese Taipei.

Once registered as an APEC engineer, a person will be granted the status equivalent to that in his/her home economy as engineer in fields such as mechanics, electronics, and computing, in the other participating economies. An APEC Engineer, in the same way as under the Washington Accord, secures equivalence of qualifications and admissions only, and thus is not automatically granted a residence permit.

5.2.4 Mutual recognition informed to GATs

Article 7 of GATS states that for the purposes of the fulfillment, in whole or in part, of its: standards or criteria for the authorization, licensing or certification of services suppliers, a member: may recognize the education or experience obtained, requirements met, or licenses or certifications granted in a particular country.

Paragraph 4 of said article further states that members should promptly inform the WTO when they adopt new recognition measures or significantly modify existing measures.

Economic aspects and significance

Today, the biggest issue concerning the liberalization of movement of natural persons is the opening up of labor markets of developed countries to developing countries. In developed countries, including Japan, opening up of labor markets (including unskilled workers markets) often receives the criticism that an increase of foreign workers will pressure the supply side of the domestic labor market causing wages to decline.

However, the liberalization of the movement of natural persons can bring positive economic effects to developing countries, as developing countries can receive significant amounts of money as their workers in developed countries transfer earnings back home. In fact, many Asian countries are now receiving a considerable amount of foreign money transfers.

In addition, the opening up of labor markets can achieve optimum distribution of the labor force between developed countries and developing countries, which may contribute to increasing GDP. Moreover, opening up labor markets for certain industries and occupations in which it is difficult to ensure domestic labor supply to meet with local demand for employment may enable businesses in these areas to continue business activities⁹.

5.2.5 Commercial presence and investment liberalization

Mode 3 of service provision is the commercial presence that is investment of enterprises (service provider) in the host country for providing services to consumer. Therefore, liberalization of service provider in mode 3 needs investment liberalization of the host country. This section discusses the legal aspect of investment liberalization so that tourism industry can be mobilized across countries and economies.

⁹ For details, refer to White Paper on International Trade 2003 published by the Japanese government

Investment: Background of Rule

Trend in Execution of Bilateral Investment Treaties

In light of the expansion of foreign direct investment, in order to protect investors and the assets thereof from risks in the host country such as expropriation, countries have proceeded to execute Bilateral Investment Treaties (BITs) since the 1960s. As at the end of 2005, 2,495 such agreements were in existence. Most of the agreements developed in the form of “investment protection agreements,” which are to be applied after the establishment of investments (post-establishment in the host country).

Effort at the OECD

With the expansion of foreign direct investment, new efforts were initiated to regulate the behavior of host countries not only in the post-establishment phase, but also in the phase when investments are initially being made in host countries. Specifically, efforts were made to lift restrictions on free cross-border investment such as foreign capital restrictions. In 1995, negotiations on the Multilateral Agreement on Investment (MAI) commenced on OECD. The objective was to settle on a comprehensive and binding multilateral agreement regarding the liberalization and protection of investment. However, as NGOs and others opposed the MAI, claiming that state regulatory authority, in particular with regards to environment matters, would be harmed by foreign investors, the negotiations came to a halt, and virtually break down when France decided to withdraw from participation in negotiation in 1998. Thus, the negotiation on the MAI was not concluded. However, ever since its early days, the OECD has been talking the issue of international arrangement regarding investment. Although the Code of Liberalization of Capital Movements enacted in 1961 cover a wide range of investment types and provides for the liberalization of transactions except in certain cases, its enforceability is weak as it lacks dispute settlement provisions. Guidelines for Multinational Enterprises, drafts in 1976, describe when the governments of member countries should recommend that multinational enterprises behave responsibly, as their behaviors may affect the development of the world economy. The guidelines were subsequently revised four times to add descriptions on the environment, employment relations, disclosure and new chapters on consumer interest and combating bribery, in accordance with developments of the world economy and change in the actions of

multinational enterprises. Upon their revision in 2000, National Contact Points were established to promote the Guidelines, handle enquiries and help to resolve issues. However, the guidelines themselves are not legally binding and their application and implementation are left to the discretion of each enterprise.

The energy Charter Treaty

An example of efforts made in an individual sector is the Energy Charter Treaty, the negotiations of which were initiated by the European countries in order to protect energy-related investments, particularly in the former Soviet Union. The Energy Charter Treaty was signed in 1994 and became effective in 1998. The three pillars of the Energy Charter Treaty are the provision on the trade in goods, investment rules and energy transport. Although limited to energy-related investments, it contains elements of so-called investment protection agreements. Japan signed the treaty in 1995 and ratified it in 2002. Each country of the former Soviet Union continues to participate in the treaty following the collapse of the Soviet Union, but the treaty is treated as being provisionally applied to Russia since it has signed but not yet ratified the treaty.

Effort at the WTO

At the WTO Singapore ministerial meeting in 1996, it was decided to consider whether the investment sector should be included as a new area for negotiation in the WTO framework, along with trade facilitation, transparency of governmental procurement and competition. Subsequently, discussions in the WTO on possible negotiations regarding “trade and investment” were led primarily by developed countries while they closely watched the progress of the discussions on the MAI at the OECD (which failed in 1998). It was agreed at the fourth ministerial meeting in 2001 to subsequently initiate negotiations if a clear consensus on negotiation modality on “trade and investment” could be obtained at the fifth ministerial meeting. From April 2002, the Working Group on trade and investment held meetings to discuss the elements (e.g., scope and definitions, transparency), contained in the Doha Declaration. However, due to strong opposition from developing countries to establishing rules regarding investments within the WTO framework, commencement of negotiations was not actually agreed at the fifth ministerial meeting.

Overview of Legal Disciplines

Traditional Investment Protection Agreements and NAFTA Type Investment Liberalization Agreements

In the past, BITs were executed primarily with a view to protecting investors of developed countries and their investments in a developing country where the rule of law has not yet been established, from legal and political risks including expropriation by the government of the developing country (the country receiving the investments, sometimes referred to as the host country) or arbitrary operation of laws, thus securing the proper treatment of the investors. These agreements are of the type usually referred to as “investment protection agreements,” major element of which are post-establishment national treatment and most-favored-nation treatment, conditions on expropriation and compensation, free transfer of funds relating to investment, dispute settlement between contracting party countries and between investors and the contracting party country, etc. Most of the approximately 2,500 investment agreements currently existing in the world are “investment protection agreement.”

A new approach to investment agreements that emerged in the 1990s held that they should address entry barriers to investment such as foreign capital restrictions in addition to providing post-establishment protection. Investment agreements reflecting this approach have been executed. Such investment agreements provide national treatment and most-favored-nation treatment during the pre-investment phase as well as the post establishment phase and prohibit “performance requirements which are considered to have a distorting effect on investment. These provisions are mostly included in FTA/EPAs as a chapter on investment. A typical example is the investment chapter in NAFTA. These may be referred to as “investment protection/liberalization agreements.”

Major Provision in Investment Agreements

As previously mentioned, investment agreements can be classified into 2 types “investment protection agreements” and “investment protection/liberalization agreements,” which contain provisions relating to both investment protection and liberalization. This section will provide an overview of the major elements of “investment protection/liberalization agreements.” However,

elements contained in investment agreements vary among agreements, and all elements mentioned hereunder are not necessarily included in all investment agreements.

National Treatment (NT) and Most-Favored-Nation Treatment (MFN)

A commonly used provision in these agreements is that each party shall accord to investors of the other party and to their investments national treatment or most-favored-nation treatment with respect to all investment activities, which include the “establishment, acquisition, expansion, management, conduct, operation, maintenance, use, enjoyment and sale or other disposition of investment.” In the case of investment protection agreements, because NT or MFN treatment is accorded in the post-establishment phase, the terms “establishment, acquisition, expansion” are often excluded and such agreements provide “national treatment or most-favored nation treatment with respect to management, conduct...or other disposition.

In the case of the WTO, which has multiple member countries, MFN treatment is a principle under which a Party must “accord all other Members treatment no less favorable than that it accords to any country” while, in contrast, in the case of a BIT it is to “accord investors of the other Party and to their investments treatments no less favorable than that it accord to investors of any non-Party and to their investments with respect to investment activities.”

