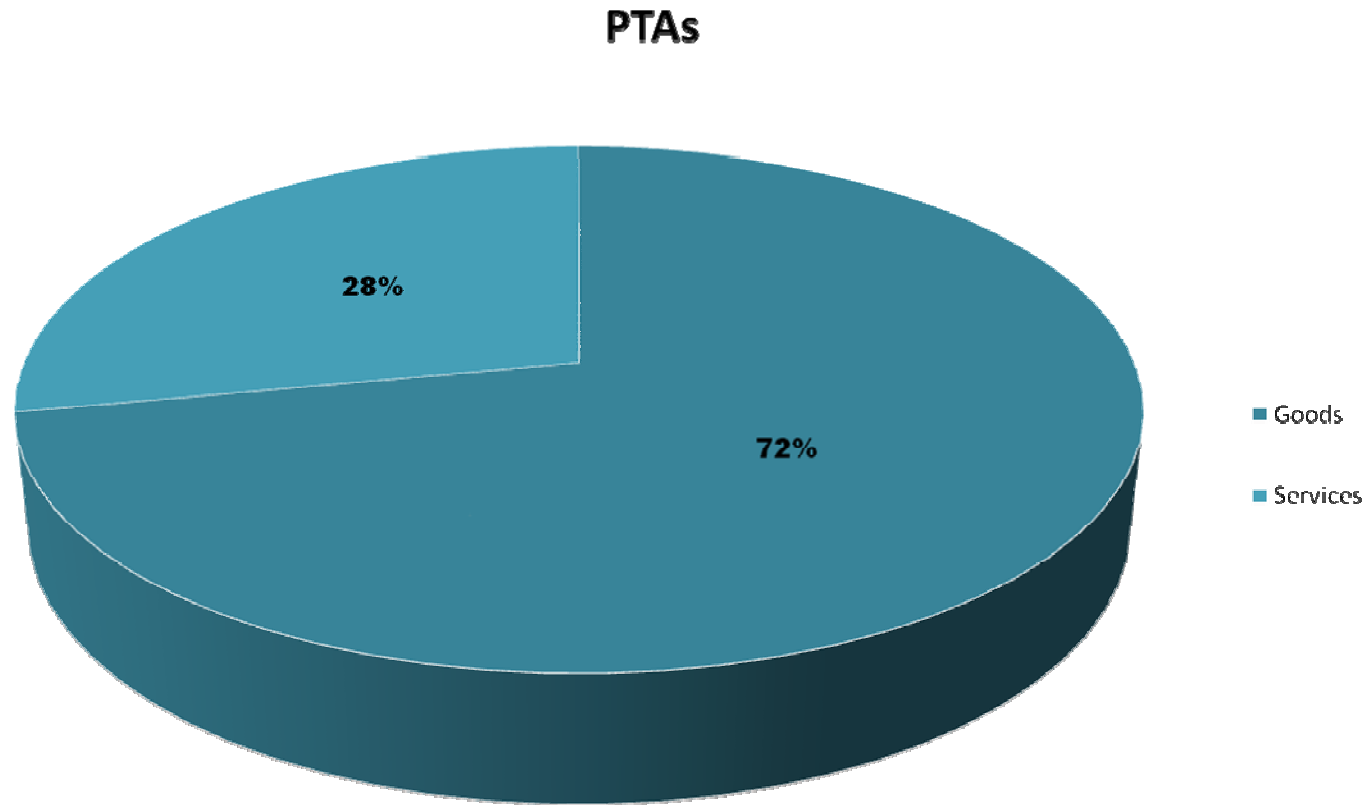


# Going preferential in services trade : lessons from practice

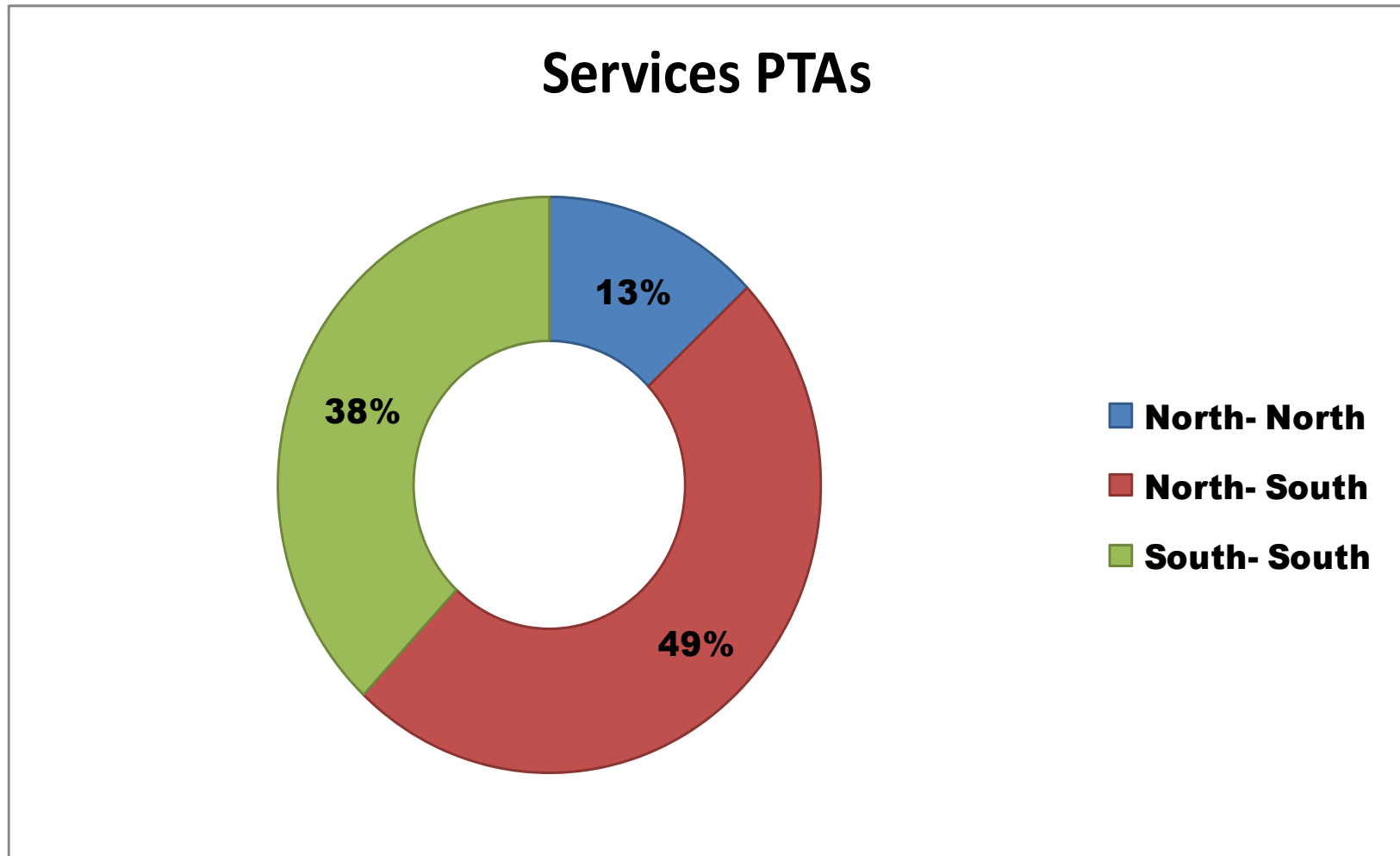
Pierre Sauvé  
World Trade Institute,  
University of Berne  
[pierre.sauve@wti.org](mailto:pierre.sauve@wti.org)

