BALANCING REGULATORY AUTONOMY WITH LIBERALISATION OF TRADE IN SERVICES: AN ANALYTICAL ASSESSMENT OF AUSTRALIA'S OBLIGATIONS UNDER PREFERENTIAL TRADE AGREEMENTS

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Trade in services can take many forms (or 'modes'), such as cross border delivery, or delivery by a commercial presence in a foreign country. Unlike tariffs or quantitative restrictions on goods, which are imposed at the border, barriers to trade in services are more commonly found 'behind the border', through domestic regulation of services industries. This article reviews Australia's obligations to liberalise trade in services under its preferential trade agreements, against the background of its obligations under the World Trade Organization's General Agreement on Trade in Services *('*GATS*'). Australia has an evident desire to liberalise trade in services as well as sensibilities about domestic regulatory autonomy in the services context. The tension between these different interests is reflected in the ongoing development of Australia's treaty practice in this field. The article summarises core obligations and exceptions under Australia's treaties, highlighting the need for progressive liberalisation and the possibility and desirability of reducing some exceptions over time. The article distinguishes 'positive' and 'negative' list obligations and Australia's approach thereto, while also raising questions as to the consistency of Australia's preferential trade agreements with the* GATS*, particularly as regards '*GATS *minus' provisions.*

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I INTRODUCTION

> There are likely to be substantial gains from liberalizing trade in services, immediately and in the longer term provided the regulatory framework is adequate.[1]

> Producers gain from access to a larger market and higher prices, and consumers gain because they get access to both a wider variety of goods and services and to lower-priced imported goods and services.[2]

Trade liberalisation and sovereign regulatory autonomy are both important concepts to bear in mind — and to balance — in devising or evaluating a preferential trade agreement ('PTA'), and especially one that encompasses services. The relationship between liberalisation of trade in services and regulatory autonomy is complex and not necessarily linear. Thus, increased trade liberalisation does not necessarily correspond with decreased regulation or decreased autonomy: 'it is by now generally accepted that liberalization requires re-regulation or sometimes original regulation'.[3] Nor is regulatory autonomy an absolute good. Too much autonomy allowed under a services PTA (or other international trade agreement) may leave less scope for the agreement to have a positive impact on development and national and global welfare, in accordance with its underlying goals. A key difficulty therefore lies in ensuring that a state such as Australia has sufficient autonomy to regulate in the public interest (for example, to promote public health or protect the environment), without undermining the trade liberalisation (and corresponding welfare) objectives of a given PTA, or creating scope for abuse of those objectives in the name of regulatory autonomy.

In the multilateral context, the services agreement of the World Trade Organization (the *General Agreement on Trade in Services* ('*GATS*'))[4] aims, through a 'fine balance', 'to re-regulate domestic policy in order to establish competition and market access in service sectors without curtailing the freedom of members to regulate so as to meet national policy objectives'.[5] This balance is captured in the preamble to the *GATS*:

> *Wishing* to establish a multilateral framework of principles and rules for trade in services with a view to the expansion of such trade under conditions of transparency and *progressive liberalization* and as a means of promoting the

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1 Brian Copeland and Aaditya Mattoo, 'The Basic Economics of Services Trade' in Aaditya Mattoo, Robert M Stern and Gianni Zanini (eds), *A Handbook of International Trade in Services* (Oxford University Press, 2008) 84, 128.

2 Ibid 88–9.

3 Markus Krajewski, 'Domestic Regulation and Services Trade: Lessons from Regional and Bilateral Free Trade Agreements' in Pierre Sauvé and Martin Roy (eds), *Research Handbook on Trade in Services* (Edward Elgar, 2016) 216, 216. See also Aaditya Mattoo and Pierre Sauvé, 'The Preferential Liberalization of Services Trade: Economic Insights' in Pierre Sauvé and Anirudh Shingal (eds), *The Preferential Liberalization of Trade in Services: Comparative Regionalism* (Edward Elgar, 2014) 37, 45.

4 *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1B ('*General Agreement on Trade in Services*') ('*GATS*').

5 Jan Wouters and Dominic Coppens, '*GATS* and Domestic Regulation: Balancing the Right to Regulate and Trade Liberalization' in Kern Alexander and Mads Andenas (eds), *The World Trade Organization and Trade in Services* (Martinus Nijhoff, 2008) 207, 210.

> *economic growth* of all trading partners and the development of developing countries;
>
> *Desiring* the early achievement of *progressively higher levels of liberalization* of trade in services through successive rounds of multilateral negotiations aimed at promoting the interests of all participants on a mutually advantageous basis and at securing an overall *balance* of rights and obligations, while giving due respect to *national policy objectives*;[6]

Bregt Natens has used a case study of the European Union to investigate the relationship between trade in services and regulatory autonomy.[7] I adopt a comparable approach in this article, focusing on services aspects of Australia's PTAs. Natens emphasises the importance of services trade to the global economy, as services facilitate economic growth,[8] for example with '[t]ransport, logistics, finance, communication, other business, and professional services' all being 'prerequisites for global value chains'.[9] He also points out the heightened difficulty of balancing liberalisation and autonomy in the context of trade in services due to the wide scope of services and their extensive regulation,[10] which is often more difficult to identify, measure and assess than barriers to trade in goods such as tariffs.[11]

Before turning to the substantive aspects of Australia's PTAs on services, I note in Part II of this article that a number of areas are typically excluded from the scope of the core services chapter in Australia's PTAs. In Part III, I explain changes in Australia's approach to positive and negative lists in its PTAs over time, while also examining the inclusion of key services obligations in Australia's PTAs: national treatment, most favoured nation ('MFN') treatment, local presence, and domestic regulation. In Part IV, I summarise Australia's own services commitments in particular sectors (in positive list PTAs) and Australia's listed non-conforming measures (in negative list PTAs), taking particular note of the unusual approach of Australia's first services PTA: the *Protocol on Trade in Services to the Australia New Zealand Closer Economic Relations — Trade Agreement* ('*ANZCERTA Services Protocol*')[12] concluded in 1988. In Part V, I address the 'general exceptions' included in Australia's PTAs, as modelled on the general exceptions in *GATS* art XIV.

Although it is difficult to generalise from this brief survey, some patterns emerge. In particular, three services agreements appear to have played an important role in the development of Australia's PTAs, with other PTAs following and building on them: first, the *GATS*, typically understood as a 'positive list' agreement in which only those sectors listed are bound by

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6 *GATS* preamble paras 2–3 (emphasis altered).

7 Bregt Natens, *Regulatory Autonomy and International Trade in Services: The EU under* GATS *and RTAs* (Edward Elgar, 2016) 12.

8 Ibid 7. See also International Monetary Fund ('IMF'), 'World Bank and WTO, Making Trade an Engine of Growth for All: The Case for Trade and for Policies to Facilitate Adjustment' (Policy Paper, IMF, World Bank and WTO, 23–24 March 2017) [70].

9 Natens, above n 7, 8.

10 Ibid 8–9. See also Copeland and Mattoo, above n 1, 127.

11 Copeland and Mattoo, above n 1, 103–4.

12 *Protocol on Trade in Services to the Australia New Zealand Closer Economic Relations-Trade Agreement*, signed 18 August 1988, [1998] ATS 20 (entered into force 1 January 1989) ('*ANZCERTA Services Protocol*').

particular *GATS* obligations; secondly, the *Australia–United States Free Trade Agreement* ('*AUSFTA*'),[13] which adopts instead a 'negative list' approach according to which services and service sectors are covered by core obligations unless otherwise specified by the relevant party; and now, thirdly, the *Trans-Pacific Partnership* ('*TPP*'),[14] another negative list agreement that contains additional innovations and flexibilities. The use of *TPP* provisions in the amendments agreed to the *Singapore–Australia Free Trade Agreement* in 2016 ('*SAFTA*')[15] suggests that the *TPP* may play an important role in future negotiations and treaties of Australia and other *TPP* countries (and, indeed, non *TPP* countries), even though the entry into force of the TPP in its current form now appears impossible. In the future, the *Trade in Services Agreement* ('*TiSA*') — under negotiation among 23 WTO members including the EU representing its 28 member states (led by Australia, the EU and the United States, but now facing uncertainty following the election of President Donald Trump) — may take up a fourth influential role in the development of services PTAs.

My examination of the provisions and annexes of Australia's PTAs suggests that Australian negotiators have identified certain 'sensitive' areas and seek to protect Australia's regulatory autonomy in those areas, with an eye to future sensitivities as well. Australia's general shift towards negative rather than positive lists in its PTAs may be understood as an effort by Australia to encourage greater liberalisation among its trading partners in order to obtain further economic benefits from services trade, while the inclusion of strong non-conforming measures ('NCMs'), exceptions and exclusions from the scope of the core services chapter simultaneously enables preservation of policy space by both parties. Australia's awareness of community concerns about sectors such as social services appears to be reflected in the various mechanisms incorporated in Australia's services chapters in PTAs to avoid or soften particular obligations.[16] However, these concerns may be rooted in mercantilist impulses of the kind that PTAs and international trade law more generally are designed to overcome. Greater services liberalisation, with its attendant economic benefits, may require a scaling back of exceptions, exclusions and NCMs, the proliferation of which also raises questions in relation to *GATS* compatibility.

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[13] *Australia–United States Free Trade Agreement*, signed 18 May 2004, [2005] ATS 1 (entered into force 1 January 2005) ('*AUSFTA*').

[14] *Trans-Pacific Partnership*, text released following legal review 26 January 2016, signed 4 February 2016, [2016] ATNIF 2 (not in force) ('*TPP*').

[15] *Singapore–Australia Free Trade Agreement*, signed 17 February 2003, [2003] ATS 16 (entered into force 28 July 2003), as amended from 24 February 2006, 13 February 2007, 11 October 2007 and 2 September 2011 ('*SAFTA*'); *Agreement to Amend the Singapore–Australia Free Trade Agreement*, signed 13 October 2016 (entered into force 1 December 2017) ('*SAFTA 2016*').

[16] With respect to the low level of *GATS* commitments in health and social services, see Rudolf Adlung, 'The *GATS* Negotiations: Implications for Health and Social Services' (2003) 38 *Intereconomics* 147 ('Social Services').

II SCOPE OF SERVICES CHAPTERS IN AUSTRALIA'S PTAS

Australia's post-*GATS* PTAs follow *GATS* in excluding from (at least) the scope of their core services obligations: government procurement[17] and services supplied in the exercise of governmental authority.[18] These PTAs also exclude from their services chapters subsidies or grants.[19] In contrast, although the *GATS* contains no specific subsidies disciplines,[20] subsidies are not excluded from other *GATS* obligations such as non-discrimination.[21] Australia's only PTA predating the *GATS* is the *ANZCERTA Services Protocol*, which excludes government procurement and subsidies from the national treatment obligation[22] and also does not apply to taxation measures.[23] Australia's other PTAs take a more nuanced approach to taxation measures, while providing that they do not apply to taxation measures except to the limited extent specified.[24] Negative list PTAs generally apply national treatment and MFN treatment obligations under the core services chapter to taxation measures in some circumstances,[25] while the 2016 amendments to *SAFTA* provide for only national treatment to apply to

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17 *GATS* art XIII:1; *Australia–Thailand Free Trade Agreement*, signed 5 July 2004, [2004] ATS 2 (entered into force 1 January 2005) art 803.2(c) ('*TAFTA*'); *AUSFTA* art 10.1.4(b); *Australia–Chile Free Trade Agreement*, signed 30 July 2008, [2009] ATS 6 (entered into force 6 March 2009) art 9.2.3(b) ('*ACIFTA*'); *Agreement Establishing the ASEAN–Australia–New Zealand Free Trade Area*, signed 27 February 2009, [2010] ATS 1 (entered into force 1 January 2010), as amended by the *First Protocol to Amend the Agreement Establishing the ASEAN–Australia–New Zealand Free Trade Area*, signed 26 August 2014, [2015] ATS 14 (entered into force 1 October 2015) ch 8 art 1.4(a) ('*AANZFTA*'); *Malaysia–Australia Free Trade Agreement*, signed 22 May 2012, [2013] ATS 4 (entered into force 1 January 2013) art 8.1.4(b) ('*MAFTA*'); *Korea–Australia Free Trade Agreement*, signed 8 April 2014, [2014] ATS 43 (entered into force 12 December 2014) art 7.1.3(b) ('*KAFTA*'); *Agreement between Australia and Japan for an Economic Partnership*, signed 8 July 2014, [2014] ATS 43 (entered into force 15 January 2015) art 9.1.2(b) ('*JAEPA*'); *Free Trade Agreement between the Government of Australia and the Government of the People's Republic of China*, signed 17 June 2015, [2015] ATS 15 (entered into force 20 December 2015) art 8.1.2(b) ('*ChAFTA*'); *TPP* art 10.2.3(b); *SAFTA 2016* ch 7 art 2.3(d).