It is natural that MFN treatment extends the favorable treatment accorded to non-party countries by a contracting party country under ordinary BITs to the other contracting party country. However, it may emerge as a point of discussion in the negotiation whether to extend the treatment accorded to a non-party country granted through FTAs/EPAs or customs unions. In some cases, treatment under FTAs/EPAs or customs unions is exempted from the MFN obligation.

Fair and Equitable Treatment

In recent years, many investment agreements, including those Japan has entered into, provide obligations to accord “fair and equitable treatment” and “full protection and security” to investors. The objective of such provisions is for the host country to accord a certain level of treatment to investors, and this treatment could be better understood in comparison with NT or MFN treatment, which is determined in relation to the treatment to other investors.

What specific treatment is deemed fair and equitable treatment, in abstract, depends on the language or the context of the provision, the purpose of the agreement, individual and specific circumstance, etc. In practice, however, discussions have centered around whether fair and equitable treatment means that minimum standard under customary international law, or more favorable treatment that exceeds such minimum standard. Some BITs are explicit in this regard using language such as “in accordance with customary international law,” but other BITs do not provide any relationship with customary international law.

Article 1105, paragraph 1 of NAFTA provides an obligation to accord fair and equitable treatment “in accordance with international law.” However, in the Pope and Talbot case it was held that because NAFTA was entered into for the purpose of building a closer economic relationship between the three countries of North America, there is not only an obligation to provide treatment consistent with the minimum standard under international law, but also obligation in addition to such minimum standard. In addition, in the S.D. Myers case it was held that a breach of other provisions under NAFTA automatically establishes a breach of general treatment obligations. Criticisms regarding the interpretation of this provision were raised mainly in the U.S. With a view to posing limitation on the expansive reading of this obligation, the NAFTA Free Trade Commission, in response to such criticism, published “Notes of Interpretation of Certain Chapter 11 Provisions” on August 1, 2001 confirming that general treatment obligations do not exceed that which is required by the customary international law minimum standard for treatment of aliens, and a breach of another provision of NAFTA, or of a separate international agreement, does not establish that there has been a breach of the general treatment obligations.

Some specific examples of fair and equitable treatment are the obligation to take due care in protecting the investment assets of foreign investors, the due process obligation, prohibition of denial of justice, obligation not to frustrate the legitimate expectations of investors, etc.

Prohibition of Performance Requirements (PR)

This provision prohibits a contracting party country from imposing performance requirements that hinder the free investment activities of investors, such as export requirements, local procurement requirements, technology transfer requirements, etc., as conditions for investment

and business activities of the investor in the other contracting party country. The TRIMs Agreement of the WTO agreement prohibits local content requirements and export/import equity requirements as being “investment measures that have a strong trade-distorting effect.” In addition, domestic sale limit requirements, technology transfer requirements, and the nationality requirements for managements are often prohibited as falling under “performance requirements.” His concept of prohibiting performance requirements is relatively new, and emerged in the discussion of MAI Agreement at the OECD, which was derailed before conclusion. Thus ordinarily, it is not included in investment protection agreements but is included in “investment protection/liberalization agreements.”

Performance requirements are usually classified in two types: absolutely prohibited items and items which are permitted if required as a condition for granting benefits. Under investment protection/liberalization agreements, the local content requirement and export equity requirement, which are strictly prohibited in the TRIMs Agreement, are treated as the former items with a view to maintaining consistency with the rules under WTO Agreement, and items such as the nationality requirements for management and technology transfer requirement are often treated as falling in the latter category in order to leave leeway for investment inducing policies for the contracting party countries.

Approach to Liberalization Commitment

The approaches to liberalization commitments of NT, MFN and PR can be classified into two types: the approach under which NT, MFN and prohibition of PR are provided to all sectors except those which the contracting party countries list as exceptions (negative list approach) and the approach under which only those sectors and content which are inscribed in the “Schedule of Commitments” are committed (positive list approach). Because “investment protection agreement” cover only the post-investment phase, the schedule of commitments for liberalizations generally not attached. In “investment protection/liberalization agreements,” developed countries such as the U.S. tend to adopt to negative list approach, which is highly transparent and legally stable, and developing countries tend to adopt the positive list approach, which is the same approach as the WTO GATs, in order t leave political leeway for foreign investment restrictions.

In the case of negative lists are generally prepared: list “without standstill obligations” allow parties to “maintain” or “adopt” measures not conforming to NT, MFN and prohibition of PR obligations; and list with “standstill and ratchet obligations” under which not only measures inconsistent with the agreement cannot be newly introduced, but also measures which do not conform to NT, MFN and PR obligation which exist at the time the agreement become effectively may be “maintained” but cannot be revised in a way that makes them more consistent with the agreement, and once the measure are revised in the decision to make them more consistent with the agreement, the measure can be made more inconsistent again (this is called as a ratchet obligation to indicate changes can only be made in one direction). By having the standstill obligation to cover as many sectors as possible, it is possible to reduce risks to investors from change of legal system (i.e. risks by which domestic system are made less favorable). At the same time, the contracting party countries register especially sensitive sectors such as sectors relating to national security like the arms and weapons industry and nuclear power industry on the list without standstill obligations. And those that are not so sensitive on the list “with standstill obligations, thereby leaving leeway for necessary restrictions as well as securing legal stability in their foreign investment policies. Specifically, the negative list adopted in the chapters on investment of NAFTA, etc., (i) the relevant sector (sub-sector), (ii) related obligation, (iii) legal ground for the measure and (iv) a summary of the measure are inscribed, thereby helping ensure the transparency of the laws and regulations of the host .

Expropriation and Compensation

The provision on expropriation and compensation provides that when the contracting party country expropriates the investment of the investor (including nationalization), it should do so in accordance with four conditions: (i) for a public purposes, (ii) on a non-discriminatory basis, (iii) upon payment of prompt compensation and (iv) in accordance with due process of law. In addition, prompt payment of compensation in accordance with fair market value as of the expropriation should be made. This is the most basic investor protection provision.

The provision usually covers indirect measures (i.e. measures equivalent to expropriation) in addition to direct expropriation that involves transferring assets to the assets to the state. Indirect expropriation, also known as creeping expropriation, refers to action that hinder the use of

investment or income due to policy measures such as deprivation of discretionary permission and license by the government of the contracting party country and the imposition of a maximum limit of production, ultimately resulting in an outcome equivalent to expropriation. Discussions on indirect expropriation were triggered by an arbitration case in the late 1990s (NAFTA Metalclad case; environmental protection measures taken by a state government of Mexico allegedly constitute indirect expropriation; the Mexican government was therefore held liable for breach of obligations under the agreement, *infra* at dispute Settlement regarding investment): to what extent do restrictive measures of the constitute “expropriation” which require compensation. In reaction to this arbitral award, the recent USA- Australia ATA and U.S.A.- Chile FTA provide that indirect expropriations require a case-by-case inquiry, that considers three factors: (i) the fact that a action or series of actions by a party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred, (ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations and (iii) the character of the government action.

Except in rare circumstances, nondiscriminatory regulatory action by a party that are designed and applied to achieve legitimate public welfare objectives, such as the protection of public health, safety, and the environment, do not constitute indirect expropriations.

Protection from Strife

If investors have suffered loss or damage relating to their investments due to armed conflict, revolution, civil disturbance, etc, this provision guarantees treatment of such investor, with regard to identification or any other settlement that is no less favorable than that which is accorded to the contracting party country’s own enterprises or enterprises of a non-party. This is one of the fundamental investor protection provisions.

Subrogation

This a provision recognizing the assignment of investor’s claims arising in the event investments suffer damages to the contracting party country or its designated agency by virtue of subrogation. For example, if investors suffer any damage due to a natural disaster or bankruptcy of local enterprises, such investor will make claims for payment under the insurance contract,

etc., against the contracting party country or its designated insurance agency. It provides that, in such case, in order to facilitate collection of the amount by the contracting party country or such insurance agency which made payments to the investors, the contracting party country or such insurance agency may succeed and exercise the investors' right under the agreement. As for Japan, this applies to insurance and insurance contracts provided by Nippon Export and Investment Insurance and Japan Bank for International Cooperation.

