

Raising Standards of Regional Liberalisation

Re-shaping APEC for the Asia-Pacific Century

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Introduction

In the first six years of the Twenty-first Century the economies of the Asia-Pacific region have shown an appetite for bilateral and regional trade agreements that is probably unmatched by any other area. If we include their ongoing negotiations with others, APEC economies now have more than 20 Regional Trade Agreements (RTAs)² in force and in excess of 60 agreements under negotiation. China by itself is reportedly in RTA talks with 27 regions and countries whose combined trade with China in 2005 came to \$350 billion – about one quarter of the country's total trade.

While the jury is still out on whether WTO's Doha Round will ever be successfully finished, heightened regional trade liberalisation activity appears to be here to stay. This fact of life has been accepted by APEC members and they have established a pretty good record of working together – both through APEC machinery and in their separate RTA negotiations – to try to produce high quality agreements that can be complementary to multilateral liberalisation efforts in the WTO and raise the bar in terms of the standards they set for future liberalisation. APEC has agreed best practice guidelines for RTAs and supplemented this work with efforts to promulgate model measures for trade facilitation. A number of the policy approaches promoted in this paper as ways of raising the standards of regional liberalisation have their origins in these APEC efforts. The fact that these higher standards are possible to achieve is backed up by concrete examples taken from existing RTAs in the APEC area.

Ensuring Complementarity with the WTO

APEC members have long been strong supporters of the multilateral trade system of the WTO and APEC support for efforts to revive the moribund Doha Round were confirmed just last month at the Hanoi Summit. APEC's best practice guidelines call – in general terms – for concluding RTAs that are consistent with the rules of the WTO. We cannot depend upon the WTO to tell us whether a particular agreement is consistent with the rules or not because the WTO Committee on Regional Trade Agreements has long since ceased to function so we should start by taking the requirements of GATT Article XXIV and GATS Article V literally.

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² I will use the general formulation "Regional Trade Agreement" or "RTA" to refer both to free trade agreements between two countries and those involving several countries.

Starting with the GATT rules for trade in goods, reasonable people would probably agree that any RTA that promises to lead to duty-free trade in 95 percent or more of all trade in goods between RTA members over a period of ten years or less should meet the WTO requirement to remove tariffs and other barriers on “substantially all of the trade” between the parties.

- On the day it entered into force, the Singapore-Australia Free Trade Agreement eliminated tariffs on all goods imported from the other party.
- In the Trans-Pacific Economic Partnership Agreement (“P-4 FTA”), where 3 of the 4 parties are developing countries, New Zealand and Singapore started with total tariff elimination and Chile eliminated nearly 90 percent of duties from the date of entry into force – with all duties set for elimination in 2017. Brunei has been given a bit more time, but also plans to eliminate all tariffs with the exception of a short list that it will exempt for moral, health and security reasons.
- In the recently concluded FTA between Chile and China, after the ten-year phase-in period, only one percent of Chile’s exports to China (3 percent of tariff lines) and three percent of China’s exports to Chile (2 percent of tariff lines) will be excluded from duty-free treatment.

GATS Article V calls for the absence or elimination of substantially all discrimination affecting trade in services and substantial sectoral coverage evaluated in terms of numbers of sectors, volume of trade affected and modes of supply and makes explicit that this condition cannot be met by an agreement that *a priori* excludes any mode of supply of a service. Here, I would argue that it is very difficult to demonstrate that the Article V standard is being met where the parties to the RTA adopt the positive list GATS-type approach to scheduling services commitments. On the other hand, most experts would agree that RTAs employing the negative list approach to services liberalisation – with demonstrably short annexes of non-confirming measures -- should be seen to meet the Article V standard. This is even more certain in the case of an RTA with a strong investment chapter incorporating pre-establishment national treatment rights.

- The Singapore-Australia FTA takes a negative list approach to services liberalisation that guarantees full market access and national treatment to each country’s services suppliers except where narrowly defined exceptions are listed in a schedule of non-confirming measures.
- The same “top-down” negative list approach to services liberalisation applies in the case of Singapore’s FTA with the United States and the US FTA with Australia. Except for the relatively limited number of non-confirming measures, market access barriers and national treatment limitations – including in respect of the right to invest – were eliminated on the day the agreements entered into force.