REGIONALISM IN AN INTEGRATING WORLD ECONOMY  
Utrecht University School of Economics  
7 May 2010

# SERVICES PTAS AS A PERCENTAGE OF TOTAL PTA NOTIFICATIONS TO THE WTO



# CLASSIFICATION OF PREFERENTIAL TRADE AGREEMENTS FEATURING SERVICES PROVISIONS BY COUNTRY GROUPINGS



# Key research questions

- If all trade agreements are, of essence, incomplete contracts, then the GATS is arguably the most incomplete of all (domestic regulation, emergency safeguards, subsidies, government procurement)
- How then 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?  
How much further than the GATS are we (GATS + and GATS -X)
- 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?
- Are PTAs optimal regulatory convergence areas?

# Study sample

- 55 of 76 PTAs featuring services provisions notified to the WTO and in force
- Of which:
  - North-North: 3\*
  - North-South: 27
  - South-South: 25
  - GATS approach: 32
  - NAFTA (negative list) approach: 23

\* Mexico and Korea counted as developing countries

# Broad similarities in scope and key provisions...

- PTAs covering trade in services tend to show broad commonality, both among each other and vis-à-vis the GATS, as regards the standard set of disciplines directed towards regulating trade in - and opening - services markets
  - Scope/coverage (similar carve-outs – e.g. air transport, public services)
  - Core provisions are also typically similar (e.g. transparency, domestic regulation, national and most-favored nation treatment, exceptions, dispute settlement; complementarity between framework (horizontal) disciplines and sector- or issue-specific (vertical) annexes.

# ... but contrasting architectures

- While their scope is broadly convergent, PTAs covering services adopt overall architectures (to rule-making and market opening) that can be classified under two main camps:
  - A first set of PTAs essentially replicates the GATS approach at the bilateral and/or regional level, including in terms of approaches to liberalization (e.g. voluntary, “hybrid”, scheduling of commitments)
  - Starting with the North American Free Trade Agreement, a second set of PTAs revolves around a distinction between trade and investment in services and sees commitments scheduled on the basis of negative lists of non-conforming measures, whereby all that is not reserved is deemed liberalized (e.g. a “list it or lose it” approach).

# Architectural divergences

- Under the NAFTA-type model, services chapters or disciplines to address the issue of cross-border supply (e.g. Modes 1 and 2 in GATS-speak), complemented by generic (i.e. non-services specific) broader disciplines on investment (GATS Mode 3 but more broadly defined and encompassing both investment protection and liberalization disciplines as well as investor state dispute settlement) and the temporary entry of business people (*à la* Mode 4 for all worker categories and not only service suppliers);
  - The US PTAs are (WTO-inconsistent?) outliers in this regard since 2004 as they no longer feature separate chapters and specific commitments on the movement of natural persons even as the latter are covered by the definition of trade in services.
- NAFTA-type PTAs also tend to feature a **right of non-establishment**, otherwise known as a **local presence** discipline (e.g. no local presence should be required as a pre-condition to supply services). There is no GATS equivalent for such a discipline.
  - Local presence obligations were originally meant to promote the cross-border supply of professional services but are also well-suited to promoting the growth of e-commerce and remotely-supplied IT services.



# PTAs are not 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 Singapore.
- The majority of South-South PTAs resort to the GATS approach (connoting continued precaution and defensiveness).

# Harnessing the best of both approaches

- Both approaches can yield identical liberalization harvests
- 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

- Pursuant to GATS Article V.3 disciplines, 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, preferential liberalization of Mode 3 approximates MFN liberalization.
- But there is growing evidence that South-South PTAs make use of the space afforded them under Article V.3 to adopt more restrictive rules of origin aimed at limiting benefits to insiders (e.g. ASEAN, Mercosul, Andean Community)
- Rules of origin targeting cross-border supply (Mode 1) remain largely unaddressed, and rules dealing with Mode 4 trade tend to be quite strict, in most instances bestowing temporary entry benefits only to citizens or permanent residents of PTA Parties.
- Policy questions to ponder:
  - How will the current economic crisis affect rule-design in this area?
  - How development-friendly are restrictive rules of origin in services trade?

