

**BILATERAL APPROACHES TO SERVICES TRADE
AND INVESTMENT LIBERALISATION – WTO PLUS
OR WTO MINUS?**

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Introduction

The Uruguay Round of multilateral trade negotiations brought not only agriculture and environment but also services, investment and intellectual property issues within the realm of the World Trade Organisation (WTO) for the very first time. The inclusion of services trade, moreover, introduced new services related aspects of competition policy, domestic regulation, people movement and government procurement issues to the WTO agenda. Much remains to be done in all of these areas, both in terms of rule making and market access. Recent bilateral and regional trade arrangements are also, naturally, grappling with how to incorporate these various “new” trade issues.

Some business and government commentators have described bilateral trade deals which incorporate these “new” issues as “new age”; recently the Australian Productivity Commission has described them as “Third Wave” agreements. There tends to be an automatic assumption among some commentators, and this despite the Productivity Commission’s findings of trade and sometimes investment diversion, that “Third Wave” agreements which go beyond the current status quo in the WTO to cover additional aspects of these “new” issues are necessarily “WTO Plus”.

This paper is oriented to a first examination of the services trade and investment outcomes in some “Third Wave” bilateral Free Trade Agreements (FTAs) in the Asian Pacific region, especially those centred around Singapore. The paper draws the preliminary conclusion that bilateral FTAs which attempt to explore territory beyond the WTO may well prove to be “WTO Minus” in terms of their impact on nascent WTO rule making in these new areas and also in their potentially negative impact on the WTO architecture itself. The paper calls for vigilance and objective evaluation to ensure that bilateral efforts are genuinely constructive rather than destructive of WTO processes. This is especially important if bilateral FTAs are to contribute in any remotely positive way to a successful and rapid outcome to the currently troubled Doha Round of multilateral negotiations .

Services is still a relatively "New" Issue in the WTO

Under Article XI of the Uruguay Round General Agreement on Trade in Services (GATS), a further set of services negotiations aiming for progressive liberalisation was "built in" to the WTO agenda, to commence no later than five years from 1995. Negotiations were initiated in 2000 with guidelines and procedures agreed in March 2001.

Like the "built-in" negotiations on agriculture, which have also been under way since 2000, the negotiations on services were rolled into the Doha Round negotiating mandate. Paragraph 15 of the Doha Declaration endorsed the work already done, reaffirmed the guidelines and procedures, and established key elements of a timetable, including the deadline of 1 January 2005 for the conclusion of the negotiations as part of a single undertaking.

The Uruguay Round had left some key issues in the GATS unresolved. The rule-making itself is unfinished with respect to emergency safeguards (Article X), domestic regulation relating to issues such as qualifications, technical standards and licensing (Article VI:4), government procurement (Article XIII); and subsidies (Article XV). And the GATS schedules contain many most favoured nation (MFN) exemptions which are now specifically subject to negotiation, with flexibility for developing countries.

With respect to modalities and procedures, the request-offer approach is the main method adopted, although other sectoral and formula based options remain potentially in play. A first set of requests was due in by end June 2002 and initial offers were due March 2003. Offers have continued to dribble in, with three new offers from developing countries, including from China over the last month. But there is not yet a critical mass of offers, with many developing countries clearly holding back from the process. And the quality of the offers has been forcefully criticised by service industry organisations around the globe. To date, with only a few exceptions, the offers forthcoming even from the OECD countries are largely standstill offers, that is they offer only to bind in the GATS schedules the liberalisation which has already been undertaken on a unilateral basis since

completion of the Uruguay Round. With only a few exceptions, they offer no new liberalisation.

Nevertheless, progress on services was widely seen pre Cancun as “on track”. The 5th WTO Ministerial Meeting at Cancun was to have set a deadline for the submission of improved offers and there had been widespread hope among services negotiators that the process could even be accelerated and the deadline brought forward from 31 March to 1 January 2004. Such hopes were completely dashed by the failure at Cancun to agree to any outcome whatsoever. The best that can now be hoped for is that by mid December, WTO members might be in a position at least to reaffirm a 31 March deadline for commencement of the serious market access negotiations in services.