In the schedules of commitments made in the WTO, “mode 4” liberalisation is generally restricted to senior managers and highly technically qualified specialists. This does not do much to free up trade in services. Unfortunately, we are not yet at the stage in the region where the “negative list” approach to services liberalisation can be applied to services supplied through the temporary movement of natural persons (the GATS’ mode 4). However, some rather innovative approaches have been adopted in certain RTAs that may show us a way forward in raising standards for liberalisation of services trade.

- In Thailand’s FTA with Australia – an agreement not otherwise noted for its leadership in trade liberalisation – very broad commitments are made that facilitate the temporary entry of expanded classes of managers and the employment prospects of their spouses. More significantly, Australia

has committed to permit unlimited numbers of Thai chefs (once certified as expert chefs by Thai cooking schools) into Australia.

- Following the entry into force of the Australian-US FTA, the American Congress enacted new legislation creating the new E-3 visa category and greatly expanding the number of Australians that could come to work in the United States.

Jagdish Bhagwati never seems to tire of arguing that RTAs contributing to a “spaghetti bowl” or “noodle bowl” effect due to overlapping and conflicting rules of origin should probably not be seen as complementary to the multilateral system. Although I suspect that the noodle bowl effect has probably been over-dramatised by the detractors of RTAs, there is nevertheless an easy way out of this problem – already suggested by work in APEC. In short, it would be a significant and relatively (technically) easy step toward raising the standards for regional liberalisation if APEC members would agree that for all of the goods trade in all of their RTAs, they would move toward the simple to understand and trade-neutral “change in tariff heading” or “CTH” approach to rules of origin.

- The CTH approach to rules of origin is generally employed for most products by parties to the “P-4” Agreement.
- Following the conclusion of the AUSFTA agreement with the United States – where Australian officials came to appreciate the value of the CTH approach to rules of origin – they successfully renegotiated the rules of origin elements of the long-standing CER with New Zealand in order to employ the CTH standard and avoid a possible contribution to the “noodle bowl”.

“WTO – Plus” RTA Provisions

Part of the attractiveness to RTA negotiations is the ability in the RTA to deal with subjects and problems that cannot be addressed in WTO because of the limited scope of the multilateral system. APEC has called on its members to adopt a “WTO Plus” approach to RTA negotiations and there are a number of areas where we can see how the standard for liberalisation is being raised by economies in the region going beyond what might be done in the WTO.

Investment

Freeing up the climate for foreign direct investment can be more important than eliminating tariffs in a modern RTA – particularly since so much of FDI today is services-related. Modern RTAs that incorporate investment chapters that treat right of establishment, provide for national treatment of foreign investors and strong legal protection of their investments once in the country should be the objective of all APEC members. A large number of RTAs concluded and in force in the region have high standard investment chapters built into the agreements.

- The Singapore – Australia FTA gives Australian and Singaporean investors national treatment in the partner country except for a small number of specifically detailed exceptions (like Australian restrictions on foreign ownership of Qantas shares). The agreement also provides for investor-state dispute settlement.
- The investment chapter of the Singapore – United States FTA is a model for the most far-reaching liberalisation in this area with an extremely broad scope of application and comprehensive protection for investors that provides detailed rules for expropriation, transfers, prohibition of performance requirements and rules preventing undue interference with senior managers or boards of directors.

Trade Facilitation

While we wait to see if the Doha Round produces a new agreement in this area, APEC member economies are already well-advanced in using their RTAs to introduce and promote important trade facilitation measures. For business people, this is perhaps the easiest aspect of trade policy to understand and appreciate because it means real money in real people's pockets. The time and cost of moving goods across border controls can be dramatically cut by adopting measures such as risk assessment techniques, single window operations for documentation, advance rulings and paperless trading. Important trade facilitation measures appear in nearly all of the regions RTAs, including those with a majority of developing economies as members.

- Consistent with APEC trade facilitation objectives, the "P-4 Agreement" provides for advance rulings on customs questions, use of risk management techniques, creation of enquiry points, release of goods within 48 hours and an eventual objective of paperless trading among its four members.

Competition Policy

It seems almost ridiculous for WTO members to take the position that competition policy questions are not an appropriate topic for inclusion in the Doha Round. If anti-competitive practices are allowed to frustrate market opening measures, the value of those measures is questionable. The standard of regional trade liberalisation can clearly be raised by recognizing in an RTA the important role played by competition policy – both generally and in a specific sectoral context.

