

GATS-Minus Trade Agreements: Why the Managerial School Does not Apply

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ABSTRACT: It is accepted wisdom that the great majority of preferential trade agreements that include services do not comply with one or more of the GATS requirements. As trade in services becomes more important to global economic growth and efficiency, these agreements are actively undermining the World Trade Organization's rules that are meant to increase global trade. Individual nations seek to include protectionist elements in agreements that violate WTO rules for internal political reasons. However, why a partner nation would accept such GATS-minus provisions can only be explained by geopolitical strategies or factors related to the managerial school, which proposes that the ambiguity of the WTO rules and lack of capacity to understand and/or implement the rules leads to GATS-minus agreements. However, this argument appears unfounded based on analysis of agreement configuration; the three major economies of the globe are partner to many of these agreements. Clearly, the managerial school does not apply when the leading nations of the WTO are complicit in agreements that undermine its rules. Instead, balance of power struggles between rising and/or revisionist powers provides the impetus for status quo and revisionist powers alike to conclude agreements that threaten the legitimacy and institutional integrity of the WTO.

Keywords: *World Trade Organization, trade agreements, balance of power, USA, China, Japan.*

Introduction

The proliferation of preferential trade agreements (PTA) since the conclusion of the Uruguay round and the subsequent creation of the World Trade Organization (WTO) has been astounding. Nearly every nation in the world is now member to some form of preferential agreement, the umbrella term covering all agreements concluded under Article XXIV, the Enabling Clause of the General Agreement on Tariffs and Trade and service agreements under Article V of the General Agreement on Trade in Services (GATS).¹

Recent scholarship, however, has begun to question how effective these agreements are in lowering barriers to trade, and specifically trade in services. For developed nations, which tend to have a comparative advantage for complex services, lower barriers to trade in services represent opportunity while developing nations stand to benefit from improved

1 "Regional Trade Agreement Database," The World Trade Organization, accessed June 1, 2016, https://www.wto.org/english/tratop_e/region_e/region_e.htm.

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financial, healthcare and education services along with their own comparative advantage for lower skilled service work. The growth in trade in international services has easily outstripped goods trade growth in the last two decades.²

PTAs that include services have also become more and more common. However, according to experts at the WTO, the great majority of these PTAs do not comply with one or more requirements the GATS lays out in Article V.³ These GATS-minus PTAs (GMPTA) exist among partner nations of varying development and across regions. Scholars have presented numerous causes for both the creation of PTAs, which are well established, and the creation of GATS-minus PTAs, which remain controversial.

PTA creation is the result of a complex interaction of domestic, international, and institutional forces. Literature to date recognizes economic, domestic political and international security concerns as the primary independent variables with explanatory power on the creation of PTAs along with the existence of multilateral trade negotiations (MTN). However, the causal mechanisms behind the creation of GMPTAs are less established and it is, therefore, not surprising that the existing literature offers simply potential variables that may explain why so many GMPTAs have come into existence without making theoretical or empirical judgments on the validity of each independent variable. Instead, scholars have offered the same variables as those in the literature on compliant PTAs along with the arguments proposed by the managerial school epitomized by Chayes and Chayes.⁴

This paper focuses on PTAs that fall short of the rules for service sector agreements because of the growing importance of services to the global economy and also because of the large library of literature on GMPTAs that has succeeded in describing the phenomenon, but failed to adequately explaining its cause.⁵ Despite this paper's more narrow focus, it is worth noting that a recent study found that 44 percent of goods sector agreements also fail to meet WTO requirements.⁶ A literature review will present the major findings of this research, which shall be followed by an analysis of the efficacy of the causal mechanisms in explaining the creation of GMPTAs. In particular, the managerial school

2 UN Conference on Trade and Development, *Handbook of Statistics*, (New York: United Nations Publications, 2015).

3 Rudolf Adlung and Sebastien Miroudot, "Poison in the Wine? Tracing GATS-Minus Commitments in Regional Trade Agreements," (working paper ERSD-2012-04, World Trade Organization Economic Research and Statistics Division, 2012).