Transfers

This provision ensures that all transfers of funds relating to investments of an investor of the contracting party countries may be made freely without delay, and is essential for investors to efficiently engage in business activities.

State-to state and investor - to state dispute Settlement

In the event any dispute arises between contracting party countries over the interpretation or application of the agreement, consultation shall be first made between the party countries, and if no settlement is reached by such consultation, the dispute will be submitted to an arbitral tribunal. Since in FTAs/ EPAs, it is stipulated that the provision on state-to-state dispute settlement pertains to the entire FTAs/EPAs including the chapter on investment, this provision is provided in a section which covers the entire agreement, such as the chapter on general provisions.

Investment Treaty Arbitration (Investor-to-state)

This provides that if any dispute arises between the investor and the contracting party country and cannot be settled by consultation, investors may submit such investment dispute to arbitration in accordance with the arbitration rules of ICSID (International Centre for Settlement of Investment Disputes) or to UNCITRAL (United Nations Commission on International Trade). (Discussed later in "Dispute Settlement regarding Investment") In FTAs/EPAs, it is provided in the chapter on investment. This is a new mechanism under international law as individual or enterprise is not subject under international law. They can only do through state under the diplomatic protection channel. This mechanism is granted to only foreign investor under investment protection chapter

thus, generally domestic investors are not entitled to this mechanism unless they have specific agreement or arbitration clause with the government in each case.

This new emerging legal framework reflects the new legal environment for investment and investors. On one hand, it ensures the high standard of investment and investor protection as well as full liberalization of investment in the host economies, on the other hand, it signals to the host economies entered into new model of investment agreements to be ready to open the market for full competition and to have an effective measure supporting local people and enterprises, who will lose in the competition field and seek another business line to get start once again. Also, the host economies need to explore what industry or line of business they would like to reserve such as sensitive business, national security, and traditional industry. Strategic liberalization is therefore proposed to the economies studied.

5.3 Economic aspect of liberalization

5.3.1 Strategies for APEC Economies to benefit from the Liberalized Market

Globalization is the movement toward greater interaction, integration and interdependence among people and organizations across national borders. The strongest manifestation of globalization has been the increasing economic interactions among countries in trade and investment and in the international flows of capital, people, technology, and information.¹⁰ But globalization is also evident in the increasing levels of international political interaction and widespread social and cultural interchange that have occurred over the past quarter of a century.

¹¹

Globalization has brought both benefits and challenges to countries around the world.¹² Globalization brings not only new economic opportunities but also new political, social,

¹⁰ United Nations, *World Public Sector Report: Globalization and the State*, New York: United Nations, Department of Economic and Social Affairs, 2001.

¹¹ Stanley Hoffman, "Clash of Globalizations," *Foreign Affairs*, Vol. 81, No. 4 (2002): 104-115.

¹² Dennis A. Rondinelli and Jack N. Behrman, "The Promises and Pains of Globalization," *Global Focus—International Journal of Business, Politics and Social Policy*, Vol. 12, No. 1 (2000): 3-16.

technological, and institutional complexities, especially to poorer countries that governments must address in order to stimulate economic competitiveness while pursuing equity, sustainability, and poverty alleviation. In order to benefit from more open and widespread economic interaction states must create and support an economic system that promotes and facilitates the ability of business enterprises to compete effectively in international markets.

The most recent surge of economic globalization, beginning at the end of World War II and accelerating in the early 1980s, was driven first by trade then by foreign direct investment, and now by both pervasive trade and investment accelerated by technological advances in communications and transportation.

Between 1990 and 2000, trade in goods as a percentage of world GDP increased from 32 percent to 40 percent. Countries at all levels of income, on average, increased their participation in international trade and foreign direct investment (FDI).

Gross FDI also increased as a percentage of GDP worldwide from 2.7 percent to 8.8 percent.¹³ The economic growth of many developing countries has been closely associated with the shift from inward-looking protectionist development strategies to outward export-oriented liberal trade strategies. Those countries that have diversified their exports and opened their economies to imports and investment have grown faster than countries that maintained protectionist policies or that continued to export only basic commodities and raw materials.¹⁴

The manufacturing export shares of developing countries increased from about 5 percent in 1913 to nearly 25 percent in 1994. By 2000, developing countries accounted for 30 percent of merchandise exports.¹⁵ And all regions of the world saw growth in manufactured exports, although countries within regions differed drastically in their rates of growth.

By the 1990s, economic globalization was being driven more by foreign direct investment (FDI) than by trade. Total world inward and outward FDI grew from 10 percent of world GDP in 1980

¹³ World Bank, *World Development Indicators 2002*, Washington: World Bank, 2002.

¹⁴ World Bank, *Global Economic Prospects and the Developing Countries*, Washington, DC: World Bank, 1994.

¹⁵ World Trade Organization, *International Trade Statistics 2001*, Geneva: WTO, 2002. 44

to 31 percent in 1999. The accumulated stocks of inward FDI increased from about \$14 billion in 1914 to about \$2.5 trillion in 1995, and to more than \$6.8 trillion in 2001.¹⁶ Both trade and investment were driven by the expansion of transnational corporations (TNCs).

Between 1996 and 2001 the number of parent TNCs grew from 44,000 to more than 65,000 and their number of foreign affiliates increased from 280,000 to 850,000. The sales of foreign affiliates doubled during the same period from \$6.4 trillion to \$18.5 trillion, growing to twice the size of world exports. The total assets of TNC's foreign affiliates grew from \$8.3 trillion in 1996 to nearly \$25 trillion in 2000. The gross product (value of output) of TNC parents and affiliates grew to \$8 trillion in 1999, accounting for about 25 percent of world GDP. Foreign affiliates of TNCs now employ more than 53 million people.

Most international economic studies conclude that the shift toward a more competitive global economy that accelerated in the early 1990s, and the opening of more countries' markets to world trade and investment over the past 50 years benefit not only richer nations but also developing countries that open their markets and those in transition from government-controlled economies to market systems. OECD concludes that countries that opened their markets to international trade and investment have achieved double the average economic growth of those that did not.¹⁷ Open market economies have higher investment ratios, better macro-economic balance, and stronger private sector roles in economic development than do non-market countries.

The OECD's studies also indicate that freer and more open market economies can bring both economic and social benefits to countries at all levels of development. Among the potential benefits are:

- 1) Greater freedom of choice for individuals about what to buy and sell and at what price, where to obtain inputs, where and how to invest, and what skills to acquire;

¹⁶ United Nations Conference on Trade and Development, *World Investment Report 2002*, Geneva: UNCTAD, 2002.

¹⁷ Organization for Economic Cooperation and Development, *Open Markets Matter: The Benefits of Trade and Investment Liberalization*, Paris: OECD, 1998.

- 2) Comparative advantages in world trade that allow individuals and businesses to prosper by using their resources to do well compared to others;
- 3) Higher incomes to those employed in jobs producing goods and services for international markets;
- 4) Greater freedom for individuals to engage in specialization and exchange;
- 5) lower prices and a greater availability of goods and services;
- 6) Opportunities to diversify risks and invest resources where returns are highest;
- 7) Access to capital at the lowest costs;
- 8) More efficient and productive allocation of resources;
- 9) Greater opportunities for firms to gain access to competitive sources of materials and inputs; and
- 10) Inward transfer of technology and know-how.¹⁸

5.3.2 The Problems of Market- and Policy- Failure

Globalization, however, does not confer benefits on all countries automatically nor does it generate benefits at no cost. All of the market failures that can occur in domestic economies also appear in the global economy. In reality, markets do not always operate as they are supposed to in theory. When they deviate from fundamental principles, market failures can produce economically and socially undesirable consequences.

