



The Future of “WTO-Plus” Provisions in Preferential Trade Agreements

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Introduction

Good morning and thank you for inviting me to speak at this meeting. The Institute for International Trade has only been around since 2003, but in one way or another we have consistently been involved with this event.

This year, I am joined on your program by Maria-Isabelle Pellan who is in Australia as the Institute's seventh Visiting WTO Fellow. She will be addressing you on trade and climate change issues tomorrow.

I suppose that, in part due to my current role as a part-time Associate Commissioner with the Australian Productivity Commission, I have been asked to speak to you today on the future of so-called "WTO-Plus" provisions in preferential trade agreements, or PTAs.

Let me be clear right from the start. The views I express today are mine alone and should not in any way be interpreted to represent the view of the Commission.

The Standard for "WTO-Plus"

Is there such a thing as a standard for determining when a trade agreement provision is "WTO-Plus"? I am pretty sure there is no generally agreed standard but I do have a rule of thumb.

In my view, a provision is "WTO-Plus" when it either (a) addresses a trade issue or topic that is not dealt with in today's WTO rules, or (b) deals with a WTO issue or topic in a way that is superior to the way the issue is dealt with in the WTO system.

My standard for "WTO Plus" is not a purely economic one and it does not incorporate a Productivity Commission – type assessment of positive economy-wide benefits.

Certain types of "WTO-Plus" provisions might actually impose a net cost on the national economy, but if they are consistent with global notions of good governance, the cost of incorporating the provision in a trade agreement should be one we are willing to bear.

This brings me to the subject areas that lend themselves to coverage under a "WTO Plus" label. First, we have the topics that are barred from treatment in the multilateral forum of the WTO. This includes investment, competition policy, government procurement and questions related to labour and the environment.

Second, topics that are addressed in WTO rules but which can be dealt with more effectively through PTAs include trade in services, intellectual property, trade facilitation and, depending upon the PTA, certain technical customs issues like those relating to rules of origin.

“WTO Plus” in the Productivity Commission Report

The recent draft report of the Productivity Commission on Australia’s trade agreements does not deal extensively with “WTO Plus” provisions *per se*, but it does make some observations on the extent to which these kinds of provisions are finding their way into modern PTAs.

The report notes [p.5.4] that the coverage of so-called “third wave” PTAs has expanded considerably so that it is not at all uncommon to find PTAs with chapters dealing with services, investment, competition policy, government procurement, e-commerce, intellectual property protection and sometimes labour and environmental standards.

It also notes that, in the case of Australia’s agreements with Singapore, Thailand, the United States, Chile and the AANZFTA with New Zealand and ASEAN, the agreements are comprehensive and cover a number of “WTO-Plus” subjects.

One new area noted by the draft Commission’s report – which some would likely list as “WTO Plus” is that of economic cooperation. The economic cooperation provisions of the AANZFTA are quite significant and without precedent in Australia’s other PTAs.

The Future of “WTO Plus” Provisions in PTAs: Services Trade

I am supposed to be commenting on the future of “WTO Plus” provisions in PTAs and I want to start with a discussion of trade in services.

The WTO’s General Agreement on Trade in Services (GATS) bases market access and national treatment commitments on a positive list approach that is very limiting in its coverage, liberalization and elimination of discrimination. Even where services sectors are scheduled, a sector might still be subject to many limiting conditions.

In addition, the positive list approach is very non-transparent. We do not know from the schedule itself whether what has been scheduled represents liberalization or the inscription of the status quo. More importantly, we have no idea what the access and discrimination situation is for any service sector that is not scheduled.

GATS Article VII specifies that to be consistent with the GATS, a services PTA must (a) have substantial sectoral coverage – understood in terms of number of sectors, volume of trade affected and modes of supply, and (b) provide for the elimination of substantially all discrimination – with both of these conditions being satisfied either at the entry into force of the agreement or on the basis of a reasonable time frame.

PTAs utilizing the GATS-type positive list approach have little hope of satisfying the requirements of GATS Article VII. Only negative list agreements, with reasonably short lists of so-called non-conforming measures, are likely to meet the test. Australia has negative list services PTAs with New Zealand, Singapore, the United States and Chile.

In my view, Australia’s agreement with Thailand would not pass the Article VII test. AANZFTA would also probably not pass in its current form, although that agreement incorporates a review process designed to improve the agreement over time, so it might one day meet the standard.

I do not know where things stand in Australia's negotiations with Japan, Korea and China in terms of the architecture of a potential deal on services. I am pretty sure, however, that the ongoing Trans Pacific Partnership negotiations, if successful, will base services liberalization on a negative list approach.

Another "WTO-Plus" aspect to PTA treatment of services trade can be found in those agreements, like Australia's agreement with the United States, that incorporate working groups designed to liberalize barriers to recognition of professional services qualifications over time. Since the entry into force of the AUSFTA, the Working Group has focussed on initiatives affecting accounting, engineering and law – with good results in each of the professions.

Take legal services as an example. The state of Delaware introduced a new Foreign Legal Consultant (FLC) rule in late 2007 that allows Australian lawyers to practice Australian and foreign law in its jurisdiction. Given that nearly all large American corporations are registered in Delaware, this is an important new opportunity directly attributable to the AUSFTA.

