Services PTAs: lessons from practice

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Services PTAs: a topography

- 76 services PTAs have been notified to the WTO to date
- A mere 6 are services-only PTAs; 70 PTAs address goods AND services
- Services PTAs come in two types: (i) Single Undertaking- type PTAs and (ii) sequential agreements
  - but services negotiations *always* come second: why?
- Services PTAs: 28% of all WTO-notified PTAs (> the share of services in world trade by close to a third)
- 62% of services PTAs feature an OECD Member (13% N-N and 49% N-S ; 38% are S-S) – yet 74% of services trade is N-N (no US-EU PTA in services)
- Such trends broadly mirror specialization patterns in services trade

Key research questions

- If all trade agreements are, of essence, incomplete contracts, then the GATS is arguably the most incomplete of WTO contracts: can developments in preferential agreements inform approaches to market opening and rule making and help complete the GATS contract?
- How do PTAs in services differ from their Geneva brethren?
- Do differences in negotiating architectures across PTAs matter and can they inform the WTO's post-Doha architecture?
- What do we know and what can we say about preference erosion in services trade?
- How much further than the GATS are we (in GATS + and GATS –X terms)?
- Are PTAs optimal regulatory convergence areas?

PTAs are not (or no longer) rigidly commoditized

- There is considerable variation in architectures within and across PTAs, with some agreements seeing members combine negative listing for investment or specific sectors with positive listing approaches for specific sectors or modes of supply (e.g. cross-border supply).

- But overall, PTAs relying predominantly on negative listing form a majority in the Americas (NAFTA‘s influence) . The trend is more balanced in Asia but negative listing still predominates thanks to the influence of Japan, Australia, New Zealand and Sigapore.

- The majority of South-South PTAs and, until the CARIFORUM EPA, EU PTAs, tend to resort to the GATS approach (connoting continued precaution and defensiveness).

Harnessing the best of both approaches

- A recent trend has seen a number of PTAs adopt and combine features from both the GATS and negative list approaches (e.g. Japan-Philippines; EU-CARIFORUM).
- Key innovations under such PTAs:
  - Maintaining the bottom-up, voluntary, GATS approach to scheduling commitments…;
  - …but such commitments cannot be scheduled below the prevailing regulatory *status quo.*
  - Some PTAs also feature a commitment to prepare and exchange non-binding negative lists for transparency purposes.
- Motivations for such a middle course approach include: preserving policy space; securing effective policy consolidation; conducting a trade-related regulatory audit; allowing to rank-order partner country trade and investment barriers, etc.

Rules of origin

- Given that a majority (62%) of WTO-notified agreements involve a developed country member**, the majority of PTAs covering services opt for the most liberal (i.e. substantial business operation) rule of origin**, with a view to promoting third country FDI inflows into the integrating area and extending the benefits of integration to all investors that are established in one of the PTA Parties.
  - **In such instances, the preferential liberalization of Mode 3 largely approximates MFN liberalization**.

- **South-South PTAs make increasing use of the space afforded them under Article V.3** to adopt more restrictive rules of origin aimed at limiting benefits to insiders: a case of questionable SD&T?

- Rules of origin targeting cross-border supply (Mode 1) remain largely unaddressed, and rules dealing with Mode 4 trade tend to be highly restrictive, typically bestowing temporary entry benefits only to citizens or permanent residents of PTA Parties.

Multilateralizing regionalism: do PTAs facilitate subsequent MFN-based commitments?

- Some early (but very limited) supporting evidence in the Western Hemisphere, where a few PTAs predated or coincided with the establishment of the GATS and the conclusion of the Uruguay Round (mostly Mexico post-NAFTA)
  - **A policy question: on efficiency grounds, once a developing country enters into a PTA with a major developed country, are there valid grounds *not* to go MFN?**

- The DDA offers of many countries provide some evidence that prior PTA market opening can raise subsequent comfort levels in the WTO (the same can be said of the results of the July 2008 Signaling Conference).

We know little about preference erosion in services trade…but preference margins are real

- The scope for – and political economy of – preference erosion in services trade is understudied and hard to gauge.
  - Do PTAs entrench regional preferences or facilitate WTO commitments? This remains an important empirical question to which the end of the DDA will provide measurable answers.
  - There is considerable “water” in GATS commitments. This may be entirely tactical and linked to the DDA state of play on agriculture and NAMA.

GATS vs PTAs: Differences in Levels of Liberalization and Margins of Preference

MARGIN	GATS	DDA Offer (0 to 100)	PTAs	GATS/PTA %	DDA/PTA %	PREF. %
Total score	27	34	63	38	54	46-62
Mode 1	24	30	59	41	51	49-59
Mode 3	30	38	67	45	57	43-55
OECD						
Mode 1	43	51	59	73	86	14-27
Mode 3	53	59	67	79	88	12-21
Non-OECD						
Mode 1	18	23	60	30	38	62-70
Mode 3	23	32	67	34	48	52-66

Source : Author calculations based on Marchetti and Roy (2009).