18 *GATS* art I:3(b); *TAFTA* art 803.2(b); *AUSFTA* art 10.1.4(e); *ACIFTA* art 9.2.3(d); *AANZFTA* ch 8 art 1.4(c); *MAFTA* art 8.1.4(a); *KAFTA* art 7.1.5; *JAEPA* art 9.1.2(e); *ChAFTA* art 8.1.2(c); *TPP* art 10.2.3(c); *SAFTA 2016* ch 7 art 2.3(c).

19 *TAFTA* art 803.2(a); *AUSFTA* art 10.1.4(d); *ACIFTA* art 9.2.3(c); *AANZFTA* ch 8 art 1.4(b); *MAFTA* art 8.1.4(c); *KAFTA* art 7.1.3(c); *JAEPA* art 9.1.2(c); *ChAFTA* art 8.1.2(d); *TPP* art 10.2.3(d); *SAFTA 2016* ch 7 art 2.3(b).

20 *GATS* art XV.

21 See, eg, WTO, Trade in Services, *Guidelines for the Scheduling of Specific Commitments under the* General Agreement on Trade in Services *(*GATS*)*, WTO Doc S/L/92 (28 March 2001) (Explanatory Note) [16] ('*Scheduling Guidelines*'); Rudolf Adlung, 'Export Policies and the General Agreement on Trade in Services' (2015) 18 *Journal of International Economic Law* 487, 501; Markus Krajewski, 'Public Services and Trade Liberalization: Mapping the Legal Framework' (2003) 6 *Journal of International Economic Law* 341, 361. Australia also recognises the existence of national treatment disciplines for subsidies, for example by scheduling 'unbound' for research and development subsidies under mode 3: GATS, *Australia: Schedule of Specific Commitments*, WTO Doc GATS/SC/6 (15 April 1994) 2 (horizontal commitments).

22 *ANZCERTA Services Protocol* art 5.4.

23 Ibid art 15.

24 *TAFTA* art 1607.1; *AUSFTA* art 22.3.1; *ACIFTA* art 22.3.1; *AANZFTA* ch 15 art 3.1; *MAFTA* art 18.3.1; *KAFTA* art 22.3.1; *JAEPA* art 1.8.1; *ChAFTA* art 16.4.2; *TPP* art 29.4.2; *SAFTA 2016* ch 17 art 3.2.

25 *AUSFTA* art 22.3.4(a)–(b); *ACIFTA* art 22.3.4(a)–(b); *KAFTA* art 22.3.2(b)–(c); *JAEPA* art 1.8.2(c)–(d); *TPP* art 29.4.6(a)–(b).

taxation measures.[26] Some PTAs provide for rights and obligations to be imposed regarding taxation measures to the extent applicable under a WTO agreement[27] and also in some instances under other PTA provisions (eg regarding investment).[28]

These limitations on the scope of the core services chapter in Australia's PTAs grant additional leeway to the parties in regulating services (although some other obligations may apply under separate chapters on government procurement etc). For example, government procurement may make up a large portion of services transactions in a given country. Governments may also be able to use taxation measures and subsidies as effective tools to achieve their regulatory goals in the services sector or potentially as tools of protectionism. The relatively limited variation among Australia's PTAs in relation to these exclusions may suggest that Australia has no intention to remove them on the path to progressively greater liberalisation in services trade, such that they represent significant scope for regulatory autonomy (or to put it differently, protectionism and discrimination) in relation to government procurement, taxation and subsidies, even if the depth and breadth of services obligations increase.

III CORE SERVICES OBLIGATIONS IN AUSTRALIA'S PTAS

A *Non-Discrimination, Market Access and Local Presence: Listing and Modes*

In understanding Australia's PTA obligations with respect to particular service sectors, we must first comprehend the concept of negative and positive listing approaches. The MFN rule in *GATS* art II adopts a typical negative list approach, whereby all measures covered by *GATS* are subject to the rule except to the extent that a WTO member has listed a relevant MFN exemption:

> 1 With respect to any measure covered by this Agreement, each Member shall accord immediately and unconditionally to services and service suppliers of any other Member *treatment no less favourable* than that it accords to like services and service suppliers of *any other country*.
>
> 2 A Member may maintain a measure inconsistent with paragraph 1 provided that such a *measure is listed in*, and meets the conditions of, the Annex on Article II Exemptions.[29]

In contrast, the market access and national treatment obligations under *GATS* adopt a positive list approach, whereby they apply only in the sectors listed in the relevant member's *GATS* Schedule, and subject to any limitations listed in the Schedule:

> With respect to *market access* through the modes of supply identified in Article I, each Member shall accord services and service suppliers of any other Member

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26 *SAFTA 2016* ch 17 art 3.3.
27 *TAFTA* art 1607.1(a); *AANZFTA* ch 15 art 3.2(a); *ChAFTA* art 16.4.3.
28 *AANZFTA* ch 15 art 3.2(b)–(c); *MAFTA* art 18.3.2(b)–(c); *SAFTA 2016* ch 17 art 3.3.
29 *GATS* art II (emphasis added).

> treatment no less favourable than that provided for under the terms, limitations and conditions agreed and specified in its Schedule.[30]
>
> In the sectors inscribed in its Schedule, and subject to any conditions and qualifications set out therein, each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, *treatment no less favourable* than that it accords to its *own like services and service suppliers*.[31]

Among Australia's PTAs, as shown in Table 1, only the *ANZCERTA Services Protocol* entered into force before *GATS*, and it adopts what may be understood as the opposite approach: a negative list[32] for market access[33] and national treatment[34] and a positive list for MFN.[35] This agreement has been credited as the first PTA adopting a negative list approach for trade in services in the absence of an investment chapter, before both services and investment being taken up in the *North American Free Trade Agreement*.[36] In contrast, like *GATS*, the *Australia–Thailand Free Trade Agreement* ('*TAFTA*'), *Agreement Establishing the ASEAN–Australia–New Zealand Free Trade Area* ('*AANZFTA*'), and *Malaysia–Australia Free Trade Agreement* ('*MAFTA*') all adopt a positive list approach for market access[37] and national treatment,[38] although they lack a traditional MFN obligation.[39] Most other Australian PTAs adopt a negative list approach for MFN (where an MFN obligation is included),[40] market access,[41] and national treatment.[42] The exception is the *Free Trade Agreement between Australia and the People's Republic of China* ('*ChaFTA*'), signed 17 June 2015, in which, unusually, Australia adopts a negative list approach[43] and China adopts a positive list approach.[44] As in the

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30 Ibid art XVI:1 (emphasis added) (footnotes omitted).

31 Ibid art XVII:1 (emphasis added) (footnotes omitted).

32 The negative list approach is effected through a general annex removing certain services from the scope of the agreement: *ANZCERTA Services Protocol* art 2.4: 'Except as otherwise provided in particular Articles, this Protocol shall not apply to the provision within or into the territory of one Member State of the services inscribed by that Member State in the Annex until such time as such services inscribed by it have been removed from the Annex in accordance with Article 10 of this Protocol'.

33 *ANZCERTA Services Protocol* art 4.

34 Ibid art 5.1.

35 Ibid art 6.

36 Aaditya Mattoo and Pierre Sauvé, 'Services' in Jean-Pierre Chauffour and Jean-Christophe Maur (eds), *Preferential Trade Agreement Policies for Development: A Handbook* (World Bank, 2011) 235, 251; *North American Free Trade Agreement*, signed 17 December 1992, 32 ILM 289 (entered into force 1 January 1994).

37 *TAFTA* art 809.1; *AANZFTA* ch 8 art 4; *MAFTA* art 8.5.1.

38 *TAFTA* art 810.1; *AANZFTA* ch 8 art 3.1; *MAFTA* art 8.3.1.

39 *AANZFTA* provides for a consultative process in relation to most favoured nation ('MFN') treatment: ch 8 art 7.

40 *AUSFTA* arts 10.3, 10.6; *ACIFTA* arts 9.4, 9.7; *KAFTA* arts 7.3, 7.6; *JAEPA* arts 9.5, 9.7; *TPP* arts 10.4, 10.7.1, 10.7.2; *SAFTA 2016* ch 7 arts 5, 7.1, 7.2.

41 *AUSFTA* arts 10.4, 10.6; *ACIFTA* arts 9.5, 9.7; *KAFTA* arts 7.4, 7.6; *JAEPA* arts 9.3, 9.7; *TPP* arts 10.5, 10.7.1, 10.7.2; *SAFTA 2016* ch 7 arts 3, 7.1, 7.2.

42 *AUSFTA* arts 10.2, 10.6; *ACIFTA* arts 9.3, 9.7; *KAFTA* arts 7.2.1, 7.6; *JAEPA* arts 9.4.1, 9.7; *TPP* arts 10.3.1, 10.7.1, 10.7.2; *SAFTA 2016* ch 7 arts 4, 7.1, 7.2.

43 *ChAFTA* arts 8.9, 8.12.1, 8.11, 8.10.1.

44 Ibid arts 8.4, 8.7.1, 8.6.1, 8.5.1.

investment chapter of *ChAFTA*, the *ChAFTA* provision for review of the services chapter specifies that the 'next round of the negotiation on trade in services' is to be conducted 'in the form of negative listing approach'.[45] In March 2017 the parties indicated their intention to commence the services and investment reviews in 2017.[46] The proposed approach for *TiSA* is also unusual in the context of Australian PTAs, but perhaps less so in the context of *GATS*; *TiSA* is proposed to adopt a negative list approach for MFN and a positive list approach for market access (both as in *GATS*) but moves to a negative list approach for national treatment.[47]

The *GATS* provisions generally apply to all four modes of service supply (mode 1: cross border supply by a supplier into the consumer's territory;[48] mode 2: consumption by a consumer abroad;[49] mode 3: commercial presence, ie local presence;[50] mode 4: presence of natural persons, where the supplier rather than the consumer moves).[51] *GATS* also includes annexes on specific sectors such as financial services and telecommunications. Some of Australia's PTAs follow this four-mode approach.[52] Several of Australia's (especially newer, negative list focused) PTAs contain a core services chapter targeting 'cross border' trade in services[53] (defined to include modes 1, 2 and 4 but not 3)[54] while they and other Australian PTAs contain separate provisions or chapters regarding telecommunications,[55] financial services,[56] electronic commerce,[57] and movement of natural persons.[58]

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45 Ibid art 8.24.3.

46 Australian Government, Department of Foreign Affairs and Trade, *Declaration of Intent by the Government of Australia and the Government of the People's Republic of China Regarding Review of Elements of the China–Australia Free Trade Agreement* (24 March 2017) <http://dfat.gov.au/trade/agreements/chafta/official-documents/Documents/declaration-of-intent-review-elements-chafta.pdf>, archived at <https://perma.cc/EM6K-CN6J>.

47 Australian Government, Department of Foreign Affairs and Trade, Trade in Services Agreement *(*TiSA*) Scheduling Approach* <http://dfat.gov.au/trade/agreements/trade-in-services-agreement/Pages/tisa-scheduling-approach.aspx>, archived at <https://perma.cc/D4B2-QT23>; Wikileaks, Trade in Services Agreement *Core Text* (1 July 2015) 4 <https://wikileaks.org/tisa/core/>, archived at <https://perma.cc/TV3L-TGMT> (24 April 2015 draft text).

48 *GATS* art I:2(a): supply of a service 'from the territory of one Member into the territory of any other Member'.

49 Ibid art I:2(b): supply of a service 'in the territory of one Member to the service consumer of any other Member'.

50 Ibid art I:2(c): supply of a service 'by a service supplier of one Member, through commercial presence in the territory of any other Member'.

51 Ibid art I:2(d): supply of a service 'by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member'.

52 *TAFTA* art 802(i); *AANZFTA* ch 8 art 2(s); *MAFTA* art 8.2(o); *JAEPA* art 9.2(n); *ChAFTA* art 8.2(x).