"WTO Plus" professional services initiatives like these are significant – especially when seen as a complement to the Australia-specific E-3 visa arrangements which were enacted by the U.S. Congress following the negotiation of the AUSFTA.

At a forum here in Canberra on August 25, the Executive Director of the Australian Services Roundtable estimated the export value of the 12,000 special E-3 visas at \$6 billion.

"WTO Plus" Investment Provisions in PTAs

Investment was carved out of the scope of the Doha Round by developing countries in July 2004.

In contrast, investment chapters are increasingly commonplace in modern PTAs, including those involving developing countries.

Sometimes the investment chapter provides for establishment rights on a national treatment basis.

The degree to which the PTA liberalizes the investment climate varies with each agreement. In Australia's agreement with the United States, FIRB review requirements in most areas now benefit from greatly expanded thresholds. There is speculation that a new agreement with New Zealand might similarly liberalize FIRB review.

Some of Australia's PTAs include investor-state dispute settlement. All of the agreements with investment-related provisions provide for important protections for existing investors and investments. None of these features are found in the WTO system.

The very interesting agreement with ASEAN and New Zealand incorporates a number of national treatment provisions for investors but then delays their application to the completion of a work program wherein the members of the AANZFTA will negotiate over a three year period to see whether investment barriers might be progressively freed up.

A Selection of Other “WTO Plus” Provisions

There are a number of other areas where “WTO Plus” provisions can be significant in PTAs.

Among the most important are provisions dealing with government procurement, competition policy and protection of intellectual property.

The utility of the WTO procurement agreement has always been compromised by its excessive red tape and limited membership. But government procurement markets can be a huge opportunity if opened up through a trade agreement and – although Australia is not a party to the WTO plurilateral agreement – “WTO Plus” government procurement liberalisation does feature in a number of our PTAs.

Including WTO-Plus competition policy provisions in FTAs can be a very important part of ensuring that the lowering of trade barriers leads to real market access – especially in sectors like telecommunications services. Competition policy chapters also sometimes provide for consumer protection – including for international e-commerce transactions.

Intellectual property rights are protected through the WTO’s TRIPS Agreement, but that agreement was negotiated and agreed in 1993 and the world has changed in many ways since that time in terms of new products and services requiring additional and/or revised forms of intellectual property rights protection.

It is more and more common for modern PTAs to oblige their members to adopt and enforce “WTO Plus” WIPO conventions in these areas that bring intellectual property protection up to date.

The Future of “WTO Plus” Provisions in PTAs

Time constraints limit my ability to address other “WTO Plus” topics today. So what’s the future for these provisions in PTAs?

First, we need to answer the question “What’s the future for PTAs themselves?” Here, on the basis of both my experience with the Productivity Commission exercise and more generally, I think we have to acknowledge that whether you like them or not, PTAs are here to stay.

Second, in my view, there is little *raison d’être* to initiate a PTA negotiation unless you want it to achieve “WTO Plus” results.

With tariffs being less and less significant, it’s the “WTO Plus” provisions we want from our PTAs. In fact, even in tariffs, the results of a PTA are “WTO Plus” because we are aiming not just for a reduction in bound tariffs but the elimination of substantially all applied tariffs.

Some have suggested that “WTO Plus” outcomes can be negotiated through less-comprehensive non-PTA routes. Perhaps. However, that does not mean that smaller stand alone agreements would pass the political economy test – particularly since it is apparent to everyone that political relationships play a very significant role in the launch and negotiation of PTAs.

The consultation process connected with the draft Productivity Commission report has identified some shortcomings with current approaches to negotiating “WTO Plus” provisions in some circumstances.

The Law Council pointed out that the market for Australian lawyers in the United States is not really opened until there is an agreement reached with non-government state bar associations.

Australian accountants told us that being recognized as an accountant is not enough. To get real access in the United States they need the U.S. SEC to agree to allow them to audit firms listed on American stock exchanges.

Maybe this means that in future trade negotiations we need to find a way to include the relevant private sector groups or non-trade agencies in the negotiation of the PTA.

Now to wrap up. Today's PTAs are really all about "WTO Plus" provisions. In the WTO, we focus on gradually reducing bound ceiling rates of protection in goods and services. In PTAs the emphasis is on eliminating – not reducing – trade barriers and discrimination.

The WTO is an important insurance policy and lowest common denominator rule-making body. PTAs, with the right "WTO Plus" elements are about real access to markets. And access can increase over time when the PTA incorporates "living agreement" elements like the AUSFTA PSWG.

For reasons I have already cited, we might need to find better ways to negotiate certain issues in Australia's future PTAs.

But PTAs are a proven way to advance trade liberalization and reform and I expect to see these agreements to continue as an important feature of the economic landscape for the foreseeable future.

As future PTAs are negotiated, I expect to see "WTO Plus" provisions becoming more and more central to the global trading environment.

And this is a good thing, not only because it leads to greater liberalization and reform but also because over time, other governments' increasing comfort with "WTO Plus" concepts and modalities will make them more inclined to consider incorporating them into the system of the WTO.

Thank you for your attention. And thank you for inviting me to speak at your conference.