Market failures appear when consumers and producers do not bear the full costs of their actions, when prices do not reflect social costs and benefits, when consumers are manipulated or misled by advertising or do not have access to appropriate or sufficient information to make good economic decisions, and when unfair trading practices prevent prices from being set by market signals. Moreover, adjustments in market economies can produce cycles of economic decline, financial crises, and recessions or depressions, casting some groups of people into poverty.

¹⁸ OECD, Open Markets Matter, op. cit.

Strong inequalities in the distribution of income can put a large segment of the population at economic disadvantage, preventing them from participating in or benefiting from market processes. Some segments of the population – the unskilled, the physically or mentally disabled, the aged, and those suffering from serious health problems, for example -- may not be able to earn sufficient amounts of income to participate at all.

Firms acting in their own self-interests may exploit natural or common resources or dispose of their environmentally-harmful wastes without regard for human health or welfare and without paying the costs of the damage to the physical environment, thereby shifting costly burdens to society. But, often, what are called “market failures” are really “**policy failures;**” the problems result from either the unwillingness or inability of governments to enact and implement policies that foster and support effective market systems and prevent countries from participating in world trade and investment. One example of policy failure often attributed to worldwide economic competition is **widespread inequality in the distribution of wealth and income resulting in high levels of poverty.**

The United Nations Development Programme’s *Human Development Report*, notes that **nearly 3 billion people live in relative poverty on incomes of less than \$2 a day and that more than 1.1 billion people live in absolute poverty on less than \$1 a day.**¹⁹ The social impacts of absolute poverty are devastating. In the poorest countries about 20 percent of children die before their first birthday, nearly half of those who survive are malnourished, a significant percentage of the population in poor countries do not have access to clean water, sanitation facilities, basic health services, or adequate education. **Most of those living in poverty do not have the opportunity to participate effectively in a market economy or to benefit from it.**

What is the problem?

Many of the political, economic, social and physical ills that are now attributed to

Globalization plagued the world long before the current cycle of globalization began. The problems often attributed to globalization may, in fact, be due to **the failure of states to create**

¹⁹ United Nations Development Programme, *Human Development Report 2002*, New York: Oxford University Press, 2002.

the competitive national market systems that allow individuals and organizations to participate effectively in global trade and investment.

What are the characteristics of national competitiveness?

What, then, are the characteristics of national competitiveness that governments need to do to foster and support? The Inter American Development Bank point out that national competitiveness is **the quality of the economic environment for investment and for increasing productivity.**²⁰ **Macroeconomic stability allows a country to integrate with the international economy.** A competitive national economy is based on an **open, efficient, and effectively operating market system.**

Studies have consistently found **a strong relationship between participation in the global economy and national economic growth.**²¹ During the 1990s the more globalized developing countries' economies grew faster than high-income countries, and both grew faster than less globalized developing countries.²²

5.3.3 A Market Economy

A market economy, in its purest form, is one in which individuals and business organizations decide which goods to produce and services to offer, how much and when to produce, and how much to charge for those goods and services, based on market signals without direct interference by non-market institutions. In order to maximize profits, individuals and businesses continually adjust these decisions in response to consumer demands.

In essence, a competitive market economy is a process of exchange through which individuals, households, and businesses -- acting in their own perceived interests -- exchange money, factors of production, goods, and services. Distribution depends on participants' ability to earn income; that is, for individuals or households to obtain money by selling their labor or by earning interest

²⁰ InterAmerican Development Bank, *Competitiveness: The Business of Growth*, Washington, DC: IDB, 2001. 45

²¹ H. Nordstrom, "Trade, Income Disparity and Poverty: An Overview," in D. Ben-David, H. Nordstrom and L.A. Winters (eds.) *Trade, Income Disparity and Poverty*, Special Studies No. 5, Geneva: World Trade Organization, 1999): 1-9.

²² *Ibid.*, p. 325.

and dividends on investments, and for business organizations to earn revenue from the sale of goods and services. When a market works effectively it is an extremely efficient means of providing consumers with a wide range of goods and services, creating value and wealth, and allocating resources to their “best uses” in society.

5.3.4 The factors or conditions contribute to a competitive national economy

The factors or conditions that contribute to a competitive national economy are reflected in the evaluations made by international organizations and transnational corporations. The World Economic Forum, for example, uses a national competitiveness balance sheet that ranks countries on

- 1) Growth competitiveness shaped by information and communications technology, macroeconomic environment, innovation, technology transfer, corruption, and law and contracts;
- 2) Current competitiveness based on sophistication of company operations and strategy and quality of the business environment, and
- 3) Other indicators including technology, public institutions, and macroeconomic environment.²³

Similarly, *The World Competitiveness Yearbook* published by the Institute of Management Developments ranks the competitiveness of countries on four sets of factors:

- 1) Economic performance, including the soundness of the domestic economy, international trade, international investment, employment and prices;
- 2) Government efficiency, including public finance, fiscal policy, institutional framework, business legislation, and education;
- 3) Business efficiency, including productivity, labor market, finance, management practices, and impact of globalization; and

²³ Klaus Schwab, Michael E. Porter, and Jeffrey D. Sachs (ed.) *The Global Competitiveness Report 2001-2002*, New York: Oxford University Press, 2002.

4) Infrastructure, including basic infrastructure, technological infrastructure, scientific infrastructure, health and environment, and value system.²⁴

The Inter American Development Bank points out that a competitive national economy requires

1. Financial market development -- financial regulation and supervision, information in financial markets, and

2. Micro-financing sources; policies that remove barriers to improved labor productivity; efficient infrastructure – good ports and transport, electricity and telecommunications; the capacity to innovate; and effective industrial and investment policies.²⁵

Governments have an important policy role in creating conditions that allow these factors to develop or be strengthened within their countries in order to enhance national competitiveness.

The World Bank contends that competitiveness and economic growth reduce poverty when **countries enact and implement policies based on two pillars of development:**

1. “Building a good investment climate in which private entrepreneurs will invest, generate jobs and produce efficiently, and
2. Empowering poor people and investing in them so that they can participate in economic growth.”²⁶

²⁴ Institute of Management Development, *The World Competitiveness Yearbook 2002*, Lausanne, Switzerland: IMD, 2002.

²⁵ 29 InterAmerican Development Bank, *op. cit.*

²⁶ World Bank, *World Development Indicators 2002*, Washington: World Bank, 2002): quote at p. 273.

5.3.5 Actors in sustainable development

1. Private enterprises

It is private enterprise, and not nations *per se*, that compete in the global economy to create jobs, income, and wealth,

2. Government

However, governments play a crucial and pervasive role in fostering, maintaining, and supporting efficient markets through which competition take place. Indeed, the most important roles of the state are to enact and implement market-supporting policies and sustain institutions that encourage and promote efficient economic interaction.

What are the roles of the government?

The most important roles of governments in an era of globalization are:

1. To set the “rules of the game,” and
2. To protect vulnerable groups from the ill effects of market failures.
3. To protect the health, safety, security, and welfare of the population,
4. To establish and enforce fair and equitable rules for market behavior, and
5. To ensure open competition.
6. In order to deal with market failures, governments often intervene in the economy to counter the negative impacts of business cycles, of “free riders,” of social inequities, and of “spillover effects” (i.e., the negative impacts of one group of people or territorial jurisdiction from activities in another).
7. Government sometimes plays a strong role in the economy when the private sector cannot or will not offer goods or services at affordable prices to a poor population.
8. Governments can help assure access to opportunity and participation in economic activities, although they cannot guarantee equal distribution of benefits.
9. Creating an institutional structure for market competition in countries that previously had government controlled, centrally planned economies or nonfunctioning market systems,
10. Initiating and sustaining macroeconomic reforms,

- a. Implementing Structural Adjustment Policies
 - b. Implementing Structural Adjustment Policies
 - c. Creating or Strengthening Property Rights
11. Strengthening legal institutions for economic transactions,
12. Enacting and implementing policies that support private enterprise development,
- a. Privatizing State Enterprises
 - b. Promoting Small Enterprise Development
 - c. Developing, Attracting, and Retaining Transnational Corporations
13. Improving government efficiency, accountability and responsiveness,
- a. Controlling Corruption and Establishing Ethical Norms
 - b. Making Public Administration More Responsive
 - c. Strengthening Judicial Institutions
 - d. Decentralizing Government
14. Providing infrastructure and overhead capital,
15. Protecting the economically vulnerable, and
16. Strengthening and supporting organizations of civil society.²⁷

5.3.6 Conclusion

Market systems are the engines of national economic growth and the means through which private enterprises become competitive in a globalizing economy. To operate effectively, however, market systems require a strong institutional framework. Globalization and the technological innovation that drives economic, social, and political interaction across national boundaries can bring substantial benefits to people in countries where governments focus on enacting and implementing market-supporting policies and creating and sustaining the institutions needed to make markets open, equitable and competitive.

