

AUSFTA as a “Third Wave” Trade Agreement: Beyond the WTO Envelope

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Introduction

With over 200 Free Trade Agreements in operation around the world and about another seventy under negotiation, I don't think it's worth much to debate the relative merits of FTAs v. the WTO's multilateral system. It's an “apples” against “oranges” debate anyway. That's because it's just not possible to negotiate in WTO today what is often the standard coverage of a modern free trade agreement. In the paper I've prepared for this conference, I focused on a significant number of WTO-Plus provisions in the Australia-USA Free Trade Agreement that demonstrate this point. These include the FTA's chapters on trade in services, investment, competition policy, government procurement, intellectual property, labour and the environment and even dispute settlement.

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Trade in Services

A good place to start in a comparison of the FTA with WTO is the bilateral agreement's provisions on trade in services. There are altogether four FTA services chapters. Two sectoral chapters deal with telecommunications and financial services, one deals with cross-border trade in services generally and covered firms' ability to provide services locally is importantly affected by the investment chapter.

The WTO's General Agreement on Trade in Services (GATS) bases market access on a positive list approach that is very limiting in its coverage and liberalisation. Even where sectors are scheduled for liberalising commitments, they may still be subject to many limiting conditions. For example, frequently the listed commitments are of little more than a standstill nature. And commitments by many countries are not very broad in terms of sectoral coverage. Some WTO Members have commitments on only one or two services sectors.

Australia's FTA with the US employs a "top down" negative list approach to coverage and market access commitments that delivers considerably more breadth and liberalisation than has so far been possible in the WTO. The only sectors or sub-sectors not liberalised fully to services suppliers of the FTA partner are those relatively few cases listed in a special annex of "non-conforming measures".

In the FTA, both MFN and national treatment non-discrimination are guaranteed across-the-board, as is market access.

In the WTO, permission to establish a local presence has to be negotiated sector-by-sector. In the FTA, with minor exceptions, permission to invest is automatic.

Another important example of where the FTA improves on the WTO services regime is found in the agreement's provisions on "mutual recognition". All that the GATS provides is an exhortation to Members to base mutual recognition agreements (MRAs) on multilateral criteria and keep participation in MRAs open to third parties. The FTA goes much further and establishes an institutional mechanism the purpose of which is to promote bilateral mutual recognition arrangements.

Overall, the FTA, through the top-down negative list approach achieves economy-wide barrier-free access and non-discrimination in one step. In the WTO, this is something that will eventually be realised only after additional multi-year negotiating rounds.

Investment

The treatment of investment in WTO rules is extremely limited. Beginning with the Singapore Ministerial Conference in 1996, the European Community and others backed proposals to initiate negotiations on investment-related questions in WTO; however, the Doha Round-related decisions taken by WTO Members in July of this year have effectively removed investment from the multilateral agenda for the foreseeable future.

What treatment WTO does provide in respect of investment is found in

- GATT's National Treatment obligations;
- in the Uruguay Round Agreement on Trade-Related Investment Measures (TRIMS) and
- indirectly in mode 3 of the Services Agreement.
- None of the WTO provisions provide for a right of establishment.

By contrast, the FTA goes way beyond the limited envelope of the WTO. With the exception of the limited number of instances where Australia or the United States maintain "non-conforming measures", the FTA confers an absolute, across-the-board right of establishment with investors of the FTA partner guaranteed both national treatment and MFN on an unconditional basis. In addition, the bilateral deal adds

importantly to the WTO TRIMS Agreement's disciplines on performance requirements.

Other important features of the FTA's investment chapter that are "WTO-Plus" for investors include

- the rules governing expropriation and compensation;
- rules setting out the protection of transfer payments relating to covered investments and
- the prohibition of foreign investors being required to appoint host country nationals to senior management positions.

What the FTA does not provide for is investor-state dispute settlement. Although investor-state dispute settlement provisions are contained in Australia's FTA with Singapore, it was pretty clear from the start of the negotiation that Canberra did not want to see similar provisions in an agreement with the United States. It also became fairly clear that the U.S. Government was happy to accommodate and leave it out of the FTA. Investor-state dispute settlement in NAFTA has frequently been politically problematic and it seems that the American Government was happy to trust in the good reputation of Australian Courts.

Competition Policy

As one might expect, the WTO system is not completely without rules relating to the promotion of a competitive environment. But the current scope of these rules is limited. For example, the GATT provisions for trade in goods basically pertain to the activities of state trading enterprises – which Members are merely obliged to operate consistent with general commercial principles expected of private traders. In the TRIPs Agreement, Members are given some flexibility in dealing with licensing practices that restrain competition.