Meanwhile, if services issues were non-problematic at Cancun, this was far from the case for the various other “new” issues. Intellectual property was so contentious that it was widely believed the Cancun meeting could not have taken place at all without a prior agreement the week before on the availability of pharmaceutical products for public health purposes. And the other new issues of investment, competition policy, and government procurement proved to be the ultimate deal breakers at Cancun. Developing countries showed at Cancun that they were simply not ready to embrace rule making on these critical issues of domestic economic governance in the multilateral arena.

Developing countries and the “New” Issues

Before examining whether these “new” issues are likely to be amenable to smoother handling on a bilateral basis, it is important to ask why the process is proving so hard multilaterally. The simple fact is that developing countries are generally not well placed to address the newer aspects of the WTO agenda. Relatively few of them are fully engaged even in the services negotiations and in general, their services commitments in the Uruguay Round were also weak.

This is evident, for example, in the East Asian region. Sally (2003a) points out that not only are ASEAN countries’ Uruguay Round commitments on services weak,

but that intra-ASEAN negotiating differences are also more evident in the services negotiations than elsewhere. Singapore has a strong market access focus and is hence a demandeur on services, but the other ASEAN members are defensive – and increasingly so since the Asian crisis, despite autonomous liberalisation achieved since the end of the Uruguay Round. On the related new issues of investment, competition and transparency in government procurement, this fragmentation is even more significant. Singapore has been open to new negotiations while the others have been much more cautious. Indeed, Malaysia played a visible role in the Cancun Ministerial walkout over precisely these issues.

One problem relates to the regulatory intensity of services trade and the difficulties associated with the much wider, more complex domestic consultation process required, including with regulatory agencies, to formulate appropriate international strategies. Negotiators tend to be overwhelmed with the breadth and complexity of the issues, particularly with respect to domestic regulation, generating a higher level of caution and defensiveness. And there is a relative information deficit with respect to the commercial service export interests of individual countries.

While these are all understandable factors behind their reticence in the WTO , the consequence is that developing countries in the region, particularly for example the ASEAN countries, are now vulnerable. The current drive for bilateral trading arrangements, already clearly intensifying in the days immediately following Cancun brings real dangers that these developing markets will be picked off individually by larger bilateral trading partners.

Services in Bilateral FTAs - the Evidence

Many business and government commentators seem to take it for granted that it will be easier to solve the problems of trade and investment liberalisation in the “new” areas, including services, among smaller groups of trading partners on a bilateral basis. Presumably the current interest in bilateral FTAs is at least partly driven by a desire to find potential ways around the challenges and difficulties presented in the multilateral negotiating framework. So it is worthwhile asking whether FTAs in the region are indeed succeeding in meeting these challenges.

There are relatively few studies available to date which compare the disciplines of the GATS with the liberalising thrust or otherwise of the services provisions in FTAs – and none which examine the services aspects of the most recent series of FTAs centred on Singapore. This paper takes a first quick look at the Singapore–Japan, Singapore–Australia and Singapore–US FTAs. In doing so it draws on OECD Secretariat research (Sauve 2002) which identifies a number of useful criteria or GATS benchmarks against which to make this comparative assessment.

The OECD study (Sauve 2002) concludes that, at least up until the recent series of FTAs listed above, services trade and investment liberalisation has tended to prove no easier to achieve in smaller groups than it has in the WTO. Stephenson and Nikomborirak (2002) argue on the contrary that, in the Western Hemisphere, the texts of the North American Free Trade Agreement (NAFTA), the Mercado Común del Sur (MERCOSUR), the Andean Pact and the Caribbean Community agreement (CARICOM) do achieve more far-reaching disciplines on services trade than does the GATS. These authors admit, however, that the liberalisation achieved on paper is not necessarily played out in practice and is difficult to assess in the absence of relevant information.

Obviously, with the GATS incomplete, there is considerable scope for bilateral experimentation. In particular, the negative list approach increasingly adopted in FTAs seems to offer good governance benefits in terms of enhanced transparency. Yet most of the time, and certainly with respect to domestic regulation, the OECD study (Sauve 2002) concludes that GATS disciplines go further than what has been achieved in FTAs, despite the opportunities provided by the use of the negative list approach.