53 *AUSFTA* ch 10; *ACIFTA* ch 9; *KAFTA* ch 7; *TPP* ch 10; *SAFTA 2016* ch 7.

54 *AUSFTA* art 10.14.1; *ACIFTA* art 9.1(d); *KAFTA* art 7.13; *TPP* art 10.1; *SAFTA 2016* ch 7 art 1.

55 *AUSFTA* ch 12; *MAFTA* ch 9; *ACIFTA* ch 11; *AANZFTA* ch 8 annex on telecommunications; *KAFTA* ch 9; *JAEPA* ch 10; *TPP* ch 13; *SAFTA* ch 10. Cf *ChAFTA* art 8.19.

56 *AUSFTA* ch 13; *MAFTA* ch 8 annex on financial services; *ACIFTA* ch 12; *AANZFTA* ch 8 annex on financial services; *KAFTA* ch 8; *JAEPA* ch 11; *ChAFTA* annex 8–B; *TPP* ch 11; *SAFTA* ch 9.

The separation of mode 3 in many of Australia's PTAs may indicate a greater level of comfort with modes 1, 2 and 4 of trading services (and particularly mode 1, which is most easily analogous to trade in goods (supply across borders)), leaving mode 3 to be dealt with as an investment as discussed further below. Sensitivities (connected with migration issues) that are reflected in limited *GATS* commitments with respect to mode 4[59] can be separately addressed in a PTA chapter on movement of natural persons. Similarly, technicalities and sector specific concerns in relation to telecommunications, electronic commerce and financial services can also be separately addressed with dedicated PTA chapters.

The Australian PTAs containing core services chapters that exclude mode 3 include an additional (negative list) obligation with regard to local presence, first exemplified in the *AUSFTA*:

> Neither Party may require a service supplier of the other Party to establish or maintain a representative office or any form of enterprise, or to be resident, in its territory as a condition for the cross-border supply of a service.[60]

This obligation builds on the *GATS*, which imposes various disciplines on residency requirements and registration requirements (eg domestic regulation obligations under art VI:5), particularly if discriminatory and in the face of full commitments under mode 1 (ie national treatment obligations under art XVII).[61]

Before the *AUSFTA*, the *ANZCERTA Services Protocol* took a slightly different approach, providing a more restricted obligation in relation to local presence requirements that draws on language from the chapeau of the *General Agreement on Tariffs and Trade* ('*GATT*') art XX and *GATS* art XIV:

> Discriminatory or restrictive measures
>
> Notwithstanding that such measures may be consistent with Articles 4, 5, 6 and 7 of this Protocol, neither Member State shall introduce any measure, including a measure requiring the establishment or commercial presence by a person of the other Member State in its territory as a condition for the provision of a service, *that constitutes* a means of arbitrary or unjustifiable discrimination against persons of the other Member State or a disguised restriction on trade between them in services.[62]

The *Agreement between Australia and Japan for an Economic Partnership* ('*JAEPA*') also applies a local presence prohibition to all modes of supply apart from mode 3 (commercial presence),[63] which by definition requires local presence.

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57 *TAFTA* ch 11; *AUSFTA* ch 16; *ACIFTA* ch 16; *AANZFTA* ch 10; *MAFTA* ch 15; *KAFTA* ch 15; *JAEPA* ch 13; *ChAFTA* ch 12; *SAFTA* ch 14; *TPP* ch 14.

58 *TAFTA* ch 10; *AANZFTA* ch 9; *MAFTA* ch 10; *KAFTA* ch 10; *JAEPA* ch 12; *ChAFTA* ch 10; *SAFTA* ch 11. See also *ACIFTA* ch 13; *TPP* ch 12.

59 *Presence of Natural Persons (Mode 4)*, WTO Doc S/C/W/301 (15 September 2009) (Background Note by the Secretariat) [74]; *Regulatory Issues in Sectors and Modes of Supply*, WTO Doc S/WPDR/W/48 (13 June 2012) (Note by the Secretariat) [282]–[283] ('*Regulatory Issues*').

60 *AUSFTA* art 10.5. See also *ACIFTA* art 9.6; *KAFTA* art 7.5; *TPP* art 10.6; *SAFTA 2016* ch 7 art 6.

61 See, eg, *Scheduling Guidelines*, WTO Doc S/L/92, 6 [14], 16–17.

62 *ANZCERTA Services Protocol* art 8 (emphasis added).

63 *JAEPA* art 9.6 note.

Australia's PTAs also deal in different ways with the overlapping nature of services and investment, in the sense that the supply of services through mode 3 (commercial presence) normally involves foreign investment. This link is important[64] because of the large proportion of trade in services that occurs via mode 3: according to a 2009 WTO Secretariat estimate mode 3 accounts for 'approximately 55–60 per cent of all services trade falling under the GATS', while foreign direct investment ('FDI') in services accounts for 'about two-thirds of FDI inflows worldwide'.[65] For Australia, data for 2014–2015 shows most majority foreign owned affiliates operating in the services sector.[66] The link between investment and mode 3 services trade is more pronounced in Australia's PTAs than in the WTO agreements because of the inclusion of significant investment obligations in most of these PTAs, and particularly where investor–state dispute settlement ('ISDS') is included. In contrast, the WTO's *Agreement on Trade-Related Investment Measures* ('*TRIMS Agreement*')[67] is confined to merchandise trade and contains only minimal investment protections such as a national treatment requirement with respect to trade related investment measures.[68]

Under *MAFTA*, certain investment provisions in ch 12 (including the minimum standard of treatment and expropriation) 'apply, *mutatis mutandis*, to' mode 3 services, 'but only to the extent that any such measure relates to a covered investment and an obligation under this Chapter, regardless of whether such a service sector is scheduled in a Party's Schedule of Specific Services Commitments'.[69] *AANZFTA* adopts a similar approach, while also allowing ISDS in respect of mode 3 services supply.[70] In contrast, the *SAFTA* amendments agreed in 2016 explicitly state, '[f]or greater certainty', that nothing in the services chapter is subject to ISDS.[71] The *TPP* explicitly excludes from ch 10 (on Cross Border Trade in Services) 'the supply of a service in the territory of a Party by a covered investment' (that is, the supply of a service through mode 3

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64 See generally Rudolf Adlung, 'International Rules Governing Foreign Direct Investment in Services: Investment Treaties versus the *GATS*' (2016) 17 *Journal of World Investment & Trade* 47; Martín Molinuevo, *Protecting Investment in Services: Investor–State Arbitration versus WTO Dispute Settlement* (Kluwer Law International, 2012).

65 *Regulatory Issues*, WTO Doc S/WPDR/W/48 (13 June 2012) [269]. See also United Nations Conference on Trade and Development, *World Investment Report 2015: Reforming International Investment Governance*, UN Doc UNCTAD/WIR/2015 (2015) 12.

66 Department of Foreign Affairs and Trade, Australian Government, 'International Investment Australia 2015' (Report, November 2016) 22–3 <http://dfat.gov.au/about-us/publications/Documents/international-investment-australia.pdf>, archived at <https://perma.cc/4X56-ZZ34>.

67 *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1A ('*Agreement on Trade-Related Investment Measures*') ('*TRIMS Agreement*').

68 Ibid art 2.1.

69 *MAFTA* art 12.3.2.

70 *AANZFTA* ch 8 art 22.2(f).

71 *SAFTA 2016* ch 7 n 1.

(commercial presence),[72] to the extent that this amounts to a covered investment).[73]

Table 1: Non-Discrimination, Market Access and Local Presence in Australia's PTAs

Treaty	Entry into force	MFN	Market access	National treatment	Local presence
ANZCERTA Services Protocol	1989	positive list	negative list	negative list	negative list
GATS	1995	negative list	positive list	positive list	×
SAFTA original	2003	×	negative list	negative list	×
TAFTA	2005	×	positive list	positive list	×
AUSFTA	2005	negative list	negative list	negative list	negative list
ACIFTA	2009	negative list	negative list	negative list	negative list
AANZFTA	2009	×	positive list	positive list	×
SAFTA amended	2011	×	negative list	negative list	×
MAFTA	2013	×	positive list	positive list	×
KAFTA	2014	negative list	negative list	negative list	negative list
JAEPA	2015	negative list	negative list	negative list	negative list
CHAFTA	2015	Australia: negative list China: positive list	Australia: negative list China: positive list	Australia: negative list China: positive list	×
TPP	–	negative list	negative list	negative list	negative list
SAFTA	–	negative list	negative list	negative	negative

[72] *TPP* art 10.1 (definition of 'cross border trade in services or cross border supply of services').

[73] Cf *Comprehensive Economic Trade Agreement*, European Union–Canada, signed 30 October 2016 (entered into force 21 September 2017) ('*CETA*') art 9.1: definition of 'cross border trade in services or cross border supply of services' to cover only modes 1 and 2. *CETA* has entered into force provisionally. See also the discussion in Natens, above n 7, 325.

2016				list	list
TiSA	–	negative list	positive list	negative list	negative list

In my view, a negative list approach is inherently more liberalising than a positive list approach because everything is covered unless otherwise specified.[74] In theory, a negative or positive list approach could be used to achieve the same outcomes, and the negotiating dynamics and bargains reached may affect the resulting liberalisation more than the listing approach.[75] The distinction between negative and positive lists is also admittedly somewhat artificial, since a listing of sectors covered typically also includes limitations, conditions or reservations to that coverage.[76] However, behavioural analysis tentatively suggests that factors such as framing effects and status quo bias may make negative lists more conducive to liberalisation.[77] More importantly, a negative list is more likely to cover 'new' services, as technology develops (unless a reservation covering future NCMs is allowed), whereas a positive list may not;[78] in that sense a negative list approach is automatically progressive.

Under the *GATS*, for example, some WTO members have undertaken commitments for services sectors that lack specific sub-sector categories under the commonly used *GATS* classification (such as 2.E 'Communication Services: Other' and 4.E 'Distribution Services: Other'),[79] meaning that future communication or distribution services not mentioned in other categories would be covered. The proper interpretation and application of a given PTA (or *GATS* Schedule) may also sometimes enable coverage of unspecified services in a positive list setting. In *China — Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, the Appellate Body held that China's commitment in respect of the distribution of sound recordings extended to electronic distribution;[80] a different approach to the evolution of *GATS* commitments could have led to a gradual

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74 See, eg, Productivity Commission, Australian Government, 'Bilateral and Regional Trade Agreements: Productivity Commission Research Report' (Research Report, November 2010) 73 <http://www.pc.gov.au/inquiries/completed/trade-agreements/report/trade-agreements-report.pdf>, archived at <https://perma.cc/KHU5-SZK6>.

75 Rudolf Adlung and Hamid Mamdouh, 'How to Design Trade Agreements in Services: Top Down or Bottom-Up?' (2014) 48 *Journal of World Trade* 191, 216. See also Tomer Broude and Shai Moses, 'The Behavioural Dynamics of Positive and Negative Listing in Services Trade Liberalization: A Look at the *Trade in Services Agreement* (*TiSA*) Negotiations' in Pierre Sauvé and Martin Roy (eds), *Research Handbook on Trade in Services* (Edward Elgar, 2016) 385, 411.

76 Broude and Moses, above n 75, 392, referring to Adlung and Mamdouh, above n 75.

77 Broude and Moses, above n 75, 390, 395–7.

78 Mattoo and Sauvé, 'Services', above n 36, 253.

79 *Services Sectoral Classification List*, WTO Doc MTN.GNS/W/120 (10 July 1991) (Note by the Secretariat) 4.

80 Appellate Body Report, *China — Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WTO Doc WT/DS363/AB/R, AB-2009-3 (21 December 2009, adopted 19 January 2010) [396]–[397], [408] ('*China — Publications and Audiovisual Products*').

reduction in the scope of commitments, particularly in dynamic sectors such as telecommunications and other technology related services.[81]

Australia's overall move away from a positive list approach and towards a negative list approach can be understood in principle as increasing the liberalising effect of Australia's PTAs in relation to services. However, the premise of a negative list may encourage negotiators to list more exempted measures than they otherwise might, in order to avoid accidentally making greater commitments than intended in particular sectors. Thus, in particular cases, a negative list approach may end up being less liberalising than a positive list approach;[82] that is the risk of endless NCMs.