4 Abram Chayes and Antonia Handler Chayes, "On Compliance," *International Organization* 47, 2 (1994).

5 Carsten Fink and Martin Molinuevo, "East Asian Preferential Trade Agreements in Services: Liberalization Content and WTO Rules," *World Trade Review* 7, 2008; Bernard M. Hoekman and Aaditya Mattoo, "Liberalizing Trade in Services: Lesson from Regional and WTO Negotiations," (EUI working papers, RSCAS 2013/34, European University Institute, Badia Fiesolana, 2013); Adlung and Miroudot, "Poison in the Wine?"; Adlung and Morrison, "Less than the GATS: 'Negative Preferences' in Regional Services Agreements," *Journal of International Economic Law* 41 (2010).

6 Weiwei Zhang, "Tracing GATT-Minus Provisions on Export Restrictions in Regional Trade Agreements," *Global Trade and Customs Journal* 3 (2016).

argues, generally, that non-compliance is the result of legal ambiguity, lack of capacity and/or socio-economic changes over time rather than intentional defection. In the case of GMPTAs these factors are either unconvincing or already covered by the control variables, meaning economic, domestic political and security concerns, on the creation of compliant PTAs. The analysis presents the case that developing nations enter into GMPTAs in order to satisfy domestic political and economic actors, and major economies, like the US, China and Japan, enter GMPTAs knowingly sacrificing potential economic gains in order to improve their international security position.

Literature Review

Scholars looking at PTAs that are non-compliant have focused primarily on analyzing the agreements to find examples of non-compliance and then have considered whether non-compliant PTAs create even more stumbling blocks for MTN in the Doha round than compliant PTAs.⁷ Causal explanation of the creation of GMPTAs has been less important for researchers and they have instead listed potential explanations, economic motives, internal political pandering, external security concerns or lack of capacity to comply, without arguing for or against the salience of the variables.⁸ Technical arguments that either positive listing, meaning listing all sectors covered in an agreement, or negative listing, meaning only listing the sectors not covered in an agreement, are better at producing compliant PTAs have been discredited.⁹

As arguments on the technical options for scheduling as creating GMPTAs have been brushed aside, the managerial school's basic premise that non-compliance is not the result of intentional defection has been put forward as a prominent causal mechanism.¹⁰ Rather than intentional violation, GMPTA creation is instead caused by ambiguity in the legal code, lack of capacity especially among developing nations and socio-economic changes over time that make compliance irrelevant or impossible.¹¹

Overall GMPTAs, at a basic economic level, present lesser potential for gains from trade and increased capacity to protect politically sensitive sectors. The motivation to protect more industries is clearly an internal political and economic concern, but the motivation for partner nations to enter into GMPTAs that allow for such protectionism, which is clearly against their baseline economic interests, can only be explained by geopolitical strategies or factors related to the managerial school. The existence of GMPTAs across regions and among nations of all stages of development suggests that either the entire world is confused by the ambiguity of the WTO rules and lacks the capacity to understand

7 Adlung and Morrison, "Less than the GATS."

8 Ibid.

9 Fink and Molinuevo, "East Asian Preferential Trade."

10 Fink and Molinuevo, "East Asian Preferential Trade"; Hoakman and Mattoo, "Liberalizing Trade in Services"; Adlung and Miroudot, "Poison in the Wine?"; Adlung and Morrison, "Less than the GATS."

11 Chayes and Chayes, "On Compliance."

and/or implement the rules, or that balance of power struggles between rising and/or revisionist powers is leading to “economic confrontations”¹² that threaten the legitimacy and institutional integrity of the WTO.