Creating the institutions and policies supporting efficient market systems and facilitating national competitiveness requires long-term political commitments by governments with strong

²⁷ Dennis A. Rondinelli, "Capacity Building in Emerging Market Economies: The Second Wave of Reform," *Business & the Contemporary World*, Vol. 6, No. 3 (1994): 153-167.

developmental orientations. States seeking to participate in and benefit from a global market economy must create and sustain institutions that promote or strengthen seven underlying attributes of market systems that make them more open to domestic and international transactions.²⁸ Governments have an important role to play in strengthening the following attributes:

Governments have an important role to play in strengthening the following attributes:

- 1) **Economic motivation** – market systems depend on society’s acceptance of material gain and the necessity of business organizations to make profits as a primary motive for individual production and investment;
- 2) **Private productive property** – in market systems governments must protect private ownership of income and wealth so that those who produce goods and services are adequately rewarded;
- 3) **Freedom of enterprise** – to employ private property effectively, owners must be permitted to mobilize the resources needed to make it more productive;
- 4) **market-based decision-making** – in market systems economic and business decisions must be made by market signals, that is, primarily through consumer decisions affecting supply and demand;
- 5) **Competition** – which is a basic attribute of market economies, and the primary motivator for individuals and producers to divide labor, specialize, develop comparative advantages, improve quality, cut costs, and innovate;

²⁸ Jack N. Berhman and Dennis A. Rondinelli, “The Transition to Market Oriented Economies in Central and Eastern Europe: Lessons for Private Enterprise Development,” *Global Focus— Journal of International Business, Economics and Social Policy*, Vol. 11, No 4 (1999): 1-13.

6) **Equality of opportunity** – “free” markets require institutions that assure all individuals and groups the opportunity to engage in economic activity through the ownership of property and the formation of enterprises, or fair sale of their labor for income; and

7) **Societal rule setting and guidance** – in order for markets to operate efficiently and effectively participants must establish and adhere to institutionalized “rules of the game,” and government must establish a “Rule of Law” and enforce regulations within which markets can function efficiently. When they operate fairly, effectively, and efficiently market economies facilitate competitiveness and stimulate economic growth, create jobs, raise incomes, provide opportunities for saving and investment, and give people the chance to improve the quality of their lives. Competitiveness in the global economy can generate the income needed for people, businesses, and governments to protect their environment and conserve natural resources, reduce poverty, and enhance human assets. Properly guided, economic growth enables organizations of civil society to work closely with business and government to strengthen the life support systems that improve human conditions and protect the global ecosystem.

5.4 Tourism Impediments Matrixes

This section provides a set of matrixes of impediments. Requirements for the stage III project was to update and prioritize the existing matrixes also add additional new challenges for tourism growth. OECD inventory of tourism impediments, and commitment made by APEC economies under GATs were included. Due to the suspension of the Doha Development Negotiation Round, the final country schedule of commitments made of WTO members has not yet reached. The existing matrixes were updated and prioritized as at the report date.

6. Conclusion

The APEC Impediment Study Stage III

- Identify the main impacts of tourism (economic, social and environmental) which need to inform policy development on the sustainability of tourism.
- See that these impacts - whether from domestic, inbound or outbound tourism - are addressed in cross-government and departmental strategies on sustainable development.
- Achieve better coordination of Government input to policy development and other relevant activities at regional level and internationally.
- Review the Government's current approach to sustainable tourism, and consider what action may be needed to strengthen and promote it.
- Work with agency and industry stakeholders to promote wider take-up of principles of sustainable tourism and to identify the scope for more strategic action across Government and by the tourism industry.
- Identify measures of progress on action within Government and take them forward.

Tourism Liberalization

In the Tourism sector, services can be delivered in four modes. This means that tourism liberalization is not limited only to receiving foreign tourists who consume tourist services and local operators' having opportunities to create tourist businesses. It also means liberalization of investments by foreign investors in various tourist service businesses (tour companies, hotels, restaurants, related services, sales of plane ticketing, travel agents, etc. (Mode 3 of service provision) and allowing natural persons from other countries, such as tourist guides to freely provide tourist services (Mode 4 of service provision). Thus the liberalization allowing foreign investment can be applied to tourism. Although liberalization of trade in services is separated from investment, investment in tourism is still investment, and investments in tourism also benefit from provisions on investment protection and liberalization.

Nature of Tourism

Tourism as an economic sector benefits from the host economies' naturally or culturally derived tourist attractions. However, tourism related businesses rely on expertise, knowledge, and experience. Existing natural endowments have to be further developed to create value from tourism for the economic benefit

of a country and its people. This includes the creation of jobs in the tourist industry for the people of the country.

Under GATS, tourism encompasses:

- 1) Hotels and restaurants
- 2) Travel agencies and tour operators
- 3) Tourist guides

Liberalization of tourism services under GATS

Members of GATT/WTO are committed to liberalization of tourism, a sector in the trade in services. They are obligated to reduce or remove barriers to trade in services and to provide access to their domestic markets. As mentioned earlier, there are four modes of service delivery. Thus a country that liberalizes trade in services has to do so for all four modes for tourism. However a member economy has the right not to open any sector or sub-sector, or may implement liberalization with reservations or exceptions. In addition, an economy may refrain from granting access to its market in a sector that it is still not ready to compete with multinational corporations or foreign competitors. However, the reservations, exceptions, or non-liberalization of certain sectors or sub-sectors has to be based on the stand-still and roll-back principles. That is, an economy shall not add more exceptions, reservations or to an agreement on liberalization commitments. It will also have to gradually lessen exceptions to complete liberalization, except in the case of items previously exempted from the agreement.

Deregulation and/or removal of barriers to tourism liberalization

The existing barriers to tourism that will be diminished or removed by full liberalization under the Free Trade Agreement can be summarized as follows:

(1) Tourism and national policy and regulations

Barriers in this category include those related to tourist visas; regulations concerning aliens coming to work in tourist businesses or individuals who will come to provide services, such as guides; regulations concerning restrictions in investment, shares, or lands held by business organizations engaged in tourist businesses, and regulations governing domestic and international air transportation.

Potential impacts from liberalization

- 1) Problems relating to the control of individuals' entering and exiting the country.
- 2) Problems created as a result of liberalization relating to local guides and other individual services.
- 3) Problems of foreign investment in tourism (Please see section on Investment)
- 4) Problems of holding/using of land/tourist sites; possession of islands and tourist attractions and natural resources, which may extend to include archeological sites, forests, resorts. (That is, APEC economy must be prepared to carefully deal with liberalization).
- 5) Impact on travel agencies, ticketing agents, and tour businesses
- 6) Impact on guest houses, restaurants, food shops, souvenir shops
- 7) Impact on spa and massage establishments, beauty salons, fashion business, and other tourism related businesses.
- 8) Impact on local residents providing services for tourists, i.e., oarsmen; operators of boats taking tourists on tours of islands, along waterways, of elephant's camps, and orchid nurseries; silk weavers; artisans making lacquer ware and handicrafts (although they may be listed under reserved vocations).
- 9) Impact on all types of logistic businesses
- 10) Impact on nursing homes, plastic surgery clinics, etc.