Australia appears to have a clear preference for negative listing (modified in *TiSA* in response to other parties' preferences),[83] and its experience with this approach makes it easier for it to apply such an approach.[84] For other countries without treaty practice embracing the negative list, the review necessary to allow the listing of NCMs can be significant and burdensome, particularly for developing countries.[85] However, by encouraging PTA partners to engage in such an exercise, Australia may pursue several benefits in connection with transparency. To begin with, listing Australia's NCMs (such as those mentioned below) provides a basis for pointing to areas of concern for the Australian community that are explicitly carved out of the agreement or of particular obligations (increasing the chances of community acceptance of the agreement). Moreover, a list of NCMs of PTA partners, particularly an extensive list, can provide a basis for Australia to seek further liberalisation in subsequent reviews of the PTA or new PTAs encompassing the same parties (much as the process of 'tariffication' — that is, conversion of import quotas to tariffs — in the Uruguay Round was said to provide a clearer basis for progressive reduction of tariffs in future rounds).[86] The same applies to Australia: the list of NCMs may be usefully whittled down over time to facilitate international trade in services for the overall benefit of Australian consumers and service suppliers, where certain NCMs are not considered necessary for the protection of regulatory autonomy.

B *Domestic Regulation*

Australia's PTAs address the different components of the domestic regulation provisions in *GATS* art VI in different ways, including in some cases through broader transparency provisions in a separate chapter on transparency (which is also covered separately in *GATS* art III). Below I show the extent to which Australia's PTAs maintain four key aspects of *GATS* art VI, as summarised in

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81 See Tania Voon, 'Introductory Note to WTO Appellate Body Report: *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*' (2010) 49 *International Legal Materials* 516, 517.

82 Mattoo and Sauvé, 'Services', above n 36, 252; Broude and Moses, above n 75, 398.

83 See Daniel Pruzin, 'Punke Cites Positive Movement in Geneva Talks on Services, ITA', *International Trade Daily* (online), 27 September 2012 <http://news.bna.com>, referring to the EU preference for a positive list; Broude and Moses, above n 75, 409, referring to the compromise proposed by the co-leaders Australia, the EU and the US.

84 Broude and Moses, above n 75, 405.

85 Ibid 406; Mattoo and Sauvé, 'Services', above n 36, 253.

86 See, eg, John H Jackson, *The World Trading System: Law and Policy of International Economic Relations* (MIT Press, 2nd ed, 1997) 140.

Table 2. To some degree the extent of alignment with *GATS* corresponds with whether the PTA takes a positive list approach to the national treatment and market access obligations, as in the *GATS* (see above Table 1). Those PTAs tend to follow *GATS* in limiting certain obligations to sectors or services in relation to which the relevant party has made 'specific commitments' (ie national treatment, market access or additional commitments). That approach makes less sense for negative list PTAs, since they do not generally have explicit commitments to particular sectors or services. Since the domestic regulation obligations are not generally limited to particular sectors or services in negative list PTAs, those PTAs have sometimes adopted alternative means of ensuring regulatory flexibility in the face of these procedural requirements, such as subjecting them to listed NCMs.

Beginning with the positive list PTAs, the *ANZCERTA Services Protocol* does not contain the *GATS* art VI provisions, having been concluded in 1988 (well before the *GATS* entered into force in 1995). However, the *ANZCERTA Services Protocol* does contain general obligations concerning licensing and certification,[87] transparency,[88] and notification.[89]

TAFTA incorporates *GATS* art VI:1, 2, 3, 5 and 6 by way of reference.[90] The other positive list PTAs tend to mirror the wording of *GATS* art VI. Article VI:1 provides that, '[i]n sectors where specific commitments are undertaken, each Member shall ensure that all measures of general application affecting trade in services are administered in a reasonable, objective and impartial manner'.[91] This general requirement can be understood as being parallel to *GATT* art X:3(a), which requires each WTO Member to 'administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings of the kind described in paragraph 1 of this Article', being '[l]aws, regulations, judicial decisions and administrative rulings of general application' pertaining to matters such as customs valuation, tariffs, taxes, restrictions on imports or exports, or affecting sale, distribution, transportation etc.[92]

AANZFTA and *MAFTA* (also positive list PTAs) adopt the *GATS* art VI:1 wording,[93] meaning that the requirement of reasonable, objective and impartial administration applies only to measures of general application, and only to sectors in which the relevant member has made specific commitments (ie national treatment or market access commitments). Somewhat strangely, *ChAFTA* also adopts this language,[94] even though Australia (unlike China) has a negative list approach to national treatment and market access under *ChAFTA*. Presumably, for Australia under *ChAFTA*, the requirement of reasonable,

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87 *ANZCERTA Services Protocol* art 9.

88 Ibid art 13.

89 Ibid art 16.

90 *TAFTA* art 807.

91 See generally Andrew Mitchell and Tania Voon, 'Reasonableness, Impartiality and Objectivity' in Aik Hoe Lim and Bart De Meester (eds), *WTO Domestic Regulation and Services Trade: Putting Principles into Practice* (Cambridge University Press, 2014) 65.

92 *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1A ('*General Agreement on Tariffs and Trade 1994*') art X:1.

93 *AANZFTA* ch 8 art 10.1; *MAFTA* art 8.9.1.

94 *ChAFTA* art 8.13.1.

objective and impartial administration applies to measures of general application in any service sector that has not been completely eliminated in Australia's NCMs lists in Annex IIIA or IIIB.

Among the negative list PTAs, the *Australia–Chile Free Trade Agreement* ('*ACIFTA*'), *JAEPA*, *TPP* and the *SAFTA* amendments agreed in 2016 adopt the *GATS* art VI:1 language, but without the restriction to sectors in which specific commitments are made,[95] which is logical as that reference makes more sense for positive list PTAs. However, all *SAFTA*'s domestic regulation obligations are subject to the NCMs listed in Annexes 4–I and 4–II,[96] with the *TPP* taking an analogous approach.[97] The *ANZCERTA Services Protocol c*ontains no obligation corresponding to *GATS* art VI:1 (which, as noted above, did not exist when the *Protocol* was concluded). The *Korea–Australia Free Trade Agreement* ('*KAFTA*') contains a broader obligation to this effect in the transparency chapter.[98] The *AUSFTA* contains specific obligations of reasonable, objective and impartial administration of measures in the telecommunications[99] and financial services[100] settings. The *AUSFTA* transparency chapter imposes on each party a more limited general obligation to provide notice and an opportunity to present arguments to administrative agencies '*[w]ith a view to* administering its laws, regulations, procedures, and administrative rulings of general application … in a consistent, impartial and reasonable manner'.[101]

Table 2: Domestic Regulation Requirements in Australia's PTAs

<table>
<tr><th></th><th>reasonable, objective, impartial administration</th><th>judicial, arbitral or administrative tribunals or procedures</th><th>procedures regarding application for authorisation to supply service</th><th>criteria regarding qualification requirements and procedures, technical standards and licensing requirements</th></tr>
<tr><td colspan="5">Positive lists for market access and national treatment:</td></tr>
<tr><td>ANZCERTA Services Protocol</td><td>×</td><td>×</td><td>×</td><td>×</td></tr>
<tr><td>GATS</td><td rowspan="4">where specific commitments made</td><td rowspan="3">✓</td><td rowspan="4">where specific commitments made</td><td rowspan="4">where specific commitments made</td></tr>
<tr><td>TAFTA</td></tr>
<tr><td>AANZFTA</td></tr>
<tr><td>MAFTA</td><td>in transparency chapter</td></tr>
</table>

95 *ACIFTA* 9.8.1; *JAEPA* art 9.8.1; *TPP* art 10.8.1; *SAFTA* ch 7 art 11.1.
96 *SAFTA 2016* ch 7 art 7.3.
97 *TPP* art 10.8.8.
98 *KAFTA* art 19.3.1.
99 *AUSFTA* art 12.22(c).
100 Ibid art 13.11.2.
101 Ibid art 20.4 (emphasis added).

ChAFTA[102]		✓		
Negative lists for market access and national treatment:				
AUSFTA	in transparency, telecommunications and financial services chapters	in transparency chapter	subject to NCMs in annex II	endeavour only
ACIFTA	✓		✓	✓
KAFTA	in transparency chapter		subject to NCMs in annex II	endeavour only
JAEPA	✓	✓	✓	✓
TPP	subject to NCMs in both annexes	in transparency chapter	subject to NCMs in both annexes	endeavour only; subject to NCMs in both annexes
SAFTA 2016		subject to NCMs in annexes 4–I/II		

The second key aspect of *GATS* art VI is the requirement in art VI:2 (not limited to sectors in which commitments have been made) to 'maintain or institute as soon as practicable judicial, arbitral or administrative tribunals or procedures' to allow for prompt review and remedies for 'administrative decisions affecting trade in services'.[103] All of Australia's PTAs apart from the *ANZCERTA Services Protocol* contain the same or a similar requirement, in either their services chapter[104] or their transparency chapter.[105] However, *SAFTA 2016*'s obligation is not to establish such tribunals or procedures but to apply any such tribunals or procedures on a non-discriminatory basis:

> Each Party shall ensure that its judicial, arbitral or administrative tribunals or procedures which provide for the prompt review of, and where justified, appropriate remedies for, administrative decisions affecting trade in services are open on a non-discriminatory basis to a service supplier of the other Party.[106]

Again, this obligation is subject to the NCMs in annexes 4–I and 4–II.[107] *GATS* art VI:3 provides:

> Where authorization is required for the supply of a *service on which a specific commitment has been made*, the competent authorities of a Member shall, within a *reasonable period of time* after the submission of an application considered complete under domestic laws and regulations, *inform the applicant of the decision* concerning the application. At the request of the applicant, the competent authorities of the Member shall provide, without undue delay, information concerning the *status* of the application.[108]

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102 As noted in Part III(A) above, in relation to services, *ChAFTA* adopts a positive list approach for China and a negative list approach for Australia. However, its domestic regulation provisions are the same for both parties and adopt the general model of Australia's positive list PTAs.

103 *GATS* art VI:2(a).

104 *TAFTA* art 807; *AANZFTA* ch 8 art 12.2; *JAEPA* art 9.8.2; *ChAFTA* art 8.13.2(a).

105 *AUSFTA* art 20.5.1; *ACIFTA* art 19.6.1; *MAFTA* art 17.6.1; *KAFTA* art 19.4.1; *TPP* art 26.4.1.

106 *SAFTA 2016* ch 7 art 11.2.

107 Ibid ch 7 art 7.3.

108 *GATS* art VI:3 (emphasis added).

Australia's positive list PTAs (*TAFTA*, *AANZFTA* and *MAFTA*, as well as *ChAFTA*) follow *GATS* art VI:3 in imposing such procedural requirements where 'authorization is required for the supply of a service on which a specific commitment has been made'.[109] As for the negative list PTAs, the *AUSFTA* and *KAFTA* follow the *GATS* language subject to Annex II NCMs.[110] *ACIFTA* and *JAEPA* contain similar obligations without the restriction to services in relation to which a specific commitment has been made.[111] These provisions also add procedural elements such as requirements to provide written reasons for a decision not to grant an application[112] and to identify additional information required to complete an incomplete application.[113] The *TPP* and *SAFTA 2016* contain further procedural elements but subject to NCMs in both annexes.[114]

Under *GATS* art VI:5 (pending the entry into force of disciplines that were expected to be developed by the Council for Trade in Services under art VI:4), a WTO member must not 'apply licensing and qualification requirements and technical standards that nullify or impair' specific commitments made by that member in a manner that 'could not reasonably have been expected of that Member at the time the specific commitments … were made' and does not comply with one or more of these criteria from *GATS* art VI:4:

> (a) based on objective and transparent criteria, such as competence and the ability to supply the service;
>
> (b) not more burdensome than necessary to ensure the quality of the service;
>
> (c) in the case of licensing procedures, not in themselves a restriction on the supply of the service.

GATS art VI:5(b) adds that, in determining whether a member complies with this obligation, 'account shall be taken of international standards of relevant international organizations applied by that Member'. Footnote 3 adds that such organisations are 'international bodies whose membership is open to the relevant bodies of at least all Members of the WTO'.

Australia's positive list PTAs (*TAFTA*, *AANZFTA* and *MAFTA*, as well as *ChAFTA*) all adopt provisions aligned with *GATS* arts VI:5 and VI:6.[115] However, apart from *ACIFTA*,[116] Australia's negative list PTAs limit the obligation, so that parties must only 'endeavour' to ensure rather than being *obliged* to ensure compliance with the specified criteria.[117] This change in the language may reflect the fact that this obligation is not, in negative list PTAs, restricted to any particular service or service sector.