Besides the controversy over whether PTAs in general help or hurt the cause of global reforms towards greater liberalization through MTN, the existence of GMPTAs that go unchallenged by the WTO itself, as well as by the member states, raises worries that the WTO is less institutionally powerful than scholars often credit it with. The existence of PTAs in relation to the larger global MTN has been likened to termites eating away at the foundation of the international trade system.¹³ GMPTAs are described as having even more negative effects unless they are able to reform to the guidelines of Article V of the GATS within the timeline of implementation as required by WTO rules.¹⁴

This paper argues that GMPTAs are the result of intentional actions, desire for greater protectionism on the part of developing nations and the desire for increased political ties on the part of developed nations, which undermine the Dispute Settlement Mechanism (DSM) so praised by scholars in favor of strict enforcement of international treaties.¹⁵ Nations, both large and small, are able to skirt the rules as this kind of behavior has become so common because external security concerns among the major powers dominate foreign economic policy. This, then, allows partner nations to negotiate in protectionist measures based on domestic political considerations.

An Analysis of the Causes of GMPTA Creation

The creation of PTAs is a complex interaction of domestic, international and institutional forces that results in an agreement that adheres to the institutionalized rules of the WTO as described in Article XXIV, the Enabling Clause and Article V of the GATS. They allow member states to violate the most-favored nation (MFN) principle of the WTO only in the belief that the near elimination of trade barriers between the PTA member states outweighs the inefficiency created by violating MFN.

Scholars have focused on three primary independent variables when analyzing the creation of PTAs, but have also recently included multilateral trade negotiations as another independent variable. However, directional causality in this case is controversial. Does the failure of the Doha round lead to PTA creation or did the PTAs already in force and in negotiation doom the MTN from the start? Scholarship on this question abounds, but is frankly unimportant when considering the cause of GMPTA creation. It is certainly possible that GMPTAs could be particularly insidious stumbling blocks to MTN progress,

12 Michael Matsudano, “Preserving the Unipolar Moment: Realist Theories and U.S. Grand Strategy after the Cold War,” *International Security* 21 (1997).

13 Jagdish Bhagwati, *Termites in the Trading System* (Oxford: Oxford University Press, 2008).

14 Rudolf Adlung and Peter Morrison, “Less than the GATS: ‘Negative Preferences’ in Regional Services Agreements,” *Journal of International Economic Law* 41 (2010).

15 Pretty Elizabeth Kuruvila, “Developing Countries and the GATT/WTO Dispute Settlement Mechanism,” *Journal of World Trade* 31 (1997).

however they could just as easily be an overreaction to the failure of the Doha round. As the scholarship focused on this particular question remains controversial, for this study MTN and PTA creation will be assumed to be endogenous, meaning the existence of MTN and GMPTA influence one another. The remainder of this section will cover how the literature to date has explained PTA creation as based on economic, domestic political and international security concerns. These factors influence on GMPTA creation is also analyzed.

Economic Factors

Economists and international relations scholars are in agreement that economic gains from lowering barriers to trade, domestic political concerns, meaning protectionist rent-seeking, and international security concerns are the primary indicators of PTA creation. Still, economists tend to focus primarily on the first two variables, while international relations scholars often focus on the larger strategic issues at play. At its simplest, however, PTA creation is an economic-focused state behavior.

Economically, forming a PTA only makes sense if the agreement generates more new trade than it diverts.¹⁶ PTAs generate new trade by eliminating nearly all barriers to trade among member nations. However, the elimination of barriers to trade among member nations means that non-members are now at a disadvantage and trade is diverted away from non-members to PTA-members. If trade creation outweighs trade diversion then a PTA has created greater efficiency and will lead to economic gains from trade. Baier and Bergstrand successfully demonstrated that economic concerns alone predicted 83 percent of all PTAs.¹⁷

The economic predictors of PTA creation are based on the Heckscher-Ohlin theory of comparative advantage when considering the labor and capital make-up of two countries. Generally speaking, capital-rich countries make the best PTA partners for labor-rich countries as one nation can supply excess capital in exchange for excess labor; it is worth noting here that the most common GMPTA configuration is between developed and developing nations.¹⁸

Natural barriers to trade, primarily geographic distance, is also an important factor best described by the gravity model of trade. According to this model two countries that are close to one another, but isolated from the rest of the world would make the best PTA partners. Conversely, nations that are separated by great distances and have many closer nations that could serve as trading partners would make the worst PTA partners. It is important to keep in mind that economists do also include control variables related to culture and geopolitical strategy including previous colonial relationships, linguistic

16 Scott L. Baier and Jeffrey H. Bergstrand. "Economic Determinants of Free Trade Agreements," *Journal of International Economics* 64 (2004).