(2) Safety and Security Issues:

- 1) Problems relating to facilitation of immigration and the issuing of visas; identification processes the inspection/searching of incoming travelers and inspection of imported objects.
- 2) Problems regarding monitoring of health issues, i.e., people who may be infected with SARS, bird flu, or mad cow disease (BSE), for example
- 3) Problems of transnational crimes
- 4) Various types of security problems.

Potential impact

- 1) Transnational terrorist movements
- 2) Spreading of serious contagious diseases

- 3) Transnational and economic crimes
- 4) Smuggling of illegal items; transnational drug dealing
- 5) Transnational criminal groups (mafias)
- 6) Transnational arms deals and other security problems relating to transnational espionage

(3) Practical issues regarding administrative practices

These include procedures in the administration, management and operation of tourism, passport and visa extensions, and extensions of stay, tourist business contacts, interpretations of rules and regulations, and corruption.

Potential impact

- 1) Problems of an influx of aliens who may not be tourists.
- 2) Problems of people using tourism as a front to conduct other businesses
- 3) Problem of unemployment of local people due to trade in labor by aliens.

(4) Issues of infrastructure, culture and environment

The infrastructure in the economies should be modernized, be it roadways, other modes of transportation, telecommunications tourist attractions, entertainment establishments, facilities such as airports, planes, ports, ships, bridges, warning systems, beaches, eco-system, environmental protection systems, and conservation of local culture and national identity.

Potential impact

1) In general, there will be a positive impact on the infrastructure. Roadways, transportation, telecommunication and communication, systems, bridges, ships, ports, airports, airplanes, warning systems, etc., will be improved.

2) On the negative side, there may be social problems due to the influx of tourists which affect the rural way of life. Natural conditions may disappear, which may lead to increased urbanization and a gradual change in local cultural identity as communities assimilate to modern cultures. Young people will imitate foreign cultures and there will be problems of conservation of culture, the environment, and national identity.

3) Foreign investment in the infrastructure may lead to the construction of private ports, foreign-owned ferry services, foreign telecommunication systems, and foreign-owned land and water transportation services.

4) Problems of toxins in the environment, if an efficient environmental protection system is not put in place.

5) Problems of sexual crimes and other crimes in entertainment places or gambling dens.

6) Spreading of sexually transmitted diseases such as AIDS

7) Problems of the creation of or increase in sex services and entertainment establishments

8) Problems of foreign-owned casinos, gambling dens, and legal brothels

All these potential negative impacts need to be dealt with in a proper way before implementing liberalization.

(5) Taxes

In many countries, different forms of tourism-related taxes are collected, such as airport tax, safety equipment fees, facilities fees, fuel surcharges, air navigation charges, and other travel related taxes

Potential impact

In general, taxes collected from tourists can generate income for the government. However, an influx of tourists can lead to a higher cost of living for locals in places such as food shops, restaurants, and hotels.

(6) Tourism related public relations and communication

In some cases, to promote tourism and attract tourists, public relations may project a positive image without paying attention to factual issues such as contagious disease, terrorism or prostitution.

Potential Impact

1) Lack of prevention of or preparation for serious problems that may arise, such as in the case of the tsunami or other natural disasters.

2) The possibility of spreading contagious diseases such as bird flu due to the lack of publicly available factual information.

3) Problems of the destruction of forests and natural resources. There may be illegal logging and forest encroachment by resorts.

4) Social problems, such as sex services, spreading of AIDS, etc.

5) A lack of effective crime suppression measures may lead to crimes committed against tourists tarnishing the country's image.

In conclusion, caution must be taken if tourism is to be liberalized. The matter must be considered wisely without focusing only on the positive aspect. There may be benefits such as the increasing number of tourists and the money they spent in the economies studied, jobs for local people, and sales of products or services. However, tourism liberalization also means allowing foreigners to operate businesses and exploit economies' natural resources and beautiful tourist attractions. They will be granted benefits and protection under the umbrella of investment protection, which covers all forms of investment. This may bring about the following consequences:

- Natural sites being occupied as a result of business operations that caters to foreign tourists. nationals may not have a chance to use the services.

- Long term exploitation under various projects and export of profits

- Business establishments being owned by foreigners and Thais may be only employees who sell their labor as in the cases of spa and massage business and businesses such as sight-seeing boats, hotels, restaurants, food shops.

- Ownership of travel agencies, ticketing agencies, tour operations and other related businesses by foreign investors

- Problems relating to local culture and wisdom. The local way of life may change through the assimilation of foreign cultures. The social structure may gradually change.

- Problems of conservation of the environment and nature, social environment, drugs, crimes, etc. that will come as a result of tourism liberalization. There may be legal casinos, gambling dens and brothels.

APPENDIX

Text of Workshop PowerPoint Slides

Tourism Impediments Stage III

Dr. Lawan Thanadsillapakul

Brief description of Project

This project is proposed in order to be able

- **To identify, update, analyze and prioritize impediments/measures to tourism development.**

From

- **Those identified and published by the OECD in 1990 in “Inventory of obstacles to international tourism in the OECD area”**
- **Those in the commitments submitted by members of the World Trade Organization (WTO)**
- **The relevant domestic rules and regulations of APEC economies and EU members**
- **To thoroughly investigate and analyze other related issues and aspects which include risks and new challenges to tourism industry of the APEC region.**

The result of the study

- **It is expected to have significant, substantive and comprehensive study on tourism impediments.**

- **APEC member economies will be able to strategically plan and manage well enough to gain advantages both in opening up themselves to attract foreign investments and to maximize benefit from the liberalized market**
- **To promote local employment; and**
- **To drive exports which include the export of labor across the world especially to those highly potential markets such as Europe and United States of America.**

Vietnam Agencies

- **1.Vietnam National Administration of Tourism (VNAT)**
- **2.Vietnam Tourism Association**
- **3.Vietnam Tourism Company**
- **4.Other leading Travel Company**
- **Ho Tay Company LTD.**
- **5.Major Tourism Agencies**
- **Vietravel, Fiditourist, Ber Thanh Tourist, Vietnam Travel Guide**

Papua New Guinea Agencies

- **1.The Tourism Promotion Authority of Papua New Guinea**
- **2.The National Tourism Organization**
- **3.Leading Travel Companies and Tourism Agencies**

The current circumstances

- **The current circumstances and economic atmosphere are that the US is negotiating FTA with some ASEAN countries, which are also the members of APEC, results in the more liberal service market, and many tourism impediments are going to be removed.**
- **This includes the liberalization of investment, unilaterally, bilaterally and regionally that directly affect the liberalization of tourism. Of course, this makes the analysis of the definite tourism impediments will be dynamic rather than static**

Modes of trade in services

- **Cross Border Supply**
- **Consumption Abroad**
- **Commercial Presence**
- **Presence of Natural Persons**

Barriers to Trade in Services

- **Direct and facially discriminatory barriers to trade in services**
- **Indirect but facially discriminatory to trade in services**
- **Direct but facially neutral barriers to trade in services**
- **Indirect and facially neutral barriers to trade in services**

Direct and facially discriminatory barriers to trade in services

- These are explicit barriers to trade specially directed at services industries
- Domestic content regulations for television and radio broadcasting
- Prohibitions on the practice of law by foreign nationals
- Restrictions on the ownership and establishment of financial institutions by foreigners

Elimination of the Barriers

- Extending the principles of National Treatment or non-discrimination to services either on a conditional or unconditional MFN basis

Exemption to National Treatment

- Where discriminatory measures can be justified as necessary to achieve legitimate domestic objectives
- through reservations on NT with respect to particular industries or even particular regulatory measures that apply to an industry in one or more countries

Indirect but facially discriminatory barriers to trade in services

- These are form of discrimination against foreigners, or barriers to international movement of factors in service production (such as people, information and capital)
- They are not targeted at, or limited to specific service sectors.
- General limitation on immigration or temporary entry into a country for work purposes
- limitation on foreign investment not specific to service industries

Elimination of Barriers:

- To deal with these kinds of barriers in international agreements that approach the barriers in a general measures (OECD) Code on invisibles or such as the general principle of personal mobility within the EU that is entrenched in the Treaty of Rome)
- To negotiate removal or relaxation of these barriers with respect to specific service sectors or service industries (Approach to mobility of people taken in Canada-US FTA)
- Canada-US FTA contains some specific (and very limited) mobility guarantees that apply to provision of particular services (mainly professional or technical services)
- Treaty of Rome establish free movement of people as a basic principle or norm

Direct but facially neutral barriers to trade in services

- Domestic regulation of service industries

Example

- To maintain a railway or telecommunication network as a national monopoly directly impedes market access by foreign providers, but is non-discriminatory with respect to foreigners because would-be domestic competitors are excluded as well.