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109 *AANZFTA* ch 8 art 10.5; *MAFTA* art 8.9.5; *ChAFTA* art 8.13.3. See also *TAFTA* art 807.
110 *AUSFTA* art 10.7.1; *KAFTA* art 7.7.1.
111 *ACIFTA* art 9.8.3(b); *JAEPA* art 9.8.6(b).
112 *ACIFTA* art 9.8.3(b)(iv); *JAEPA* art 9.8.6(b)(v).
113 *JAEPA* art 9.8.6(b)(iii). See also *JAEPA* art 9.8.6(b)(iv).
114 *TPP* arts 10.8.4, 10.8.8; *SAFTA 2016* ch 7 arts 7.3, 11.4.
115 *TAFTA* art 807; *AANZFTA* ch 8 arts 10.3, 10.4; *MAFTA* arts 8.9.3, 8.9.4, 8.9.6; *ChAFTA* arts 8.13.5, 8.13.6.
116 *ACIFTA* art 9.8.2.
117 *AUSFTA* art 10.7.2; *KAFTA* art 7.7.2; *JAEPA* art 9.8.4.

The *TPP* and *SAFTA 2016* not only refer to a 'right to regulate' (whatever that means) but also remove the criterion of 'not more burdensome than necessary', which may be seen as analogous to art 2.2 of the WTO's *Agreement on Technical Barriers to Trade* ('*TBT Agreement*'):[118]

> With a view to ensuring that measures relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade in services, while recognising the *right to regulate* and to introduce new regulations on the supply of services in order to meet its policy objectives, each Party shall *endeavour to ensure* that any such measures that it adopts or maintains are:
>
> (a) based on objective and transparent criteria, such as competence and the ability to supply the service; and
>
> (b) in the case of licensing procedures, not in themselves a restriction on the supply of the service.

Finally, *TPP* and *SAFTA 2016* make this obligation subject to the NCMs listed in either annex.[119] *TPP* and *SAFTA 2016* are Australia's only negative list PTAs that include the *GATS* reference to the relevance of international standards in determining compliance with this obligation.[120]

These changes, particularly in the *TPP* and the *SAFTA 2016*, may reflect a growing understanding of the potential breadth and uncertainty of a no 'more burdensome than necessary to ensure the quality of the service' requirement,[121] as well as the criteria regarding objectivity and restrictions on the supply of a service. The multi-layered approach of *SAFTA 2016* to this problem — invoking the NCMs lists in both annexes with respect to all domestic regulation obligations and removing the obligation regarding the burden of such measures — may represent a concerted effort to preserve regulatory autonomy, particularly in relation to sensitive service sectors such as health and education. However:

> In order for regulations to achieve their perceived objectives, certain conditions need to be met. In particular, the adverse social impact of an unregulated market should be higher than the risks associated with 'regulatory failure' on the part of the governments and administrations involved. The latter cannot simply be assumed to be impartial advocates of the public interest … and to have more accurate information and foresight than private individuals or groups. The regulatory process … is subject to vested interests lobbying for influence. …

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118 *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1A ('*Agreement on Technical Barriers to Trade*') ('*TBT Agreement*'); TPP art 10.8.2 (emphasis added). See also *SAFTA 2016* ch 7 art 11.6.

119 *TPP* art 10.8.8; *SAFTA 2016* ch 7 art 7.3.

120 *TPP* art 10.8.3; *SAFTA 2016* ch 7 art 11.7.

121 In respect of accountancy, WTO members modified this obligation to a requirement that relevant measures be 'not more trade restrictive than necessary to fulfil a legitimate objective', aligning more closely with the language of *TBT Agreement* art 2.2 as discussed below: *Disciplines on Domestic Regulation in the Accountancy Sector Adopted by the Council for Trade in Services on 14 December 1998*, WTO Doc S/L/64 (17 December 1998, adopted 14 December 1998) [2].

> Inventors and innovators, consumers and taxpayers typically play second fiddle.[122]

WTO jurisprudence suggests these overlapping protections of policy space may unnecessarily undermine the purpose of the domestic regulation obligations (and trade liberalisation in general), for example to prevent unduly burdensome regulation that stifles competition and innovation, privileging incumbents. To date, the WTO Appellate Body has never found a violation of the requirement in *TBT Agreement* art 2.2 that technical regulations not be 'more trade restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create', instead adopting a deferential approach to this provision, in contrast to its analysis under *TBT Agreement* art 2.1 with respect to discriminatory measures.[123] Although these results would not determine or necessarily even influence the outcome under Australia's services PTAs, they indicate the potential for appropriate analysis and understanding of government regulatory approaches in interpreting and applying obligations of proportionality such as *GATS* art VI:4(b).

IV AUSTRALIA'S SERVICES COMMITMENTS AND NON-CONFORMING MEASURES

A ANZCERTA Services Protocol*: Annex*

Australia's first 'positive list' entailed commitments to the MFN obligation for sectors inscribed in the Annex to the *ANZCERTA Services Protocol*.[124] Yet this Annex serves two purposes: both to apply the MFN obligation to listed sectors[125] (pursuant to a positive list approach) and to apply — through additional descriptions under the listed sectors — limitations and conditions to not only the MFN obligation but also (pursuant to a negative list approach) the national treatment and market access obligations.[126] This approach has led to unusual developments through progressive negotiation. Over time, Australia has removed certain sectors from the Annex, consequently removing not only the corresponding limitations and conditions on national treatment/market access commitments but also the MFN obligation with respect to those sectors. These revisions appear to have taken place on two occasions, as shown in Table 3.

The most recent revision of the Annex was effected by a letter that is publicly available, in which the Australian Minister for Trade and Investment advises the New Zealand Minister of Trade that the Australian government 'is removing from the Annex to the Protocol the inscription "*Broadcasting and Television: Limits on foreign ownership as set out in the Broadcasting Services Act 1992*"

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122 Adlung, 'Social Services', above n 16, 148–9.

123 See generally Tania Voon, Andrew Mitchell and Catherine Gascoigne, 'Consumer Information, Consumer Preferences and Product Labels under the *TBT Agreement*' in Tracey Epps and Michael J Trebilcock (eds), *Research Handbook on the WTO and Technical Barriers to Trade* (Edward Elgar, 2013) 454.

124 *ANZCERTA Services Protocol* art 6, annex.

125 Ibid art 6.

126 Ibid art 2.4; annex: 'Where an activity is described further, the exemption in terms of Article 2.4 of this *Protocol* applies to the description only'.

with effect from the date of this letter'.[127] The letter attaches a copy of the amended Annex, which removes not only the specified inscription regarding limits on foreign ownership, but the sector 'Broadcasting and Television' itself (while retaining the separate sector of 'Broadcasting and Television (short wave and satellite broadcasting)').

Table 3: Australia's MFN Commitments under the *ANZCERTA Services Protocol*

	18 August 1988	9 March 1999	20 April 2015
MFN coverage (* indicates limitations and conditions on MFN/national treatment/market access)	• Telecommunications* • Banking* • Airport services* • Domestic air services* • International aviation: passenger and freight services* • Coastal shipping* • Construction, engineering and general consultancy* • Broadcasting and television* • Broadcasting and television (short-wave and satellite broadcasting) • Basic health insurance services • Third-party insurance • Workers Compensation insurance • Postal services*	• Air services* • Coastal shipping* • Broadcasting and television* • Broadcasting and television (short-wave and satellite broadcasting) • Third party insurance* • Postal services*	• Air services* • Coastal shipping* • Broadcasting and television (short-wave and satellite broadcasting) • Third party insurance* • Postal services*

As shown in Table 3, as Australia has gradually reduced the list of sectors inscribed in the Annex, the limitations and conditions on its market access and national treatment commitments have decreased, but at the same time the sectors covered by the MFN obligation have also decreased. This may be an unintended quirk arising from the use of the Annex as both a positive and negative list, in contrast to several of Australia's other PTAs, which adopt a negative list approach to MFN, national treatment and market access, and also in contrast to the *GATS*, which contains separate schedules of MFN exemptions (pursuant to a negative list approach) and national treatment/market access commitments

[127] Letter from Andrew Robb, Minister for Trade and Investment, Australia to Tim Groser, Minister of Trade, New Zealand, 20 April 2015 <http://dfat.gov.au/trade/agreements/anzcerta/Documents/notification-letter-for-nz-on-cer-services-protocol.pdf>, archived at <https://perma.cc/Q3FS-NZ2G>.

(pursuant to a positive list approach). The unusual example of the *ANZCERTA Services Protocol* may caution against combining annexes or other lists of negative and positive list commitments (notwithstanding the blurring of the two approaches as acknowledged above), given the potential for unwittingly (or deliberately) reducing commitments over time instead of engaging in progressive liberalisation of trade in services.

The significance of this development in the *ANZCERTA Services Protocol* may be minimised from the perspective that the market access and national treatment obligations are sufficient to protect foreign services and service suppliers, such that once these obligations apply in full, the MFN obligation is no longer needed as a 'second best' protection. However, most PTAs (and most WTO agreements, including the *GATS*) recognise the MFN obligation as an important independent protection rather than one that is superfluous where general national treatment and market access obligations apply.

Rather than referring to foreign investment policy in the Annex as a limitation on national treatment or market access, the text of the *ANZCERTA Services Protocol* itself specifies that the 'provisions of this Protocol shall apply subject to the foreign investment policies of the Member States'.[128] Similar provisions are included in other ways in other Australian PTAs, as discussed further below.

B *Positive Lists: Commitments, Limitations and Conditions*

Apart from the *ANZCERTA Services Protocol*, Australia's three PTAs adopting positive lists follow the *GATS* approach, namely a schedule of commitments to accord national treatment and market access.[129] *TAFTA*, *AANZFTA* and *MAFTA* also adopt a structure similar to *GATS* schedules, so that the schedules look quite similar, except that the *TAFTA* schedule is not divided into columns for market access, national treatment and additional commitments. As noted above, unlike *GATS*, these three PTAs contain no MFN obligation and therefore no list of MFN exemptions.

Some commitments that Australia has made in these three PTAs that are not found in its *GATS* schedule are with respect to:

a) basic telecommunications services (eg 'voice telephone services' and 'digital cellular services'), subject to mode 3 restrictions regarding Telstra's ownership, offices and directorship, and certain structural requirements regarding entities holding new carrier licences; and
b) environmental services: increasing coverage of sub-sectors and removal of limitations and conditions.

Some common limitations and conditions on Australia's services obligations under these three PTAs are with respect to:

a) Australia's foreign investment policy (with respect to all sectors included in the schedule);
b) secondary, higher and other education services: unbound with respect to market access for mode 3 (commercial presence), meaning no market access commitments for these sectors in this mode; and

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128 *ANZCERTA Services Protocol* art 2.2.
129 *TAFTA* annex 8; *AANZFTA* annex 3; *MAFTA* annex 3.

c) health services: 'other' human health services unbound under *GATS*/*AANZFTA* with respect to market access and national treatment in mode 1 (cross border supply); *MAFTA* applies the same approach to these services and also to private hospital services (which are not covered at all in *GATS*/*AANZFTA*/*TAFTA*); 'other' human health services not 'unbound' under *TAFTA* but permanent residency requirement with respect to some of these services specified for some states.

Australia's most recently concluded PTAs — the *TPP* and the amendments to *SAFTA* agreed in 2016 — adopt a different approach, facilitating comparisons with *GATS* commitments. Even though these agreements adopt a negative list approach for the MFN, market access and national treatment obligations (which are therefore subject to specified NCMs as discussed below), the relevant negative list annexes also include an Appendix A setting out Australia's 'market access improvements' in comparison with Australia's *GATS* commitments (that is, in a positive list manner).[130] Appendix A nevertheless forms part of the negative list approach by virtue of a reservation or NCM that specifies for market access with respect to all service sectors:

> Australia reserves the right to adopt or maintain any measure at the *regional level of government* that is not inconsistent with Australia's obligations under Article XVI of GATS.
>
> For the purposes of this entry, Australia's Schedule of Specific Commitments is modified as set out in Appendix A.[131]

The *GATS* commitments are also subject to change, as the reservation is specified to include commitments made under *GATS* art XVI 'after the date of entry into force of this Agreement'.[132] As with Australia's more positive list PTAs, the market access improvements include additional coverage of telecommunications and environmental services.