17 Ibid.

18 Adlung and Miroudot, "Poison in the Wine?".

affinity, political affinity in terms of regime type and the existence of military alliance or relationship. However, in economic studies these control variables are relevant but rarely central to the analysis.

The above models work well for explaining PTAs, but are also based on trade models that for the most part ignore institutional factors. Economists often assume that a PTA fully eliminates all barriers to trade for the purpose of modeling while being well aware that PTA creation simply requires the elimination of *substantially* all barriers to trade, not all barriers to trade. In reality this means that states enter into a horse-trading negotiation of concessions. It is certainly possible that a state may be willing to accept a certain level of protectionist behavior in its PTA partners, even to a degree that violates the rules of the WTO, so long as significant reductions are made on the whole.

There are a variety of ways in which a PTA may be GATS-minus. One PTA member may offer less coverage in scheduling than was previously promised in the GATS schedule of concessions.¹⁹ Here, theoretically, one or more states are accepting less coverage in certain sectors, but in return receive greater liberalization on the whole than would have existed without a PTA. There is clearly an economic reason to allow a state to increase protectionism in one area but increase liberalization across other areas. This, however, is generally not the case, at least among PTAs among Asian nations and their partners, which according to Razeen Sally of the London School of Economics, are “very weak and have resulted in hardly any net liberalisation.”²⁰

The literature on compliance has repeatedly tested and shown that while developing nations may lack the capacity to adhere to the rules of the WTO, developed nations do not.²¹ Therefore, while states may be entering into GMPTAs for economic gains, there is little reason to believe they are ignorant of the non-compliant provisions. Additionally, while a GMPTA might lead to overall lessening of barriers to trade, certainly, at least the developed nations realize that they would receive greater economic benefits if the agreement complied with WTO requirements. Despite this fact the US, Japan and China are all party to these types of deals.²² It appears as though these nations are not negotiating more thoroughly to receive the full market access they are allowed under the WTO rules. Instead, they are leaving economic gains on the table in order to secure an agreement that is more politically palatable to their partners.

While the economic gains from trade from even a GMPTA may be higher than simply going by the WTO concessions, developed nations are clearly purposefully not pursuing the market access, not only entitled to them, but, in fact, required for PTA creation under the WTO rules. Developed nations are routinely offering developing states GATS-minus

19 Adlung and Morrison, “Less than the GATS.”

20 Razeen Sally, “Regional Economic Integration in Asia: The Track Record and Prospects,” *ECIPE Occasional Paper 2* (2010).

21 Kuruvila, “Developing Countries.”

22 Adlung and Morrison, “Less than the GATS.”

provisions in order to secure agreements. The fact that states have repeatedly left economic gains on the table suggests that for many of these agreements economic gains is clearly not the only objective; perhaps not even the primary objective.

Domestic Political Concerns

Treaties related to trade and commerce, like PTAs, are particularly important to governments because they affect domestic firms and labor directly. Regardless of the political structure of a state, all governments require a strong level of political support either from economic elites or the laboring masses, or, ideally, from both. Within an economy, trade liberalization along the lines that PTAs require can be a boon as gains from trade increase general welfare. This does not mean, however, that PTAs are always economically beneficial for the state and it certainly does not mean that they are beneficial across all industries and social classes.