Elimination of Barriers

- Fundamental change in domestic regulatory approach
- Ex. US demands for removal of these kinds of barriers through GATT/WTO in order to achieve “free market access”

Indirect and facially neutral barriers to trade in services

- **These barriers arise out of domestic regulation. They include the additional costs to foreign providers of adapting to distinctive national regulatory standards and requirements**

Example

- **Barriers of this nature can be described as indirect because they do not limit or prohibit competition as such but impose some disadvantages on foreigners who must adapt their activities and practices to the idiosyncratic regulatory structure of the country concerned.**
- **Barriers with respect to professional service, ex: a country has distinctive requirements for training and certification of professionals and does not recognize licenses, diplomas or other credentials acquired abroad.**
- **Ultimately, removal of these barriers would require harmonization of regulatory regimes (as in the EU blueprint for liberalization of financial services) or home country regulation whereby a service provider is given the right to enter a foreign market provided it complied with its home country's regulatory requirements.**

Elimination of barriers

- **In the case of professional services, the equivalent to home country regulation is mutual recognition of qualifications or licenses, whether in accounting, engineering, law or architecture.**
- **A country specific knowledge base may often be seen as a legitimate pre-condition for professional competence.**
- **Commitments under GATS of ASEAN Countries**
- **Controls on remittances and payments abroad. (e.g. for liquidity reasons)**

- **These kinds of measures go beyond domestic or international regulation of services industries as such)**

General Investment restriction

Restricted areas of investment

Restricted entry and investment

Restricted foreign equity ratio

Screening process

Control on the operation of foreign investors

Limitation and Exemption

- **Limitation on Market Access**
- **Limitation on National Treatment**
- **MFN Exemption (Art. V GATS)**

Summary of Most Common Limitation on Horizontal

- ❖ **Limitation on Foreign ownership**
- ❖ **Limitation on the type and number of foreign personnel and their duration of stay**
- ❖ **Limitation on ownership of land**
- ❖ **Requirement that domestic residents be part of board of directors**

Mutual Recognition

- **Variable internal requirements, Regulatory differences have come to be regarded as Non-tariff barriers hindering trade flows even though they are not intended to be protectionist**
- **Art VII GATS encourages the approach of mutual recognition and common international standards**
- **The ECJ (the Cassis de Dijon case, ECJ) ruled that what is legally produced and sold in one country should be legally marketed in another. This encourages mutual recognition and its mandated recognition of other member states**
- **Under GATS , recognition of educational or other qualifications may be achieved through harmonization or may be accorded autonomously or based on agreement or arrangement enter into by members, bilaterally, regionally, or plurilaterally**
- **Art. V of AFAS encourages ASEAN members to enter into agreement recognizes education or experiences obtained, requirements met, or licenses or certification granted in another ASEAN countries. Therefore, qualifications or requirements of service providers would be mutually recognized for their qualification, provided that such qualifications meet the requirements of the receiving countries (substantive standard)**

What are the impediments?

- **Any factor, such as a regulation, capacity constraints, policy or operating practice which limits the growth of tourism to or within the APEC Region**
- **Impediments which limit the ability of the individual to travel to or from economies within the region or affect their decision to travel to economies in the region**
- **Factors which limit the operation, promotion, establishment or development of tourism-related businesses within the APEC region**

Major impediments

- **Visas or restrictions on entry**
 - **Difficulties in obtaining Visa**
 - **Expensive**
 - **Variety of visa types**
- **Taxes or charges which affected visitors**
- **Airport taxes, Departure taxes, airport charges**
- **Complex procedures for starting new businesses**
- **Difficulties in importing capital equipment**
- **Difficulties in accessing technology**
- **Constraints on recruiting skilled staff from abroad**
- **Taxes or charges which discriminate against tourism businesses**
- **Infrastructure**
 - **Water supply**
 - **Electricity**
 - **Postal & mail**
- **Transportation**
 - **Air**
 - **Airport capacity**
 - **Airline capacity**
 - **Direct flight**

-
- **Sea, inland water**
 - **Service providers**
 - **Standard/capacity**
 - **Frequency**
 - **expensive**
 - **Rail & road**
 - **Standard**
 - **Capacity**
 - **Services**
 - **Public transportation**
 - **Lack of Business Center**
 - **Insufficient Commercial/Department Stores**
 - **Human resources/Development**
 - **Hotel & Accommodation**
 - **Professional services/standard**
 - **Capacity**
 - **Quantity**
 - **Location**
 - **Costs**
 - **Telecommunication**
 - **Telephone**

- **Internet**
- **Fax**
- **Satellite**
- **Mobile phone**

- **Travel agencies and tour operations**
- **Tour guiding**
- **Tourism Policy**

Factors affecting visitors coming to the country

- **Visa restrictions**
- **Currency or fx restrictions**
- **Health concerns**
- **Relative travel cost to**
- **Relative travel cost within**
- **Customs or barrier controls**
- **Communication barrier (Language Barrier)**
- **Accommodation availability/standard**
- **Scale of airport exit or related taxes**
- **Insurance cost**
- **Tourism as a tax base – new taxes and charges**
- **Consumer protection legislation and litigation risks**

- Access to payment systems and transaction costs
- Environmental legislation
- Tourists health

Factors affecting visitors coming to the country

- Insurance cost
- Tourism as a tax base – new taxes and charges
- Consumer protection legislation and litigation risks
- Access to payment systems and transaction costs
- Environmental legislation
- Tourists health

Impediments affecting people traveling abroad

- Restriction on overseas travel
- Currency or fx restriction
- Airline capacity
- Relative costs to travel abroad
- Communication barriers

Financial regulations or control affecting tourism

- Limitation on repatriation of profits
- Shortage of investment capital
- Limits on foreign equity participation
- Foreign exchange controls

- **Discriminatory taxes and charges**

- **Foreign investment controls**

Labor issues in the tourism sector

- **Shortage in skilled staff**

- **Lack of experienced managers**

- **Control on employment of non-nationals**

- **Lack of training facilities**

- **Services quality**

- **Language skills**

Issues in marketing and promoting tourism

- **Costs of promoting in main markets**

- **Access to distribution systems in main market**

- **Restriction on import of advertising materials**

- **Quotas or licenses for travel agencies**

- **Taxes on import of promotional materials**

Technology and information systems

- **Incompatible technology between systems**

- **Communication difficulties between economies**

- **Disparity in telecommunication charges or cost**

- **Cost of developing, acquiring or operating systems**

- **CRS access and costs**

Strategic liberalization

- **Neutral Approach**
 - **Natural resources**
 - **Cultural preservation**
- **Active liberalization approach**
- **Passive Liberalization approach**

Legal Impediments

- **Restrictions on investment**
- **Restrictions on capital repatriation**
- **Restrictions on industrial sectors**
- **Restrictions on bureaucratic procedures**
- **Restrictions on TRIMs – Trade-related investment Measures**
- **Restrictions on investment protection**
- **Restrictions on Taxation and fees**

The interaction of Commitments made under various economic agreements and domestic laws and regulations

- **Domestic Laws and regulations**
- **Commitments made under WTO- Multilateral/international**
- **Obligations under economic agreements made between PNG and partners**
 - **Bilateral level**
 - **Multilateral level**

– **Unilateral liberalization**

The proposed suggestion

- **We found that the absolute liberal tourism policy might not work sufficiently and effectively in economic development of APEC economies.**
- **Invisible loss in culture diversity, natural resources, the way of life, the benefit accrued to local people and local wisdom require the wise management and that should be dealt with carefully.**
- **Free movement of labor/people should be fully implemented synchronizing the liberalization of tourism**
- **Two way liberalization of labor movement between developed and developing economies is necessary**