C *Negative Lists: Non-Conforming Measures*

Australia's seven PTAs employing negative lists for the MFN, market access and national treatment obligations are, as shown above in Table 1: *AUSFTA*, *ACIFTA*, *KAFTA*, *JAEPA*, *ChAFTA* (although China adopts a positive list approach to all three obligations), the 2016 agreed *SAFTA* amendments, and the *TPP*. These lists are in theory more easily comparable, given that they should all include measures imposed by Australia that do not conform to these three core services obligations. However, the complexity of the descriptions and their separation into different schedules makes comparisons more difficult.

The *AUSFTA* can be seen as establishing the new model of negative lists for Australia's PTAs, which subsequent PTAs have tended to follow. The *AUSFTA* provides, in relation to measures that do not conform with the obligations regarding national treatment (art 10.2), MFN treatment (art 10.3), market access

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130 *SAFTA 2016* annex 4–II(A) (Australia) appendix A; *TPP* annex II (Australia) appendix A.

131 *SAFTA* 2016 annex 4–II(A) (Australia) 4 (emphasis added); *TPP* annex II (Australia) 4 (emphasis added).

132 *SAFTA 2016* annex 4–II(A) (Australia) 4; *TPP* annex II (Australia) 4.

(art 10.4) and local presence (art 10.5) in respect of cross border trade in services (mode 1):

> 1 Articles 10.2, 10.3, 10.4, and 10.5 do not apply to:
>
> (a) any *existing non-conforming measure* that is maintained by a Party at:
>
> (i) the central level of government, as set out by that Party in its Schedule to Annex I;
>
> (ii) a regional level of government, as set out by that Party in its Schedule to Annex I; or
>
> (iii) a local level of government;
>
> (b) the *continuation or prompt renewal* of any non-conforming measure referred to in subparagraph (a); or
>
> (c) an *amendment* to any non-conforming measure referred to in subparagraph (a) to the extent that the amendment does not decrease the conformity of the measure, as it existed immediately before the amendment, with Articles 10.2, 10.3, 10.4, or 10.5.
>
> 2 Articles 10.2, 10.3, 10.4, and 10.5 do not apply to any measure that a Party adopts or maintains with respect to sectors, sub-sectors, or activities as set out in its Schedule to Annex II.[133]

The lists of NCMs in Australia's PTAs are typically common to the services and investment chapters. That is, for example, Annexes I and II referred to above contain NCMs in connection with both services and investment obligations under the *AUSFTA*. The significance of the different annexes is also common to the two areas. Thus, the above wording means with respect to Annex I that: (i) existing NCMs of local government are exempt even if not specifically listed as NCMs; (ii) amendments to NCMs are covered only to the extent that they do not decrease the conformity of the measures (known as a 'standstill' mechanism); and (iii) amendments that enhance the conformity of NCMs are covered, and subsequent amendments cannot return to a lower degree of conformity (a 'ratchet' mechanism). In addition, a party may list in Annex II 'sectors', 'sub-sectors' or 'activities' in which NCMs are exempt, without the need to list them and regardless of whether they exist at the time the treaty is concluded. The standstill and ratchet mechanisms do not apply to measures falling within the scope of the areas listed in Annex II. Annex II thus provides a much greater degree of flexibility to parties and less trade liberalising effects.

These seven 'negative list' PTAs include certain key areas of interest from the perspective of regulatory autonomy, as set out in Table 4.

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[133] *AUSFTA* art 10.6 (emphasis added).

Table 4: Key Areas of Non-Conformity in Australia's Positive List PTAs

	Social services incl health, education	**Tobacco, alcohol, firearms (wholesale /retail)**	**Culture (incl broadc-asting, newspa-pers)**	**Indigenous persons**	**Foreign investment policy**	**Existing international agreements**
AUSFTA	Annex I/II	Annex II	Annex I/II	Annex II	Annex I/II	Annex II
ACIFTA	Annex I/II	Annex I	Annex II	Annex II	Annex I/II	Annex II
KAFTA	Annex I/II	Annex I/II	Annex II	Annex II	Annex I/II	Annex II
JAEPA[134]	Annex 6/7	Annex 6/7	Annex 7	Annex 7	Annex 6/7	Annex 7
ChAFTA[135]	Annex IIIA/B	Annex IIIA/B	Annex IIIB	Annex IIIB	Annex IIIA/B	Annex IIIB
TPP	Annex I/II	Annex II	Annex II	Annex II	Annex I/II	Annex II
SAFTA 2016[136]	Annex 4–I/ 4–II	Annex 4–I/4–II	Annex 4–I/ 4–II	Annex 4–II	Annex 4–I/ 4–II	Annex 4–II

As shown in Table 4, some of the listing approaches are not always consistent, for example as to whether particular NCMs are listed in Annex I or Annex II (or their equivalents). However, apart from this distinction they are often similar in scope and content. For example, the typical Annex II type NCM listing for social services applies to non-conformity with national treatment, MFN treatment and local presence provisions as well as certain investment obligations (regarding performance requirements and senior management) and reads:

> Australia reserves the right to adopt or maintain any measure with respect to the provision of law enforcement and correctional services, and the following services to the extent that they are social services established or maintained for a public purpose: income security or insurance, social security or insurance, social welfare, public education, public training, health, and child care.[137]

A footnote to this provision in the most recent two PTAs specifies, '[f]or greater certainty', that 'measures adopted or maintained with respect to the provision of services covered by this entry include measures for the protection of personal information relating to health and children'.[138] An additional footnote to this provision in some newer PTAs specifies '[f]or the avoidance of doubt'

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134 *JAEPA* annexes 6 and 7 broadly correspond with *AUSFTA* annexes I and II respectively.

135 *ChAFTA* sections A and B of annex III broadly correspond with *AUSFTA* annexes I and II respectively. *ChAFTA* also includes a side letter on education services.

136 *SAFTA 2016* annexes 4–I and 4–II broadly correspond with *AUSFTA* annexes I and II respectively.

137 *AUSFTA* annex II (Australia) 4.

138 *SAFTA 2016* annex 4–II(A) (Australia) 8 n 6; *TPP* annex II (Australia) 8 n 6.

that such services include 'any measure with respect to: the collection of blood and its components; the distribution of blood and blood related products, including plasma derived products; plasma fractionation services; and the procurement of blood and blood related products and services'.[139] Rather than a footnote, *KAFTA* contains instead a separate entry for such blood related matters, specifying existing legislation with respect to 'Australia's policy on blood self-sufficiency'.[140]

The typical Annex II type NCM listing for tobacco, alcoholic beverages and firearms applies to non-conformity with the market access obligation for distribution services and states: 'Australia reserves the right to adopt or maintain any measure with respect to wholesale and retail trade services of tobacco products, alcoholic beverages, or firearms'.[141] Extensive provisions regarding broadcasting tend to relate to matters such as 'transmission quotas for local content' and '[s]ubsidies or grants for investment in Australian cultural activity where eligibility for the subsidy or grant is subject to local content or production requirements'.[142] NCMs with respect to the MFN obligation apply to 'preferential co-production arrangements for film and television productions'.[143] Foreign investment limits are sometimes specifically included with respect to national treatment in the newspapers sector.[144] NCMs with respect to culture are sometimes linked to those with respect to indigenous matters, such as in the *SAFTA* amendments agreed in 2016:

> Australia reserves the right to adopt or maintain any measure with respect to the creative arts, Indigenous traditional cultural expressions and other cultural heritage.[145]

The general indigenous-focused listing applies to all sectors and to market access, national treatment, local presence, and investment obligations concerning performance requirements and senior management, including with respect to services:

> Australia reserves the right to adopt or maintain any measure according preferences to any Indigenous person or organisation or providing for the favourable treatment of any Indigenous person or organisation in relation to acquisition, establishment or operation of any commercial or industrial undertaking in the service sector.[146]

The various NCM listings for foreign investment policies are broad and note several different legislative components of 'Australia's foreign investment

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139 *ChAFTA* annex IIIB (Australia) 1038 n 25. See also *JAEPA* annex 7 (Australia) [2.8] n 6; SAFTA *2016* annex 4–II(A) (Australia) 8 n 7. See also *TPP* annex II (Australia) 8 n 7. A side letter applies under *AUSFTA* with respect to blood related products and services, which is focused on the government procurement chapter rather than the cross border trade in services chapter.

140 *KAFTA* annex II (Australia).

141 *AUSFTA* annex II (Australia).

142 Ibid annex II (Australia).

143 Ibid.

144 Ibid annex I (Australia).

145 *SAFTA 2016* annex 4–II(A) (Australia) (footnotes omitted). See also *TPP* annex II (Australia).

146 *SAFTA 2016* annex 4–II(A) (Australia). See also *TPP* annex II (Australia) 3.

framework', which imposes notification and approval requirements on foreign investments above certain thresholds (eg AUD252 million) in sectors such as telecommunications and in other sectors above higher thresholds (eg AUD1.094 million).[147]

As discussed below, some of Australia's PTAs contain exceptions regarding other international agreements. Moreover, Australia's Annex 4–II of the 2016 agreed *SAFTA* amendments contains a general reservation for all sectors with respect to the MFN obligation in the services and investment chapters under which 'Australia reserves the right to adopt or maintain any measure that accords more favourable treatment to the service suppliers or investors of non Parties under any bilateral or multilateral international agreement in force on, or signed prior to', *SAFTA 2016*'s entry into force.[148] That description could extend to pre-existing PTAs, the WTO agreements, and bilateral investment treaties ('BITs') (*AUSFTA* contains a similar NCM listing in Australia's Annex II).[149] A footnote to this provision confirms that it extends to 'subsequent review or amendment' of such an agreement, including 'any existing or future protocol' to the *ANZCERTA Services Protocol*.[150] *ACIFTA*,[151] *KAFTA*,[152] *JAEPA*[153] and *ChAFTA*[154] adopt a similar approach, as does the *TPP*, which also adds a reference to measures according more favourable treatment 'to any service supplier or investor of a Pacific Island Forum member state under any international agreement' whether signed or in force before or after the *TPP*.[155]

In addition to those types of NCMs summarised in Table 4, some common listings apply to:

a) existing measures at the regional level of government (ie Australian State and territory governments), subject in some cases to WTO consistency;[156]
b) the ownership and management of Telstra (with respect to telecommunications), Qantas (with respect to transport) and CSL (with respect to health services);[157] and
c) gambling and betting services.[158]

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147 *SAFTA 2016* annex 4–I(A) (Australia).
148 Ibid annex 4–II(A) (Australia).
149 *AUSFTA* annex II (Australia).
150 *SAFTA 2016* annex 4–II(A) (Australia) 18 n 18.
151 *ACIFTA* annex II (Australia).
152 *KAFTA* annex II (Australia).
153 *JAEPA* annex 7 (Australia).
154 *ChAFTA* annex III(B) (Australia).
155 *TPP* annex II (Australia) 19.
156 See, eg, *AUSFTA* annex I (Australia) 1, annex II (Australia) 2; *KAFTA* annex I (Australia) introductory note, annex II (Australia); *JAEPA* annex 6 (Australia) pt 1 s 1 [6], annex 7 (Australia) pt 1 s 2 [3]; *ChAFTA* annex IIIA (Australia) pt 1 s 1 introductory notes [3], annex IIIB (Australia) 1; *TPP* annex I (Australia) 2, annex II (Australia) 4. See also above nn 130–131 and corresponding text; *SAFTA 2016* annex 4–I(A) (Australia) introductory notes [1], annex 4–II(A) (Australia) 4.
157 See, eg, *KAFTA* annex I (Australia); *JAEPA* annex 6 (Australia); *ChAFTA* annex III (Australia); *TPP* annex I (Australia); *SAFTA 2016* annex 4–I (Australia).
158 See, eg, *JAEPA* annex 7 (Australia); *TPP* annex II (Australia) 15; *SAFTA 2016* annex 4–II (Australia) 15.