Firms naturally seek to control more market share as a way to control supply and therefore pricing. Tariffs and other trade barriers keep foreign competitors at bay. Yet, even within this same economy some other firms may rely more on foreign markets and could derive real benefits from trade barrier elimination in a PTA partner's economy. Laborers can also either gain or lose out on a PTA based on their level of skills, their industry and whether that industry in their nation is more or less competitive than that of the partner nation.

The Grossman-Helpman model on endogenous protection, meaning the interaction between rent-seeking and political support, hypothesizes that governments are most concerned with retaining incumbency and that liberalization leads to general welfare increases.²³ Therefore, governments will only allow for protectionism because those firms, labor organizations or individuals that gain from protectionism are able to provide sufficient political support to counteract the lost support from general welfare gains. This model has been demonstrated to be accurate in its depiction of rent-seeking and political contributions in both democratic and authoritarian regimes and developed and developing nations.²⁴

The creation of PTAs is therefore dependent on a political and economic climate where those who can gain from protectionism are either marginalized and unable to use political influence to block liberalization or are powerful enough to have their sector or sub-sector be exempt from eliminating barriers to trade. Again, the WTO only requires

23 Gene Grossman and Elhana Helpman. "Foreign Investment with Endogeneous Protection," (*working paper No. 4876, National Bureau of Economic Research*, Cambridge, MA, 1994).

24 Pinelopi Koujianou Goldberg and Giovanni Maggi, "Protection for Sale: An Empirical Investigation," (*working paper No. 5942, National Bureau of Economic Research*, Cambridge, MA, 1997); Kishore Gawande and Usreee Bandyopadhyay. "Is Protection for Sale? Evidence on the Grossman-Helpman Theory of Endogeneous Protection," *The Review of Economics and Statistics* 82 (2000); Devashis Mitra, Dimitrios D. Thomakos, and Mehmet Ulubasoglu, "'Protection for Sale' In a Developing Country: Democracy vs. Dictatorship," *The Review of Economics and Statistics* 84 (2002).

that substantially all barriers to trade be removed, even in compliant PTAs many barriers to trade remain and these are most easily and accurately explained by domestic political motivations.

Maintaining or increasing the level of protectionism for one or more sectors is clearly the motivation behind GMPTA creation as opposed to an agreement that was more liberal and complied with the WTO. Though liberal economic theory holds that the elimination of trade barriers brings increased efficiency, productivity, consumer choice and also leads to lower prices, again, this does not mean that all parts of society benefit. Those industries that receive protection from foreign competition are able to secure rents, meaning higher than normal profits, because of man-made barriers to trade. Politicians have every reason to protect industries so long as these industries are able to provide political support that makes up for lost support over general welfare gains.²⁵

Political support from protected industries provides the motivation for individual states to pursue GMPTAs, but it provides no insight into why partner nations would accept such agreements. As discussed above, agreeing to a PTA that allows partners to protect certain industries beyond what is allowed under the WTO requires means that states are losing out on market access they are both entitled to and essentially required to have. It makes little sense for states to leave economic gains they are entitled to on the negotiating table unless non-economic factors are at work.

Security Concerns

Like the economists who recognize foreign policy strategic elements in PTA creation, international relations scholars also understand the economic variables and yet emphasize the geopolitical struggle of great powers. These scholars routinely argue that economic factors alone are not sufficient in explaining the growth in PTA creation since the end of the Cold War.²⁶ Others have argued that there has been too little research into the trade-security nexus both generally and in relation to PTA creation.²⁷

The argument that security policy is the driving force behind economic policy, and PTA creation in particular, is based primarily on the central tenant of realism that all economic and material gains in the end are an expression of actual or potential military hard power. Matsudano argues that, “we should expect a state that pursues political confrontations

25 Grossman and Helpman, “Foreign Investment.”

26 Seungjoo Lee. “The Emergence of an Economic-Security Nexus and the Diversity of FTA Linkage Strategies in East Asia,” *The Korean Journal of Policy Studies* 27 (2012); Yul Sohn and Min Gyo Koo. “Securitizing Trade: the Case of the Korea-US Free Trade Agreement,” *International Relations of the Asia-Pacific* 11 (2011); Mike M. Mochizuki. “Political-Security Competition and the FTA Movement: Motivations and Consequences,” in M. Solis et al., *Competitive Regionalism* (New York: Palgrave Macmillian, 2009).