One possible exception, noted in Stephenson and Nikomborirak (2002), results from the ‘Standard of Treatment’ clause used in some NAFTA-type FTAs. This confers whichever is the more favourable treatment under either the MFN or the national treatment principle. The agreements also contain a mechanism which ratchets up future liberalisation and binds it automatically to the FTA. On the face of it, NAFTA-style ratchet mechanisms appear highly liberalising in that they extend to bilateral partners any liberalisation negotiated subsequently with any new partner. However, unlike simple ‘review of commitments’ clauses, they do not necessarily

encourage bilateral trading partners to work away on sensitive areas carved out of their original bilateral agreement.

The OECD study (Sauve 2002) points out, in addition, that none of the FTAs to date have really tackled the issues proving most difficult in Geneva –the interface between domestic regulation and liberalisation. There is little evidence of regulatory integration anywhere other than in ANZCERTA – at least not in the NAFTA-type agreements. Where agreements do have provisions in this area, they tend to be less fleshed out, weaker or more narrowly drawn – for example, focusing solely on professional services – than those arising under Article VI of the GATS (including the Article VI:4 work program).

Stephenson and Nikomborirak (2002) note that the NAFTA-type agreements go beyond the GATS in actually trying to encourage mutual recognition but, as noted above, target recognition very narrowly to subsectors such as professional services.

Nor, according to the OECD Secretariat, has there been any real progress in FTAs on the sectors proving most sensitive in Geneva – for example, air and maritime transport, audiovisual services and energy services – with the notable, but occasional, exception of transport, where the OECD suggests that regional proximity may sometimes have been a major facilitating factor. The ASEAN Framework Agreement on Services provides a relevant example. In general, Stephenson and Nikomborirak assess the market access commitments undertaken within ASEAN to date to be only marginally better than those in the GATS. However, the air and maritime transport sectors do show greater preferential commitments than in the GATS. Agreements involving the United States, however, typically carve out both air and maritime services, even with regional neighbours and this is certain to feature in the Agreement also with Australia. Meanwhile the evidence is that sectors other than transport, which have proved elusive multilaterally, have also proved elusive bilaterally.

FTAs are sometimes assumed to offer scope for speedier headway in areas such as services-related standards and the recognition of licences and professional or educational qualifications. Despite the presumed possibilities, the OECD study argues, however, that FTAs have not actually achieved much on standards. Progress in this area has been slow and generally disappointing, even at the regional level.

And FTAs have achieved no progress on the unfinished GATS rule-making, especially on safeguards and subsidies (which are typically grandfathered or carved out through negative listing). Progress has occasionally been made in the NAFTA-type FTAs on government procurement. The bilateral discussions on rules issues have otherwise seemed to face the same technical challenges and political sensitivities found in Geneva. Carve outs on services subsidies are certain to feature also in AUSFTA.

The OECD study (Sauve 2002) also concludes that, in the two key infrastructural sectors of telecoms and financial services, on balance, FTAs have seen less progress in bound liberalisation than is the case under the GATS, though in developing countries they may have encouraged greater transparency in implementation. The OECD suggests that this result confirms the political economy gains associated with the achievement of critical mass through multilateral bargaining.

Finally, the OECD research suggests that FTAs have rarely, if ever, achieved much of value on Mode 4. ASEAN's own experience tends to confirm this finding. Stephenson and Nikomborarik (2002) also note that NAFTA-type agreements do not cover Mode 4 as such but are limited only to coverage of temporary movement of business service providers. This will clearly be the case also in the case of AUSFTA.

What emerges from this discussion is that regulatory harmonisation and mutual recognition (and hoped for associated gains for people movement) in particular seem to remain difficult whatever the negotiating arena. There are no easier answers at the bilateral level. This can be expected to prove the case also in FTAs between developed countries such as Australia and the United States.