Workshop in PNG

- **The outcome of the workshop in PNG**
- **Proposal of some solutions to PNG for the improvement of tourism development and the enhancement of sustainable tourism: the improvement over the Master Plan (elimination of discrimination, to penetrate new market, to attract new target group of tourism, PR promotion, strategic management)**
- **Proposal of some strategies for promoting tourism in PNG: the active liberalization approach, set up travel agencies abroad, internet market, e-commerce)**

Workshop in Vietnam

- **The Outcome of the workshop in Vietnam**
- **Proposal of sustainable development in Vietnam**
- **Proposal of strategic liberalization of trade in services and investment**
- **Development of infrastructure**
- **Capacity building and human resources development**

The results of legal analysis

- **The interplay of the multilayered regulatory implementation and commitments made under different levels of international legal framework results in significant legal impediments to tourism liberalization and growth**
- **The interaction of Commitments made under various economic agreements and domestic laws and regulations has played an important role in governing international business activities.**

These include:

- **Domestic Laws and regulations**
- **Commitments made under WTO- Multilateral/international**
- **Obligations under economic agreements made between countries and partners**
- **Bilateral level: BIT, FTA, EPA**
- **Regional level: ASEAN, APEC, EU**
- **Unilateral liberalization**
- **International Law**
- **International Codes of conduct, Guidelines (Soft Law)**
- **The Multilateral Environment Agreements**
- **Treaty Regime (BITs, Regional Treaty, Multilateral Treaty)**
- **WTO Rules and Regulations relating to investment**
- **Special regime for investment liberalisation**

The liberalization of service trade in mode 3 directly involves foreign direct investment which is inevitably subject to the multimodal of legal framework governing FDI as follows:

Legal frameworks governing FDI at the international sphere

- **International Law**
 - **Traditional recognized absolute State sovereign rights**
 - **Diplomatic protection**
 - **State responsibility**
 - **Minimum international standard of treatment**
- **International Codes and Guidelines, soft law**
- **The Multilateral Environment Agreements (MEAs)**
- **The role of WTO**
 - **Multilateral Investment Agreement**
 - **General Agreement on Trade related-investment measures (TRIMs)**
 - **The General agreement on trade in services (GATs)**
 - **General Agreement on Trade-related intellectual property rights (TRIPs)**
- **Regional economic integration : EU, NAFTA, ASEAN (regional level)**

The interplay of the TRIMs and FTA affects the profit from investment in the host developing countries. This includes service trade in the area of tourism. The following table shows the counteraction of such laws and regulations.

Benefit from investment	TRIMs under GATT/WTO	Prohibition of performance requirement under FTA, EPA
Capital inflow		Lack of short term capital control measures
Job creation		Employee can come with investment
Technology transfer	Prohibition of trade-related investment measures	Prohibition of performance requirement
Improvement of management		Management from abroad

Therefore the proposed Models and Policy options are suggested to the targeted/designated countries of study

- **Model 1. “Investment Control”** (followed by most BITs, although some exceptions exist; US BITs and Canada BITs). This model does not offer positive rights of entry & establishment. It based on national discretion
- **This model is to accept complete State discretion** through the investment control model, thereby preserving the general power to screen proposed investments
- **Model 2. “Selective Liberalization”** (illustrated by GATs: a right of establishment exists where a member of GATs makes specific commitments on market access under Art. XVI. (considerable discretion in determining the extent of its market access)).

- **This model is to liberalize cautiously through the adoption of the selective liberalization model, opening up one or more industries at a time**

- **Model 3. “Regional industrialization programme”** (followed by ANCOM, COMESA, ECOWAS, ASEAN Industrial Joint ventures, ASEAN AICO, ASEAN Brand-to-Brand Complementation Scheme)
- **This model is to follow the regional industrial programme model and encourage the establishment of regional multinational enterprises, thereby setting up a supranational form of business organization aimed at encouraging intraregional economic development.**

- **Model 4. “Mutual national treatment”** (followed by EC when it was European Community, in the Treaty Establishing the European Community), Code of liberalization of Capital Movements and the Code of Liberalization of Current Invisible Operations of the OECD, CARICOM, ECCAS, CEPGL, COMESA, Revised ECOWAS.
- This model is to grant full liberalization of entry and establishment on the basis of mutual national treatment, thereby allowing such rights to exist between States that see a common interest in regional integration, but which are not necessarily committed to full multilateral liberalization

- **Model 5. “Combined national treatment/Most-Favoured-nation treatment” (NT/MFN)** (followed by NAFTA, Modern US BITs model, Free Trade Treaty between Colombia, Mexico and Venezuela, MERCOSUR, APEC non-binding investment principles, ASEAN AIA (ASEAN Investment Area under ASEAN Open Regionalism))
- This model is to follow the full NT/MFN model and open up entry and establishment for investors from the contracting State on the basis of the better of these two standards, subject only to a “NEGATIVE LIST” OF RESERVED

ACTIVITIES, INDUSTRIES OR APPLICABLE POLICIES. The existence of a negative list of excepted industries emphasizes that certain strategic industries may be beyond the reach of liberalization measures.

- **Model 6. “Hybrid model”**
- **This model is to follow a mix of models bearing in mind that some of the options appear to be incompatible or difficult to combine. The economic effect of these hybrid options would be to offer more specialized alternatives that may be more compatible with the mix of location advantages enjoyed by particular host countries.**

Players in the international Service Market

We need to consider the player in the service market in the field of tourism in order to promote tourism business and enterprises whom will be affected by the factual and legal impediments of this sector. They are

- **Transnational corporations (TNCs) or Multinational Corporations (MNCs)**
- **State Enterprises**
- **States**
- **Individual service provider**
- **Consumer**
- **Players in domestic Market**
- **Local enterprises &**
- **Small and Medium Enterprises**
- **Individual service provider**
- **Consumer**

They will need the strategic policy and operation in a tourism liberalized market. The state also has to accommodate the free market with favorable legal and sustainable environment for tourism while they need to provide effective measures to protect local wisdom, natural resources, traditional way of life, national value, and customary norms and

The sustainable development is the main policy and we need to concern the following objectives in tourism liberalization

- **To balance Liberalization and the conservation of exhaustible natural resources/sustainable use of natural resources, and to protect environment**
- **To generate wealth of the local people**
- **To evenly distribute income throughout the country**
- **To maintain cultural way of life and local wisdom**

How to achieve the Balance of State and Market

State

- **Sovereignty, sovereign rights**
- **State Jurisdiction**
- **National, culture, custom and practices**

Market

- **Market function, invisible hands**
- **The rule of demand and supply**
- **Free Competition**

– **Resources allocation**

How to achieve an even and balanced development of the global economy

- **To promote trade and investment**
- **To encourage self reliance economy**
- **To strengthen sustainable development**
- **To fully participate in the global economy**
- **To integrate our economy to the global economy**
- **To improve competitive position**
- **To develop human resources**
- **To develop technology and science**
- **To preserve natural resources**

The areas need careful liberalization

- **Intellectual Property Rights Protection**
- **International Investment rules**
- **Trade – related investment Measures**
- **The Treatment of Foreign Investors**
- **The liberalization of Trade in services**
- **Mutual Recognition**

The sustainable development

- **To balance Liberalization and the conservation of natural resources and environment**

- **To generate wealth of the local people**
- **To evenly distribute income throughout the country**
- **To maintain cultural way of life and local wisdom**

Environment protection: Development –Related Issues and sustainable development will focus on

- **Eco-System**
- **Climate Change, Ozone Layer, Air Pollution Control, Noise Abatement, Water Protection and water management, Waste and Waste Management, Soil Protection, Chemicals and Environment Risks**
- **Preservation of Natural Resources**
- **Bio Diversity, Gene Technology and Environmental Risks**
- **Social and Economic environment**
- **Regulatory Environment**
- **Warning System for environment problem, production process, sustainable consumption and the effective environment Measures**