27 Matsudano, “Preserving the Unipolar Moment.”; Ann Capling, “Preferential Trade Agreements as Instruments of Foreign Policy: an Australia-Japan Free Trade Agreement and Its Implications for the Asia Pacific Region,” *The Pacific Review* 21 (2008).

with a revisionist state to also pursue economic confrontations.”²⁸ If status quo states, meaning those states agreeable to the current international hierarchy, fear that a rising state intends to upend the balance of power, these states will react aggressively to ensure access to scarce materials and market access.²⁹ However, commercial liberals also tend to believe that institutionalized commercial ties between states can breed mutual trust.³⁰ Lastly, liberal and realist visions combine to argue that in a balance of power struggle states will seek political influence in neutral and non-aligned states.³¹

The elephant in the room is obviously China. Although it has a relatively well-developed market economy, it remains politically authoritarian. Its increasing economic clout has raised questions the world over as to what its intentions might be given its new found great power status. Even economically, latent state intervention through state owned enterprises, particularly banks that control financing for major investment projects, puts China at odds both politically and economically with the US and its major westernized market economy allies in Europe, East Asia and parts of Latin America.

This paper is not intended to argue either for or against the idea of a balance of power struggle between China and the West. Rather, the literature clearly shows that security issues, especially between the US, its allies and China, are a driving force behind PTA creation. Min Gyo Koo has argued that China is using economic forums rather than security forums alone to assuage ASEAN fears of its growing economic and military clout and that the US has similarly been using PTAs to bolster long-standing security alliances.³² Seungjo Lee has emphasized that Chinese and Japanese economic policy is profoundly influenced by the perception of increased security competition.³³

While the balance of power struggle appears most stark within East Asia because of China’s geographic presence and US historical presence since the end of World War II, other regions also show signs of economic competition in relation to security concerns. China has been busy concluding commercial deals with countries throughout South America offering loans for infrastructure projects to be built by Chinese companies. The US has responded by reemphasizing trade relations with its closest allies in the region, Colombia, Peru, and Chile. Chinese interests in building an inter-oceanic canal in Nicaragua to rival the Panama Canal also raise red flags for policymakers in Washington and other western capitals.

The trade-security nexus analysis does not mean that economic factors are unimportant or that domestic politics can be ignored. Instead, scholars have argued that PTA creation and economic policy more broadly cannot be fully understood without including the larger

28 Matsudano, “Preserving the Unipolar Moment.”

29 Ibid.

30 Mochizuki, “Political-Security Competition.”

31 Ibid.

32 Min Gyo Koo, “US Approaches to the Trade-Security Nexus in East Asia: From Securitization to Resecuration,” *Asian Perspective* 35 (2010).

33 Lee, “The Emergence of an Economic-Security Nexus.”

geopolitical strategies states engage in. Matsudano has stated that, “foreign economic policy depends on the position of the state in the international economic structure and the international security structure.”³⁴ States pursue economic gains as a baseline for economic policy, but this is done within a larger geopolitical framework dominated by security concerns and with the understanding that states have their own internal political battles that affect PTA creation.

Strategic concerns offer a clear causal mechanism for leaving economic gains on the negotiating table and for allowing partner nations to flaunt the WTO rules in order to protect certain politically sensitive sectors. Matsudano has argued that when the international environment is more stable and less threatening to the dominant power, ie. in a unipolar security arrangement, states are able to pursue economic and security policies on separate tracks. However, when the international hierarchy is in flux, nations pursue strategies that combine security and economic policy often with the latter taking a back seat.³⁵

The largest economies of the world are allowing developing nations to include GATS-minus provisions despite the economic gains left behind. Clearly, some non-economic factor is making up for this. International relations scholars are in agreement that the most recent spurt of PTA creation has been driven by security concerns.³⁶ The fact that so many PTAs are in fact less liberalizing than they appear and frequently fail to comply with WTO rules furthers their argument. Developed states are willing to forgo economic gains in order to secure political cooperation during a period of perceived balance of power maneuvering.