Before moving on to look briefly at the more recent FTAs centred on Singapore, it is important to recognise two other important general characteristics of FTAs covering services. First, the OECD study draws attention to the fact that, with very few exceptions, FTAs covering services typically feature a liberal 'rule of origin'/denial of benefits clause. That means they extend the preferential treatment to all legal persons conducting substantial business operations in the member countries. In practice, this implies that at least the post-establishment treatment of what in many

instances represents the most important mode of supplying services in foreign markets – that is, investment – is extended to third-country investors and is non-preferential.

Second, the OECD study (Sauve 2002) notes that governments participating in FTAs have shown a greater readiness in services than in goods to subsequently extend regional preferences on an MFN basis under the GATS. This may reflect a realisation that preferential treatment is harder to confer in services trade. Multilateral liberalisation also offers the opportunity to secure access to the world’s most efficient suppliers. This is economically vital in critical infrastructural services which are likely to exert significant effects on economy-wide performance. .

Services in FTAs –Recent Regional Experience

A key question is whether the above conclusions hold also for the most recent agreements, for example those agreed recently between Singapore, Japan, Australia and the United States. In their own way, these will tend to serve as models for future agreements in the region at least with developing countries. In fact, one would hope that an FTA between two developed countries, for example between Australia and the United States, might attempt to go beyond these models and display a greater degree of ambition in setting a potential template for problem solving in the GATS.

Even a quick glance at the tables of contents of these recent agreements shows that services issues, along with other “new” issues, many of them services related, have come to dominate the content of regional FTAs. Although this analysis is far from complete, some basic early conclusions from examination of these agreements emerge.

Judged against the benchmarks set out in the OECD study discussed above (Sauve 2002), the recent agreements can be seen on balance to tend to focus on specific bilateral market access issues (and to provide access on a reciprocal preferential basis) rather than really grappling with the rule making issues which might facilitate trade in services more generally. They tend, admittedly with some exceptions, not to sufficiently address issues such as competition policy, mutual recognition or regulatory harmonisation.

Usefully, the Singapore–US agreement does make some progress on competition policy and investment policy issues in Singapore which will in effect have MFN application. The Singapore–US and Singapore–Australia agreements both seek to make limited starts in the direction of regulatory convergence, with a welcome focus on the transparency of regulation. The Singapore–Japan agreement focuses, importantly, on transparency of implementation. The Singapore–Australia agreement seeks in a limited (and in practice relatively unsuccessful) way to encourage the process of mutual recognition for professional services. It remains very unclear whether FTAs can add any substantive value to the traditionally difficult negotiations associated with mutual recognition and equivalence. Despite the Government’s rhetoric, Australia’s engineers would be hard pressed, for example, to identify any concrete gains in this area from the Singapore/Australia FTA (SAFTA).

There is, moreover, nothing positive to report in the recent agreements on the unfinished GATS rule-making front. On the contrary, the negative list approach risks locking in certain existing restrictions which new GATS rules (for example, on subsidies) might well seek to discipline.

Nor is there anything especially creative on the ‘movement of natural persons’ front. The Singapore–US agreement follows the example already set in the other NAFTA-type agreements. With respect to services, Modes 3 and 4 are separated out and dealt with in generic chapters (Mode 3 in the chapter on investment and Mode 4 in the chapter on temporary movement of business people). The services chapter consequently deals only with cross-border trade in services (Modes 1 and 2). The investment chapter covers bilateral investment promotion and protection and defines basic MFN and national treatment disciplines on investment in both goods and services.

The Singapore–Australia agreement covers Mode 3 more traditionally in the services chapter. The difference between these two approaches is considered in Australian Government circles to be largely cosmetic. The inclusion of Mode 3 in the investment chapter serves to pad that chapter out. Clearly, however, the US approach, should it continue to become institutionalised, especially in agreements involving developed countries such as Australia, risks setting precedents which could have a

pre-emptive impact both on the structure of the GATS and on the modalities for future investment and government procurement negotiations in Geneva.