V EXCEPTIONS TO SERVICES OBLIGATIONS

In this Part I examine common exceptions in Australia's PTAs, pursuant to which states party may derogate from their services obligations subject to certain conditions. As I have focused on the 'cross border trade in services' and 'trade in services' chapters of Australia's FTAs rather than the chapters specific to financial services, telecommunications services, or movement of natural persons, I do not analyse exceptions in the PTAs that are specific to financial services,[159] telecommunications services,[160] or movement of natural persons.[161] All of Australia's PTAs, as well as the *GATS*, contain security exceptions,[162] exceptions regarding the disclosure of confidential information,[163] and 'general exceptions'.[164] Australia's PTAs tend to follow the relevant *GATS* provisions with respect to these matters. I focus here on the general exceptions and related extensions to the *GATS* provisions in the PTAs, before turning to some additional exceptions regarding international agreements.

GATS art XIV (general exceptions) provides:

> 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 like conditions prevail, or a disguised restriction on trade in services, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures:
>
> (a) necessary to protect *public morals* or to maintain public order;[5]
> (b) necessary to protect human, animal or plant life or *health*;
> (c) necessary to *secure compliance* with laws or regulations which are not inconsistent with the provisions of this Agreement including those relating to:
> (i) the prevention of deceptive and fraudulent practices or to deal with the effects of a default on services contracts;
> (ii) the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts;
> (iii) safety;
> (d) inconsistent with Article XVII [national treatment], provided that the difference in treatment is aimed at ensuring the equitable or effective imposition or collection of direct *taxes* in respect of services or service suppliers of other Members;

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159 See, eg, *TAFTA* art 1606 (Prudential Measures); *ACIFTA* art 12.8 (Treatment of Certain Information); *MAFTA* ch 8 annex on financial services art 7; *ChAFTA* ch 8 annex 8–B (Financial Services) art 3.

160 See, eg, *SAFTA 2016* ch 10 art 18.

161 See, eg, *TAFTA* art 803.4.

162 *GATS* art XIV *bis*; *ANZCERTA Services Protocol* art 18(a); *TAFTA* art 1602; *AUSFTA* art 22.2; *ACIFTA* art 22.2; *AANZFTA* ch 15 art 2; *MAFTA* art 18.2; *KAFTA* art 22.2; *JAEPA* art 1.10; *ChAFTA* art 16.3; *TPP* art 29.2; *SAFTA 2016* ch 17 art 2.

163 *GATS* art III *bis*; *ANZCERTA Services Protocol* art 13.3; *TAFTA* art 1603; *AUSFTA* art 22.4.1; *ACIFTA* art 22.5.2; *AANZFTA* ch 8 art 13; *MAFTA* art 21.4; *KAFTA* art 22.4; *JAEPA* art 1.7.2; *ChAFTA* art 16.1.1; *TPP* art 29.7; *SAFTA 2016* ch 7 art 10.

164 *GATS* art XIV; *ANZCERTA Services Protocol* art 18; *TAFTA* art 1601.2; *AUSFTA* art 22.1.2; *ACIFTA* art 22.1.2; *AANZFTA* ch 15 art 1.2; *MAFTA* art 18.1.2; *KAFTA* art 22.1.2; *JAEPA* art 1.9.2; *ChAFTA* art 16.2.2; *TPP* art 29.1.3; *SAFTA 2016* ch 7 art 16.

> (e) inconsistent with Article II [MFN treatment] provided that the difference in treatment is the result of an agreement on the avoidance of double taxation or provisions on the avoidance of *double taxation* in any other international agreement or arrangement by which the Member is bound.[165]
>
> ———
>
> 5 The public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society.

Most Australian PTAs simply incorporate *GATS* art XIV, *mutatis mutandis*, into the agreement. However, some variation exists. *AANZFTA*, in addition to incorporating *GATS* art XIV,[166] adds an exception (subject to chapeau type language) for 'measures necessary to protect national treasures or specific sites of historical or archaeological value, or measures necessary to support creative arts of national value'.[167] A footnote defines 'creative arts' broadly to include 'the performing arts', 'visual arts and craft, literature, film and video, language arts, creative on line content, indigenous traditional practice and contemporary cultural expression, and digital interactive media and hybrid art work', among other details.[168] The reference to 'national treasures' is reminiscent of *GATT* art XX(f), which refers to measures 'imposed for the protection of national treasures of artistic, historic or archaeological value'.

While following the general structure of *GATS* art XIV, the *ANZCERTA Services Protocol* general exceptions add measures necessary 'to prevent disorder or crime'[169] or 'to prevent unfair, deceptive, or misleading practices'[170] (without such measures having to be necessary to secure compliance with laws relating to these matters). The general exceptions also incorporate a security exception[171] and an exception regarding international agreements as noted below.

The *ANZCERTA Services Protocol* also adds a gloss to the national treatment obligation, which in retrospect appears something like the gloss that the WTO Appellate Body has added to the non-discrimination obligation in *TBT Agreement* art 2.1 (that is, a detrimental impact on imports that stems exclusively from a legitimate regulatory distinction is not discrimination contrary to art 2.1).[172] The WTO Appellate Body has cited the absence of a general exceptions provision in the *TBT Agreement* corresponding to *GATT* art XX/*GATS* art XIV as one reason for introducing this gloss on *TBT Agreement* art 2.1[173] and as a reason for not introducing it into the national treatment

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165 *GATS* art XIV (emphasis added) (footnotes omitted).
166 *AANZFTA* ch 15 art 1.2.
167 Ibid art 1.4.
168 Ibid ch 15 art 1 n 2.
169 *ANZCERTA Services Protocol* art 18(b).
170 Ibid art 18(d).
171 Ibid art 18(a).
172 See, eg, Appellate Body Report, *United States — Measures Affecting the Production and Sale of Clove Cigarettes*, WTO Doc WT/DS406/AB/R, AB-2012-1 (4 April 2012) [215].
173 See, eg, ibid [109].

obligation in *GATT* art III:4 or the MFN obligation in *GATT* art I:1.[174] The Appellate Body has adopted a similar approach, albeit in obiter dicta, in excluding regulatory distinctions and the *TBT Agreement* 'gloss' from both likeness and less favourable treatment under *GATS* arts II:1 (MFN) and XVII (national treatment).[175]

Moving away from the Appellate Body approach to less favourable treatment under *General Agreement on Tariffs and Trade 1994* and *GATS*, the *ANZCERTA Services Protocol* allows differential treatment provided that it 'is no greater than that necessary for prudential, fiduciary, health and safety or consumer protection reasons'.[176] That restriction operates in addition to, rather than in the place of, the general exceptions clause. An even broader exception applies under *TAFTA*, again in addition to the incorporation of *GATS* art XIV:[177]

> Nothing in this Chapter shall prevent a Party from maintaining and introducing measures to regulate service sectors within its territory, provided that such measures are applied on a non-discriminatory basis without the intention to nullify or impair the benefits accruing to the other Party under the terms of this Chapter.[178]

More recently, in addition to the general exceptions provisions in *SAFTA* and the *TPP*, a footnote specifies that 'whether treatment is accorded in "like circumstances"' in relation to national treatment or MFN treatment 'depends on the totality of the circumstances, including whether the relevant treatment distinguishes between services or service suppliers on the basis of legitimate public welfare objectives'.[179] Rather than 'doubling up' on the general exceptions (as the Appellate Body's reasoning might suggest), this kind of qualification acknowledges that legitimate policy objectives exist beyond those enumerated in *GATS* art XIV or the corresponding PTA provisions, and therefore that the general exceptions provisions may be insufficient to protect all legitimate regulation.

As regards taxation measures and taxation agreements (which are addressed in *GATS* art XIV(d)–(e)), Australia's PTAs have different approaches to exceptions, in addition to the limitations on scope as discussed in Part II of this article. The *ANZCERTA Services Protocol* is distinct from the others as it does not apply to any taxation measures, as noted above. The other Australian PTAs do apply to taxation measures to some extent and therefore have a number of exceptions. Australia's positive list PTAs (apart from the *ANZCERTA Services Protocol* and *SAFTA*) provide exceptions for existing non-conforming tax measures, the continuation or prompt renewal of such measures, and

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174 Appellate Body Reports, *European Communities — Measures Prohibiting the Importation and Marketing of Seal Products*, WTO Docs WT/DS400/AB/R, WT/DS401/AB/R, AB-2014-1, AB-2014-2 (22 May 2014, adopted 18 June 2014) [5.125].

175 Appellate Body Report, *Argentina — Measures Relating to Trade in Goods and Services*, WTO Doc WT/DS453/AB/R, AB-2015-8 (14 April 2016, adopted 9 May 2016) [6.106], [6.111], [6.112], [6.115], [6.121].

176 *ANZCERTA Services Protocol* art 5.2(a).

177 *TAFTA* art 1601.2.

178 Ibid art 803.3.

179 *TPP* ch 10, 4 n 2; *SAFTA 2016* ch 7, 4 n 3. A corresponding footnote appears in the investment chapters as well: *TPP* ch 9, 6 n 14; *SAFTA 2016* ch 8, 5 n 8.

amendments to such measures that do not decrease the level of conformity.[180] *ACIFTA* adds to these an exception for the adoption of a non-conforming tax measure that is substantially similar to an existing non-conforming tax measure of the other party.[181] These PTAs and also *SAFTA* provide an exception of some kind for measures allowed under *GATS* art XIV(d) (without regard to its limitation to direct taxes): that is, measures aimed at ensuring the equitable or effective imposition or collection of taxes.[182]

Most Australian PTAs contain an exception (often MFN specific) for double taxation agreements[183] and/or a statement that double taxation agreements prevail to the extent of any inconsistency.[184] More narrowly, *TAFTA* provides that the double taxation agreement between Australia and Thailand prevails to the extent of any inconsistency.[185] More unusually, *JAEPA* specifies that the dispute settlement procedures provided under ch 19 do not apply to the national treatment provisions in the trade in services chapter with respect to a measure falling 'within the scope of an international agreement between the Parties relating to the avoidance of double taxation'.[186] Finally, in the *TPP* but not the *SAFTA*, an exception applies to taxation measures by Singapore that are not 'more trade restrictive than necessary to address Singapore's public policy objectives arising out of its specific constraints of space'.[187]

GATS arts V and V *bis* provide exceptions from *GATS* obligations for economic integration agreements and labour markets integration agreements respectively, in a manner broadly comparable to *GATT* art XXIV (as discussed further below). These exceptions determine the *GATS* consistency of PTAs, as discussed in Part VI of this article below. Only some of Australia's PTAs include exceptions that might be understood as corresponding in part to these *GATS* exceptions. For example, under *ChAFTA*, an MFN exception applies to differential treatment 'in accordance with any free trade agreement or multilateral international agreement in force or signed prior to the date' of *ChAFTA*'s entry into force.[188] That description appears directed to PTAs (including those with an investment chapter) and the WTO agreements, but would not appear to cover a BIT. In contrast, Australia's negative list PTAs include existing international agreements including BITs in their Annex II type NCM lists, as discussed above. The *ANZCERTA Services Protocol* includes as part of its general exceptions measures necessary 'in pursuance of obligations under international agreements',[189] which could arguably provide an MFN

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180 *AUSFTA* art 22.3.4(d)–(f); *ACIFTA* art 22.3.4(e)–(g); *KAFTA* art 22.3.3(b)–(d); *JAEPA* art 1.8.3(a)–(c); ChAFTA art 16.4.4(b); *TPP* art 29.4.6(e)–(g).

181 *ACIFTA* art 22.3.4(h).

182 Ibid art 22.3.4(i); *AUSFTA* art 22.3.4(g); *KAFTA* art 22.3.3(e); *JAEPA* art 1.8.3(d); *ChAFTA* art 16.4.4(c); *TPP* art 29.4.6(h); *SAFTA* ch 17 art 3.3.

183 *AUSFTA* art 22.3.4(c); *ACIFTA* art 22.3.4(d); *AANZFTA* ch 15 art 3.6; *MAFTA* art 18.3.7; *KAFTA* art 22.3.3(a); *ChAFTA* art 16.4.4(a); *TPP* art 29.4.6(d).

184 *AUSFTA* art 22.3.2(a); *ACIFTA* art 22.3.2; *AANZFTA* ch 15 art 3.5; *MAFTA* art 18.3.4; *KAFTA* art 22.3.6; *JAEPA* art 1.8.4; *ChAFTA* art 16.4.5; *TPP* art 29.4.3; *SAFTA 2016* ch 17 art 3.4.

185 *TAFTA* art 1607.3.

186 *JAEPA* art 9.4.2.

187 *TPP* art 29.4.9.

188 *ChAFTA* arts 8.7.2, 8.12.2. See also *AANZFTA* ch 8 arts 7.2, 7.4.