## 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 on GATS).

# We know little about preference erosion in services trade

- 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.
  - Poor swimmers beware: there is considerable “water” in GATS commitments! This may be entirely tactical and linked to the DDA state of play on agriculture and NAMA.

## Limited PTA progress on the unfinished rule-making agenda of the GATS

- PTAs have generally made little progress in tackling the rule-making interface between domestic regulation and trade in services.
- Indeed, many PTAs feature provisions in this area that are no more fleshed out and, in some instances, weaker or more narrowly drawn (*i.e.* focusing solely on professional services) than those arising under Article VI of the GATS (including the Article VI:4 work programme).
- GATS+ advances primarily take the form of strengthened disciplines on transparency (prior notification) and procedural issues, mainly in North-South PTAs, and especially in US PTAs.

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

- ...at least not in respect of the unfinished agenda of GATS.
- PTAs increasingly appear to rely on GATS developments on unfinished rule-making challenges, affirming the desire of parties to incorporate by reference any such advances.
- 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.

## Examples of novel (GATS-X /precedent-setting) rule-making advances can however be found in many PTAs

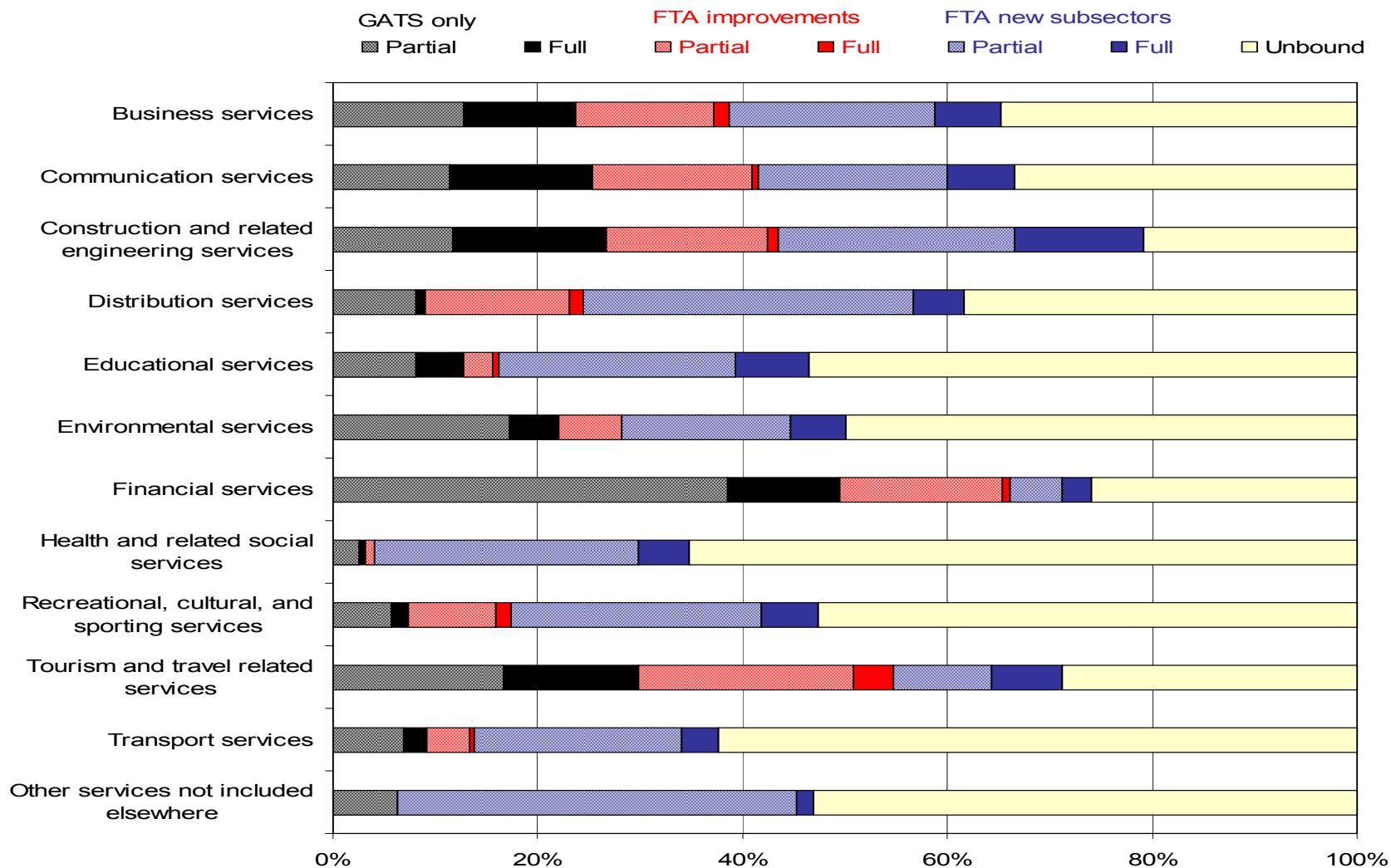
- Not all advances are to be found in the services provisions of PTAs. Some are treated in separate chapters, others relate to generic issues of regulatory cooperation.
- Advances on new rules relating to services are often achieved in policy areas that feature a market access component (e.g. govt. procurement, express delivery, digital trade).
- 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 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