Through the generic investment disciplines, the Singapore–US agreement provides for a right of non-establishment – that is, there is no local presence requirement as a precondition to supply services. This is seen as a means of encouraging cross-border trade in services. Such a provision, for which no GATS equivalent exists, is thought to be well suited to promoting e-commerce.

The jury is out on whether these agreements, despite the claims of GATS-Plus, can serve effectively as benchmarks either for the Doha Round negotiations or for broader regional integration. New market access commitments are only truly GATS Plus if they are applied on an MFN rather than a preferential basis. As these recent agreements are implemented, we will see the extent to which participating governments choose to extend the commitments multilaterally and bind them in the GATS as part of the Doha Round outcome. It would be consistent with the rhetoric of ‘competitive liberalisation’ for the governments involved to take precisely such a step. Meanwhile, trade and investment diversion will apply in services just as it does in goods, with the effect of locking in new bilateral partnerships instead of seeking access to world’s best practice in services delivery.

Bilateral Benchmarks for the WTO – WTO Plus and WTO Minus

Irrespective of preparedness or capacity among developing countries on services related trade and investment related issues, East Asian nations, like Western Hemispheric nations, are now seemingly embarked on an unstoppable process of bilateral FTA trade negotiation. These Agreements, even those between developing countries, will inevitably cover at least some of the “new” issues, given the importance of services to all of these economies and given the WTO rules on comprehensiveness of FTA coverage .

It is critically important to ensure that new bilateral agreements – which seek increasingly to go beyond the WTO agreements and into uncharted territory, chiefly on the services trade and investment related front – set ambitious problem-solving benchmarks for the WTO rather than, accidentally or otherwise, undermining it. This is one of the most important trade policy challenges now facing not only this region but every other region of the globe.

Unfortunately, the reality of bilateral negotiation is that the larger, more powerful nation tends to win, and the wins reflect the particular market access objectives of that nation, not necessarily the most liberal outcome from a multilateral perspective. Ensuring that bilateral PTAs negotiated within the region set constructive rather than destructive benchmarks for the multilateral system will require considerable ongoing vigilance.

As described earlier, the GATS rule-making process is unfinished, with issues such as subsidies, safeguards and government procurement yet to be negotiated. There is multilateral controversy about whether new issues such as e-commerce and digital trade more generally should even be classified as services and hence be covered under the GATS.

To the extent that FTAs experiment with these issues, they will start to set powerful potential precedents for the WTO. Such precedents will no doubt automatically be described by the participating governments as ‘WTO Plus’ or ‘Beyond WTO’ outcomes. But this could prove to be a very misleading description because the political negotiating positions in Geneva into which such precedents will tend to lock FTA partners may not necessarily be constructive for the multilateral process. On the contrary, to the extent that future bilateral commitments are in fact ‘new’, they may have the effect of prejudging and foreclosing the multilateral debate in Geneva, especially if the FTA partners are politically strong players in the WTO. The outcomes would then better be described as ‘WTO Minus’ rather than ‘WTO Plus’.

And, since Cancun, any such outcomes should be clearly understood as having the potential, not to boost the WTO but on the contrary, to bring the Doha Round to its knees. Attempts to force export driven outcomes on the new issues, via the use of

bilateral bargaining clout, could prove enormously damaging to trust in the broader WTO process. The WTO had barely commenced any work on investment and competition policy. Yet these were the topics which escalated the tension to breaking point in Cancun. So the way in which these sorts of new issues are handled in FTAs, could kill or breathe new life into the associated WTO process.

Architectural Issues

The whole idea of a rules-based system is to protect the small and medium-sized countries. The largest, most powerful trading nations cannot set the multilateral trade rules alone. But to the extent that they can bilaterally pick off in FTAs those countries with different perspectives on negotiating issues in Geneva, they can enhance their overall negotiating power in the WTO. FTAs offer countries such as the United States a back door route to control of the negotiating agenda in Geneva.

The WTO architecture is based around the GATT, which covers goods trade, and the GATS, which covers trade in services. But the handling of new trade-related issues such as investment and competition policy, both of which are already covered to a degree within the GATS, raises architectural design questions for the WTO system as a whole.