189 *ANZCERTA Services Protocol* art 18(e).

exception for existing and even future agreements covering trade and/or investment as well as other kinds of agreements.

Some Australian PTAs provide an exception with respect to 'actions authorised by the Dispute Settlement Body of the WTO'[190] or (in the case of the *TPP*) 'authorised by the Dispute Settlement Body of the WTO or … taken as a result of a decision by a dispute settlement panel under a free trade agreement to which the Party taking action and the Party against which the action is taken are party'.[191] Several Australian PTAs also contain more general provisions (not positive exceptions) regarding their relationship to other international agreements in general[192] or particular kinds of agreements, such as the WTO agreements[193] or multilateral environmental agreements.[194]

VI WTO CONSISTENCY OF AUSTRALIA'S PTAS ON SERVICES

I have elsewhere raised questions about the *GATS* compatibility of the approach to international mobile roaming favoured as between Australia and New Zealand[195] and now reflected in the *TPP* text.[196] Those questions relate to an apparent MFN violation not clearly exempted under *GATS* or other PTAs. Similar questions could arise in relation to the various deviations from *GATS* in Australia's PTAs as outlined in this article. In order to comply with Australia's *GATS* obligations, any treatment Australia provides under a PTA that is *more* favourable than treatment accorded under *GATS* must fall within the parameters of the exception for economic integration in *GATS* art V or for labour markets integration agreements in *GATS* art V *bis* (or conceivably a general exception in *GATS* art XIV). Otherwise, the more favourable treatment is likely to violate the MFN obligation in *GATS* art II, which is a negative list obligation. Australia has listed an MFN exemption only with respect to audiovisual services[197] and not more generally (or with respect to its BITs).[198]

Notwithstanding the apparent reluctance of WTO members to raise complaints under the WTO dispute settlement system regarding PTAs, a third country could conceivably invoke the MFN rule to demand the more favourable treatment under a PTA to the extent that it falls outside the *GATS* exceptions.

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190 *KAFTA* art 22.1.4; *ACIFTA* art 22.1.3.

191 *TPP* art 29.1.4.

192 See, eg, *AUSFTA* art 1.1.2; *AANZFTA* ch 18 art 2; *MAFTA* art 21.2.

193 See, eg, *AUSFTA* art 1.1.2; *AANZFTA* ch 18 art 2; *MAFTA* art 21.2.

194 See, eg, *AUSFTA* art 19.8.

195 Tania Voon, 'Discrimination in International Mobile Roaming Regulation: Implications of WTO Law' (2013) 16 *Journal of International Economic Law* 91, 116–17.

196 Danny Kotlowitz and Tania Voon, 'Telecommunications Services in the *Trans-Pacific Partnership*: Will the Mobile Roaming Provisions Benefit Tourists and Traders?' (2016) 17 *Melbourne Journal of International Law* 404, 435–7; Danny Kotlowitz and Tania Voon, 'Services in the *TPP*: A Case Study of Telecommunications' in Tania Voon (ed), *Trade Liberalisation and International Co-operation: A Legal Analysis of the* Trans-Pacific Partnership Agreement (Edward Elgar, 2013) 131, 152–4.

197 *Australia: Final List of Article II (MFN) Exemptions*, WTO Doc GATS/EL/6 (15 April 1994); *Australia: List of Article II (MFN) Exceptions Supplement 1*, WTO Doc GATS/EL/6/Suppl.1 (26 February 1998).

198 See, eg, *United States of America: Final List of Article II (MFN) Exemptions*, WTO Doc GATS/EL/90 (15 April 1994) 1. See also Rudolf Adlung, 'Trade in Healthcare and Health Insurance Services: WTO/GATS as a Supporting Actor (?)' (2010) 45 *Intereconomics* 227, 237 ('Trade in Healthcare').

Such a claim would be enhanced by the WTO Appellate Body's stringent interpretation of the corresponding exception for PTAs in *GATT* art XXIV.[199] Based on the Appellate Body Report in *Turkey — Restrictions on Imports of Textile and Clothing Products* ('*Turkey — Textiles*') (with respect to *GATT* art XXIV:1), more favourable treatment might be exempted under GATS art V:1 only if introduced at the formation of the relevant PTA and if necessary for that formation.[200] In addition, *GATS* art V:4 (similarly to *GATT* art XXIV:5) specifies that an agreement exempt under *GATS* art V:1:

> shall be designed to facilitate trade between the parties to the agreement and shall not in respect of any Member outside the agreement raise the overall level of barriers to trade in services within the respective sectors or subsectors compared to the level applicable prior to such an agreement.

Furthermore, any *less* favourable treatment under Australia's PTAs than under *GATS*[201] (or even under other PTAs)[202] may also raise concerns regarding *GATS* compatibility. For example, an NCM that is listed under a PTA but not under *GATS* might not comply with *GATS*. As discussed above, while some Australian PTAs (eg the 2016 amendments agreed to *SAFTA* and the *TPP*) define certain NCMs with reference to *GATS* obligations,[203] others such as the *AUSFTA* include NCMs lists that are not explicitly restricted by *GATS* compatibility.[204] The coverage of the MFN obligation in the *ANZCERTA Services Protocol* has reduced in some respects over time, as discussed in Part IVA of this article. Some Australian FTAs do not even contain an MFN obligation, as illustrated in Table 1 above. Several Australian FTAs contain sweeping reservations with respect to other agreements including other PTAs, as noted earlier.[205] As explained in Part V of this article, *AANZFTA* and the *ANZCERTA Services Protocol* add to the list of general exceptions recognised in *GATS* art XIV.

All these reductions in the levels of preferential treatment in Australia's PTAs risk undermining Australia's reliance on *GATS* art V:1, which exempts a PTA provided that it:

> (a) has substantial sectoral coverage; and
>
> (b) provides for the absence or elimination of substantially all discrimination, in the sense of Article XVII [national treatment], between or among the parties, in the sectors covered under subparagraph (a), through:

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199 See generally Andrew D Mitchell and Nicolas JS Lockhart, 'Legal Requirements for PTAs under the WTO' in Simon Lester, Bryan Mercurio and Lorand Bartels (eds), *Bilateral and Regional Trade Agreements: Commentary and Analysis* (Cambridge University Press, 2015) 81.

200 Appellate Body Report, *Turkey — Restrictions on Imports of Textile and Clothing Products*, WTO Doc WT/DS34/AB/R, AB-1999-5 (22 October 1999, adopted 19 November 1999) [46], [58] ('*Turkey — Textiles*'). See also Rudolf Adlung, 'The *Trade in Services Agreement* (*TiSA*) and Its Compatibility with *GATS*: An Assessment Based on Current Evidence' (2015) 14 *World Trade Review* 617, 623 ('The *Trade in Services Agreement*').

201 See generally Rudolf Adlung and Sébastien Miroudot, 'Poison in the Wine? Tracing *GATS*-Minus Commitments in Regional Trade Agreements' (2012) 46 *Journal of World Trade* 1045.

202 See Adlung, 'The *Trade in Services Agreement*', above n 200, 622–4.

203 See above n 130 and corresponding text.

204 See above n 133 and corresponding text.

205 See above nn 148–155 and corresponding text.

> (i) elimination of existing discriminatory measures, and/or
>
> (ii) prohibition of new or more discriminatory measures,
>
> either at the entry into force of that agreement or on the basis of a reasonable time frame, except for measures permitted under Articles XI [payments and transfers], XII [restrictions to safeguard the balance of payments], XIV [general exceptions] and XIV*bis* [security exceptions].[206]

Just as a third country might use *GATS* plus or *GATS* minus provisions to challenge an Australian PTA's compliance with *GATS* art V:1, so too might one of Australia's PTA partners use the WTO dispute settlement system to enforce compliance with *GATS* commitments notwithstanding their relaxation in the relevant PTA. The Appellate Body in *Peru — Additional Duty on Imports of Certain Agricultural Products* took a restrictive approach to *inter se* agreements between WTO Members (modifying their WTO obligations as between themselves). The Appellate Body noted the conditions specified in *Turkey — Textiles*[207] and stated that the references in *GATT* art XXIV:4 'to facilitating trade and closer integration are not consistent with an interpretation of Article XXIV as a broad defence for measures in FTAs that *roll back on Members' rights and obligations under the WTO* covered agreements'.[208] That sentiment would seem even more applicable to the *GATS*, which refers in several places to progressive liberalisation of services,[209] including in the preamble, as noted at the start of this article.

VII CONCLUSION

The analysis of Australia's services PTAs in this article makes clear the different mechanisms that Australia has used to preserve regulatory autonomy with respect to trade in services. These include: excluding areas from the scope of the core services chapter (in particular government procurement, taxation, subsidies, and the exercise of governmental authority); limiting the content of core obligations, such as through changing 'hard' obligations to 'best endeavours' type obligations with respect to domestic regulation, and explicitly recognising a right to regulate in this regard; listing limitations to commitments in positive list PTAs and NCMs in negative list PTAs (whether in Annex I (subject to standstill and ratchet requirements) or Annex II (providing more flexibility for future regulatory change) or their equivalents); and incorporating general exceptions in both positive and negative list PTAs, whether or not such exceptions overlap with limitations on commitments or specified NCMs. Social services in general, including health and education services, are well protected in both positive list PTAs (as conditions on obligations) and negative list PTAs (as NCMs). NCMs in Australia's modern PTAs extend specifically to regional regulation, indigenous peoples, culture, tobacco, alcohol, firearms, gambling,

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206 *GATS* art V:1 (footnotes omitted).

207 Appellate Body Report, *Peru — Additional Duty on Imports of Certain Agricultural Products*, WTO Doc WT/DS457/AB/R, AB-2015-3 (20 July 2015, adopted 31 July 2015) [5.115] ('*Peru — Agricultural Products*').

208 Ibid [5.116] (emphasis added).

209 See, eg, *GATS* art XIX:1.

foreign investment policy, Qantas, CSL, and Telstra. Exceptions now tend to apply to other pre-existing international agreements, for example allowing what might otherwise amount to MFN violations to the extent reflected in a PTA (or, in some but not all cases, a BIT).

Australia's apparent preference for negative list services PTAs may assist in enhancing transparency and the potential for increasing liberalisation, particularly in relation to new services and new technologies. However, that potential may be undermined by overuse of the tools just mentioned (exclusion of large areas from the scope of services chapters, general exceptions overlaid with specific NCMs, and weakening of obligations with reference to best endeavours). An increasing focus on 'policy space' also risks potential conflicts with Australia's WTO obligations under the *GATS*. The value of a negative list may also be diluted if the two parties adopt different approaches, as in *ChAFTA*. Similarly, the use of a hybrid approach in *TiSA* (to accommodate the preferences of other negotiating parties) may not be ideal (although it has arguably worked in the *GATS*). Structural problems may be avoided by ensuring separate annexes are used instead of using the same annex to list both exemptions for a negative list obligation and inscriptions for a positive list obligation (as in the *ANZCERTA Services Protocol*). Just as the *GATS* and the *AUSFTA* appeared to provide a focal point for Australia's services PTAs, the *TPP* may be set to do the same, and subsequently the *TiSA*. Given the compromises made by Australia in these negotiations, the *TiSA* hybrid listing approach should not be automatically applied to future Australian PTAs; nor the substantive services provisions of the *TPP* and *TiSA* without considered reflection on a case by case basis (particularly given the withdrawal of the US from the *TPP*).

This article has briefly addressed investment issues in the context of their treatment in Australia's services PTAs. The overlap between services and investment is a crucial aspect of Australia's trade and investment framework, which must be carefully resolved, for example by removing mode 3 services from the core services chapter, as under the *TPP*, or otherwise through exceptions and NCMs or similar mechanisms. However, the precise mechanism used will be important. Allowing the investment chapter to do all the work once done by *GATS* with respect to mode 3 services may provide clarity but will also make the content of the investment chapter all the more significant, including as regards ISDS. The investment chapter may be less well equipped to preserve regulatory autonomy than the services chapter in Australia's PTAs. For example, not all Australian PTAs and BITs include general exceptions akin to *GATT* art XX/*GATS* art XIV, whereas Australia's PTAs do all include general exceptions of this kind with respect to trade in services.[210] These exceptions may be particularly important in relation to matters that arise in the future and are not specified in footnotes or NCMs because they do not yet exist.

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[210] See generally Adlung, 'Trade in Healthcare', above n 198.