GATS rules for competition in services trade are much more significant. There are some rules governing the operation of monopoly services providers and provisions for consultations in the case of private restraint of trade.

The GATS' most significant foray into competition policy is the so-called "Reference Paper" adopted by many countries as an additional commitment in the telecommunications sector and which obliges adopting members to take such measures as might be necessary to promote a pro competitive environment and restrain established suppliers with dominant market power from preventing the entry of new competitors in the market.

The FTA goes considerably further than the WTO. Chapter 14 of the FTA builds on existing antitrust cooperation agreements and then amplifies certain of the competition policy principles found in the WTO. For example, Article 14.4 goes beyond what the WTO provides for in terms of ensuring that state enterprises operate consistent with commercially significant principles of fair competition.

Several years ago, the United States lost a high-profile WTO dispute against Japan trying to make the case that the Government of Japan had failed to ensure a competitive environment in the Japanese film market (the Kodak-Fuji dispute). Much of the American case was grounded on the premise that by virtue of being a Member of the WTO, governments somehow have undertaken an obligation to ensure a general environment of competition in their domestic economies. The WTO Panel didn't buy the argument.

The US would be able to make the argument much more effectively in the FTA. This Agreement makes explicit the obligation to ensure competition in the market. Article 14.2.1 provides "Each Party shall maintain or adopt measures to proscribe anticompetitive business conduct and take appropriate action with respect thereto..." When this provision is combined with other areas of antitrust cooperation we can see that Australia and the United States recognize that in order to work, competition policy needs to have "bite".

Government Procurement

The WTO system has had an agreement dealing with government procurement since the end of the Tokyo Round negotiations in 1979. Unfortunately, the utility of the agreement has always been compromised by its very limited membership. WTO Members are not obliged to join the “plurilateral” agreement and Australia has eschewed membership from the start (a policy position that has barred Australian firms from competing in the American market for government purchasing).

The FTA, by contrast, contains ambitious rules and market opening measures in the area of government procurement. In addition to federal level procurement, substantial amounts of both countries’ state-level procurement are opened to competition. The conditions of the market are further improved by the ban on offsets under AUSFTA and by the FTA’s explicit provisions on ensuring integrity in the procurement process.

Protection of Intellectual Property

One of the widely-criticised chapters of this FTA is Chapter 17, concerned with the protection of intellectual property rights. Most of the criticism comes from those who believe the FTA goes too far in tilting the scales in favour of protection for the holders of intellectual property

rights. I think we all appreciate that there is a fine line between too much protection of intellectual property and insufficient protection. It's not my task today to take a position on this in the FTA. In my paper, I discuss the FTA's intellectual property provisions as "WTO Plus" from the standpoint of the rights holders.

It is not really necessary here to address in detail the specific ways in which intellectual property is protected under the WTO's Agreement on Trade-Related Intellectual Property Rights (a.k.a. the TRIPS Agreement). For the most part, the TRIPS Agreement provides protection that was state of the art in 1993 when the negotiation of the Uruguay Round was completed. The subject matter covered includes copyright, trademarks, geographical indicators, industrial designs, patents, layout designs and protection of undisclosed information. Obligations are generally cross-referenced to a variety of WIPO² Conventions concluded over the years on specific topics.

The problem for the FTA's negotiators was that the world has changed in many ways since 1993 with new products and services requiring additional and/or revised forms of intellectual property rights protection. This is particularly the case in the copyright area where digitisation of copyright material, the widespread use of the Internet and developments in transmission technologies have radically altered the technological and economic landscape.

² World Intellectual Property Organization (Geneva)

It was clear that the legal framework needed to catch up to the situation on the ground. To devise an agreement that reflects current commercial realities, FTA negotiators had no choice but to go beyond the WTO envelope as reflected in the TRIPS Agreement.

A considerable number of the FTA's TRIPS-Plus provisions relate to copyright and new technologies, such as rules for the

- protection of encrypted program-carrying satellite signals;
- liability-related provisions dealing with Internet Service Providers; and
- the requirement that there be criminal penalties for parties guilty of circumventing "effective technological means" that restrict unauthorized uses of copyrighted material.

In addition, the FTA provides for rules to govern the management and dispute resolution for domain names on the Internet. Another sign of the FTA's recognition of a changing commercial environment is the FTA partners' recognition that trademark coverage can go beyond things that are visible to the eye (for example, scents and sounds).