- The AUSFTA clearly goes beyond the WTO envelope in making an obligation to ensure competition in the market explicit. Article 14.2.1 provides "Each Party shall maintain or adopt measures to proscribe anticompetitive business conduct and take appropriate action with respect thereto..." This clearly falls into the WTO Plus category, as are AUSFTA provisions on cross-border consumer protection and recognition and enforcement of monetary judgments.
- The Singapore – Australia FTA and others that incorporate a chapter on telecommunications services trade devotes most of the chapter to repeating and elaborating the GATS basic telecommunications reference paper – essentially a competition policy document.

Government Procurement

It is recognized that many APEC economies – including Australia and New Zealand – chose not to join the plurilateral WTO Agreement on Government Procurement because it is seen as a "red tape heavy" agreement that imposes high costs on its participants. That said, any high quality RTA should aim to include liberalisation of government procurement markets and economies in the Asia-Pacific region have adopted a number of innovative approaches to bringing procurement into the RTA mix.

- In the Closer Economic Partnership Agreement between Singapore and New Zealand, the parties agree to apply national treatment to each others' suppliers for covered procurement and to conduct their purchasing through open and selective tendering consistent with APEC's non-binding principles of government procurement.
- The "P-4 Agreement" incorporates government procurement obligations applying to goods, services and construction contracts above specified thresholds and its parties have agreed that the scope of the agreement applies to measures adopted or maintained relating to government procurement by any

contractual means, including purchase and rental or lease, with or without an option to buy, build-operate-transfer contracts and public works concessions contracts.

"Living Agreement" Work on Mutual Recognition Arrangements

In many RTAs, it is recognized at the time of their adoption that it is impossible to solve all problems once and for all. For this reason, many modern RTAs incorporate "living agreement" provisions where the parties to the agreement set up mechanisms allowing problems to be addressed and resolved over time without a need to revisit the text of the RTA. A key area where such living agreement provisions make a lot of sense is that of standards (both technical barriers to trade and sanitary and phytosanitary measures) applied to goods and qualifications and certification requirements applied to services providers. Some important examples of where APEC member economies have made "living agreement" provisions work for them include:

- Under the Singapore – Australia agreement's provisions relating to problem-solving work on standards issues Australia and Singapore announced at their very first ministerial review that they had concluded work on a Horticultural Goods annex – facilitating Singapore's exports of orchids and foliage to Australia – and a Food Annex – whereby parties are able to recognize the others' standards and compliance procedures for trade in foodstuffs as equivalent to their own.
- Within ASEAN's AFTA framework, important work is underway on the development and adoption of mutual recognition agreements (MRAs) for professional service providers. Already, AFTA members have agreed on an Engineering MRA and work is well advanced on MRAs for nursing and a range of other professional activities.
- Australia's FTA with the United States created a working group on professional services which is designed over time to encourage the development and adoption of MRAs addressed to professional services licensing and certification issues.

Conclusions

This short paper promotes a number of ways in which regional trade agreements and initiatives can be used to raise standards of trade liberalisation. In many cases, the current attitude of WTO members precludes our using that forum for high quality ("WTO-Plus") liberalisation work. However, it has been demonstrated that APEC member economies have shown that agreements can be – and have been – concluded that raise the bar of trade liberalisation through:

- Providing for the comprehensive elimination of barriers to goods trade within ten years;
- Employing a top-down approach to liberalisation of trade in services;
- Adopting innovative approaches to liberalising the movement of people;
- Using a "change in tariff heading" approach to rules of origin in RTAs;
- Incorporating robust provisions on liberalisation and protection of investment;
- Adopting trade facilitation methods and concepts in an RTA;
- Building competition policy concepts into RTAs – generally and sectorally;

- Using RTAs to liberalise government procurement markets; and,
- Crafting "living agreements" that enable parties to build progress over time in important areas like mutual recognition agreements for goods and services.

There is no reason for us to wait to achieve progress toward greater trade liberalisation in these areas – it is already being done in APEC. What would be important, however, would be to seek APEC-wide commitment to using RTAs as a matter of policy to achieve maximum trade liberalisation on all of these fronts. The idea of a possible Free Trade Area of the Asia-Pacific (FTAAP) has been discussed from time to time. Given what APEC member economies have been doing in their RTAs over the past five years it seems clear that – in order to be seen as a step forward -- an FTAAP should incorporate all of the elements enumerated in this discussion paper.

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