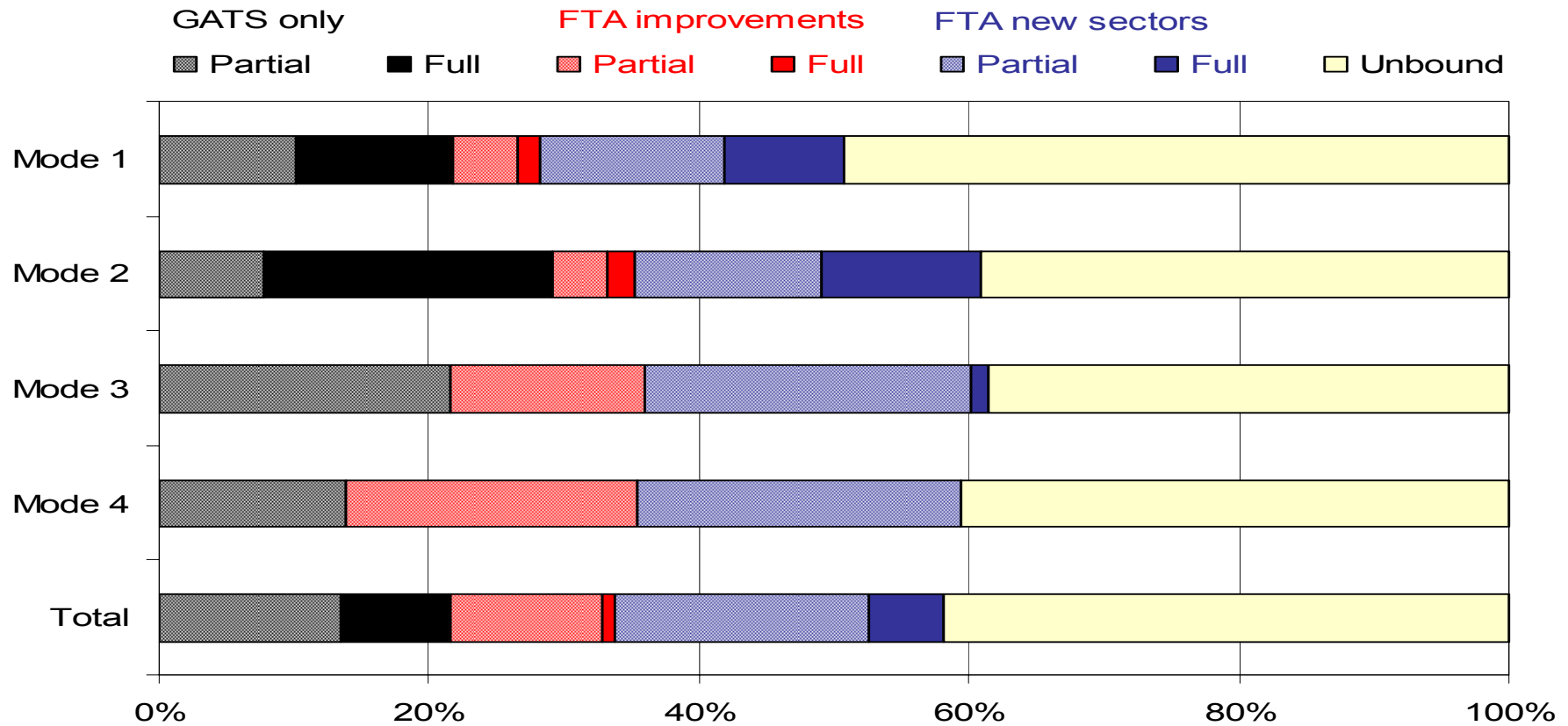
- Even if progress in liberalizing services markets remains limited in virtually all trade negotiating settings, the gap between PTA and WTO liberalization in services has become significant. This is true both in respect of sectors and modes of supplying services.
  - This should not come as a surprise 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.