PTAs do not on the whole appear to be rule-making laboratories in the services field…

- …**at least not in respect of much of the GATS' unfinished agenda**

- PTAs increasingly rely on GATS developments on unfinished rule-making challenges, affirming the desire of parties to incorporate by reference any such advances ("**Waiting for Godot rule-making"**).
- **No necessity or proportionality test** for services trade can be found in PTAs.
- There is, similarly, **no progress to report on the issues of emergency safeguard measures** – even within South-South agreements where demands might be expected to emanate from Members, **as well as on services-related subsidy disciplines**.
- **Considerable headway has however been achieved in opening government procurement** markets in services, though here again mostly within North-North and North-South PTAs and in the procurement chapters of such agreements, not their services ones.

But increasing evidence of GATS-X rule-making advances is found in PTAs

- **Not all advances are to be found in the services provisions of PTAs**. Some are treated in separate chapters, others relate to generic issues of regulatory cooperation.
- **Advances on new rules relating to services are often achieved in policy areas that feature a market access component** (e.g. govt. procurement, express delivery, postal and courier services).
- **Far-reaching advances on investment** can be found in most PTAs, in respect of promotion, protection and liberalization.
- **Increasingly prescriptive chapters on digital trade** embrace the revolution in e-commerce/cross-border supply.
- **New sectoral annexes or specific provisions feature innovative sector-specific disciplines** (e.g. competition policy provisions in the tourism sector in the EU-CARIFORUM EPA; provisions on cultural cooperation and the mobility of artists; aid for trade modalities; enhanced cooperation in matters of labor mobility)
    - **Not all of the above however is legally enforceable**
    - **Increasing co-existence of hard and soft law provisions**

An increasing gap in levels of bound market opening between PTAs and the WTO

- Even if progress in liberalizing services markets remains limited in virtually all trade negotiating settings, **the gap between PTA and WTO liberalization in services has become significant**. This is true both in respect of sectors and modes of supplying services.
  - **This should not come as a surprise to the extent that we are comparing the PTAs of today with the GATS commitments of 1994-97. It is not a fair comparison even as it shapes perceptions of relative negotiating dynamics.**
  - The nature of the beast is to periodically harvest past unilateral virtue: under both the WTO and PTAs, services negotiations tend to yield policy consolidation (and often less than *status quo* commitments when the rules allow it) and relatively limited *de novo* market opening.

Evidence of PTA+ advances in subsequent PTAs

- There is **some evidence that parties to PTAs may be prepared to go further in subsequent preferential agreements**, such that market opening advances feed not only subsequent WTO commitments but also pave the way for further preferential market opening.

- This is notably the case of recent US PTAs that have achieved significant NAFTA+ outcomes in many sectors and modes of supply (except Mode 4). The CARIFORUM EPA may be expected to yield similar effects, though it's a hard sell in SSA.

- But is there **also evidence of PTAs introducing new restrictions or reservations that were not in earlier agreements, notably in response to WTO dispute rulings or to the emergence of new of changed policy sensitivities** (chilling effect of US Gambling or China AV, regulatory approval of "new " financial services)

Some issues are thorny even in PTAs (or just plain easier to tackle in the 'hood)

- **Sensitive sectors tend to be the same across negotiating settings** despite the fact that in almost all instances, PTAs have generated forward movement on all such fronts, and especially N-S PTAs, and most notably US PTAs. This has dented interest in the DDA.
- **Progress on Mode 4 trade remains uneven and generally limited even in PTAs, though the possibility to contain MFN leakage helps to raise comfort levels at the trade-migration interface** (also treated in non-trade deals, especially for lower-skilled movement)
- Moreover, **some sectors (e.g. land transport/logistics, MRAs in professional services) lend themselves more readily and easily to "neighborhood" approaches**.

Do PTAs facilitate regulatory convergence?

- Yo: yes and no! (what do you expect from a dismal scientist?)

- PTAs tend to be viewed as offering greater scope for making speedier headway on matters relating to regulatory co-operation in services trade, notably in areas such as services-related standards and the recognition of licenses and professional or educational qualifications.

- The evidence is once again somewhat mixed; harmonization (almost never beyond *de minimis* thresholds) and mutual recognition are challenging even among a limited subset of partners.

Do PTAs facilitate regulatory convergence?(2)

- To the limited extent that it occurs, such **negotiated convergence occurs far more under "closed" Article V agreements rather than through the open regionalism incantations of GATS Art. VII.**

- With only a few exceptions, **progress on regulatory issues tends to be less pronounced in *trans-regional* PTAs**. This suggests stronger returns to geographical proximity in matters of regulatory cooperation.

- **PTAs can however play a key role in promoting dialogue between regulators, business groupings and civil society organizations, the "regional public good" benefits of which may be reaped outside of trade agreements** but in a manner that nonetheless facilitates and promotes trade and investment, helps to promote better/fairer policy outcomes and improves investment climates.

Thank you!

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