The FTA expands on what is found in the TRIPS Agreement in terms of its treatment of geographical indications and provides for fairly specific challenge procedures, for example.

For trademarks, there is a marginal expansion of the minimum term of protection (10 years instead of the 7 years found in TRIPS).

The most criticised “TRIPS Plus” aspect of the FTA is its requirement that the general term of copyright protection be expanded from the TRIPS standard of life plus fifty years to an FTA standard of life plus seventy years. Many people think this is excessive. We could see this coming, however, as it has been a standard American demand in all of the FTAs recently negotiated or under discussion. Both Singapore and Chile accepted such an extension before the Washington-based negotiators met with their counterparts from Canberra, making it politically impossible to settle for anything less from another developed country.

Labour and the Environment

Just a few words on labour and the environment. Although the FTA’s provisions addressed to labour standards and protection of the environment are not very dramatic, they do break ground compared to what is found in the WTO – which is absolutely nothing. As an interesting side note, labour unions on both sides of the Pacific have criticised the labour chapter as being inadequate mainly on the grounds that the underlying national legislation governments are obligated to uphold is bad legislation.

Dispute Settlement

A final point worthy of brief comment is the dispute settlement approach that will go into force with this FTA. In most respects, the system and its procedures mirror those of the WTO's Dispute Settlement Understanding, but there is a very important difference.

The WTO dispute settlement system that came into being in 1995 has been a remarkable success story – handling more than 300 government-to-government disputes over the years. Disputes that used to drag out for years under the GATT have been successfully handled in the legally prescribed time limits of the mechanism. Where the system has come in for some justifiable criticism, however, is how it operates at the very end of the dispute resolution process.

A “guilty” party in the WTO whose practices have been found to be inconsistent with its obligations has three options at the end of the process. It can of course bring its practices into conformity with its obligations under the WTO. This is clearly the best option. However, for a number of reasons, this might not be politically possible – at least in the short term. Where the government cannot conform, it has two other alternatives.

The first of these is to compensate its trading partner by “paying” for the damage with equivalent liberalising concessions in some other –

hopefully related – sector. While this is trade liberalising, it suffers from the fact that “innocent parties” in the newly liberalised sector are made to pay for the wrongs brought on by those benefiting from the inconsistent practice. Another problem is that the compensation often does not directly benefit the aggrieved parties in the country that brought the complaint. Reducing tariffs on imported automobiles doesn’t put money in the pockets of a farmer who has lost his wheat market due to an illegal WTO practice.

The second alternative option is to do nothing to come into conformity or compensate and suffer retaliation against the country’s export trade. There are a lot of problems with retaliation, but probably the biggest criticism against it is that it is de-liberalising. Meeting protectionism with an equivalent level of protectionism certainly does not make for good economic management in the WTO system.

The FTA has the same three alternative options as the WTO, but significantly adds a fourth option. Losing parties that don’t want to comply with the rules can pay a monetary fine. Article 21.11.5 of AUSFTA allows the two parties to consult on the appropriate level of the fine but also sets a default level of an annual payment in US dollars equal to fifty percent of the level of benefits found to be compromised by the lack of conformity with the FTA’s provisions.

The significance of this option as a WTO-Plus feature should not be underestimated. It is a way to keep pressure on the “guilty party” to come into conformity without at the same time negatively affecting innocents or exacerbating barriers to bilateral trade.

Conclusions

Free Trade Agreements like the Australia US FTA are supposed to be more liberalising in terms of market access than the WTO. So it's not in market access where we would call this agreement WTO Plus.

Where this FTA (and others like it) goes beyond the envelope of the WTO is in its approach to rules.

In some cases, these are entirely new rules, for example in the areas of antitrust cooperation or the right of establishment for investors of the other party.

In other cases, the negotiators of the AUSFTA have adopted a dramatically different approach to the structure of the agreement. A case in point is the “top down” negative list approach used for trade in services.

Finally, the FTA goes beyond the WTO with its inclusion of updated rules to address issues that were not foreseen in 1993, such as the copyright protection issues for digital works.

Beyond the border “WTO Plus provisions like these are so important in this Agreement that we should really begin to question the use of the term “Free Trade Agreement” to describe such a treaty. When you study this agreement and its emphasis on behind the border rules for doing business, it becomes clear that this is really an economic integration agreement.

Thank you for your attention.