# GATS+ advances in Asian PTAs covering services: sectoral breakdown



Source: Fink and Molinuevo (2007)

# GATS+ advances in Asian PTAs covering services: modal breakdown



Source: Fink and Molinuevo (2007).

## Evidence of PTA+ advances in subsequent PTAs

- There is some evidence that parties to PTAs may be prepared to go further in subsequent 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)
- But is there also be evidence of US PTAs introducing some new restrictions or reservations that were not in the NAFTA (in areas not subject to comparable WTO commitments (e.g. on cross-border supply of gambling services or on some types of financial services transactions in response to WTO dispute rulings or to the emergence of new of changed policy sensitivities.

# 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 (e.g. maritime transport, aviation, audio-visual services, health, education, energy) despite the fact that in almost all instances, PTAs have generated forward movement on all such fronts (especially N-S PTAs, and most notably US PTAs).
- 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)
- Moreover, some sectors (e.g. land transport/logistics, MRAs in professional services) lend themselves more readily and easily to “neighborhood” approaches.

# Evidence of liberalization synergy between PTAs and the WTO

- PTAs allow progress to be made in areas where regulatory conditions evolve rapidly or where new pro-liberalization constituencies arise (i.e. e-commerce/digital trade; express delivery, energy-related services; environmental services).
- In this sense, PTAs may be seen as useful market opening laboratories in services trade even as they appear to have ceased playing that role on rule-making issues.
- The iterative nature of market opening advances illustrates the existence of strong PTA-WTO complementarities.

# Do PTAs facilitate regulatory convergence?

- 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, though most advances in these areas are made within PTAs (i.e. under cover of GATS Article V (Economic Integration) and not Article VII (Recognition)).

## Do PTAs facilitate regulatory convergence?(2)

- The EU and NAFTA experiences attest to such difficulties. Still, a number of PTAs have registered some progress, especially in professional licensing (e.g. ASEAN, Mercosul, Japan-Philippines, CARICOM) and associated labor mobility privileges).
- With only a few exceptions (CARIFORUM-EU EPA – a case of historical proximity), 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!

Pierre Sauvé  
[pierre.sauve@wti.org](mailto:pierre.sauve@wti.org)