To the extent that FTAs in the region start to reflect individual countries' negotiating preferences on unfinished rules issues or architectural design issues, such precedents are likely to prove powerful influences on the course of the debate in Geneva. This is highly likely to be the case, for example, for issues relevant to digital trade, where deep definitional debate remains to be resolved before substantive progress in rules making can be achieved in the WTO. The same is equally likely to prove to be the case with respect to investment and competition policy issues – indeed any issues where rule making in Geneva is still nascent.

Whenever bilateral precedents are set, they risk detracting from the debate in Geneva. Through FTA arrangements, the United States is clearly aiming to build a growing US-oriented negotiating alliance in Geneva, especially on digital issues. There is a danger that Japan will be tempted to follow suit in the agricultural arena.

Does this matter? Some commentators will argue that if the outcome is more liberalising than is proving possible in the WTO, then it does not matter. Especially post Cancun, they will argue that bilateral bullying into trade and investment liberalisation is precisely what the world economy needs. There is some historical evidence to cite in support of this view, in the largely MFN outcomes, for example, achieved by the United States bilateral bullying of East Asia before the Uruguay Round was launched. But the complacency of this view ignores the other half of the story. There is also historical evidence, for example, of a strong protectionist outcome, including the locking in of rents for defensive domestic US industry interests implicit in the proliferation in that same era of bilaterally imposed orderly marketing arrangements and “voluntary” export restrictions.

Assessing the Notion of “Competitive Liberalisation”

The doctrine of “competitive liberalisation” arises out of a pragmatic mix of geopolitical objectives and export driven market access interests. The notion is flawed, however, in the sense that its own various objectives are internally inconsistent. On the one hand, it recognises the importance of a demonstration effect and calls for negotiation of “good” world’s best practice “liberalising” FTAs. The notion of a “good” agreement is measured first against the currently very weak disciplines of the WTO rules on Regional Trade Agreements and second against a vague imperative to go “beyond the WTO” and achieve “WTO Plus”. Its effectiveness as a strategy is also presumably to be measured by what success it might have in encouraging other trading partners also into partial opening up through bilateral FTA arrangements or, alternatively and more constructively, back into the WTO negotiating arena.

But in order to achieve this desired outcome, the doctrine also implicitly suggests that bilateral partners should not be especially concerned about trade and investment diversion, the apparent virtue in these outcomes being that perceptions of loss on the part of outsiders whose interests are damaged by FTAs will act as a “competitive” incentive for those outsiders to come on board also as FTA or WTO partners.

Even if a “competitive” bilateral approach to trade liberalisation is successful in creating economic incentives, in the form of trade diversion, to attract in other bilateral players, no global economic gains will necessarily be forthcoming unless the liberalisation achieved is genuinely non-discriminatory or can genuinely and readily become multilateralised.

But the domestic politics associated with FTAs are complex, with local protectionist interests to defend, especially in infrastructural services. Dealing with market access issues in a repeated “competitive” reciprocal bilateral manner through negotiation of one FTA after another is unlikely to lead to agreements which can be broadened to include a progressively wider number of regional players. Bilateral market access deals, moreover, unless they also deal effectively with the competition policy environment, can create new opportunities for rent seeking. This can lead to ‘first-mover’ gains to particular firms, which then have a vested interest against the extension of the bilateral agreement to include other trading partners. The chances of individual developing countries, in particular, succeeding in negotiating consistent and complementary non-exclusive arrangements, allowing opportunities for eventual wider subregional participation, would seem to be extremely poor.

The chances are that discriminatory deals driven by offensive export interests will serve not to open up the world economy but to lock in inefficient rent-seeking, to build new political constituencies for protection, and to delay the process of genuine globalisation.

Conclusion

In assessing the “Third Wave” of bilateral FTAs, and Australia’s participation in them, it will be important not to jump automatically to the conclusion that if an FTA achieves commitments which go “beyond the WTO” in “new” areas such as services trade and investment, that the outcome is necessarily to be applauded. Precisely the opposite could well prove to be the case. Vigilance and impartial evaluation will remain essential to the pro-trade policy tool kit.

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