Why the Managerial School Does not Apply

Before concluding that GMPTA creation is primarily the result of domestic pressure for protectionism and the international security competition, it is important to consider the managerial school’s position that legal ambiguity, lack of capacity and socio-economic changes over time are primarily responsible for all violations of international law. The prescription to cure unintentional violations is to provide dispute resolution, technical assistance and to increase transparency.³⁷ The primary criticism of the managerial school has been to argue that states are overall compliant with international law because states are not entering into deep cooperation that actually requires adjustment of state behavior.³⁸ Critics of the managerial school in general have accepted that compliance is generally quite high, but that this is simply because international law describes state behavior rather

34 Matsudano, “Preserving the Unipolar Moment.”

35 Michael Matsudano, “Economics and Security in Statecraft and Scholarship,” *International Organization* 52 (1998).

36 Koo, “US Approaches.”; Capling, “Preferential Trade Agreements.”; Mochizuki, “Political-Security Competition.”

37 Chayes and Chayes, “On Compliance.”

38 George W. Downs, David Rocke, and Peter N. Barsoom. “Is the Good News About Compliance Good News for Cooperation?” *International Organization* 50 (1996).

than dictates it.

GMPTA creation, however, is not a case of infrequent or rare examples of violation. The literature presents GMPTA creation as something of an epidemic accounting for the majority of agreements.³⁹ States of all shape and size are violating the WTO rules consistently and are not facing any sanction despite the capacity of WTO member states to request action.⁴⁰ Still, adherents to the managerial school believe that ambiguity, lack of capacity and socio-economic changes are the reason the entire world seems to be engaged in GMPTA creation.⁴¹

There is no doubt that the WTO rules are complex and there remains a good deal of ambiguity when it comes to defining what the requirement that PTAs cover substantially all trade means in practice. However, there is no reason to believe that vague language in the legal code is more of a hurdle for service related provisions than goods sector provisions.⁴² Scholars have attempted to explain GATS-minus provisions as the result of “interpretation problems” because of inexperience.⁴³ Others have argued that states suffer from “informational obstacles,” that they should learn through time and that mistakes in PTA creation might help states learn how to properly integrate multilaterally further down the line.⁴⁴ However, GATS-minus provisions that might be explained by misunderstandings, lack of capacity and lack of experience in the first GMPTAs have become even more prevalent over time.⁴⁵ Rather than learning from past mistakes and correcting them, states have continued to create GMPTAs.

Another issue raised by the managerial school is that developing states’ “regulatory frameworks are inadequate to manage unrestricted entry and competition.”⁴⁶ Here GMPTAs are the result not of politically motivated protectionism, but because developing states do not have the regulatory capacity to enforce a PTA that liberalizes substantially all service sectors. Developing states therefore need technical assistance in order to build capacity.⁴⁷

This idea ignores the fact that developing and developed states are both including GATS-minus provisions.⁴⁸ This also ignores the fact that these same states are opening up a great deal of their service industries to international competition without apparent difficulties in building regulatory capacity. No explanation is given as to why only certain

39 Adlung and Morrison, “Less than the GATS.”; Hoakman and Mattoo, “Liberalizing Trade in Services.”; Adlung and Miroudot, “Poison in the Wine?”.

40 Adlung and Morrison, “Less than the GATS.”

41 Fink and Molinuevo, “East Asian Preferential Trade.”; Hoakman and Mattoo, “Liberalizing Trade in Services.”; Adlung and Miroudot, “Poison in the Wine?”.

42 Adlung and Miroudot, “Poison in the Wine?”.

43 Adlung and Morrison, “Less than the GATS.”

44 Fink and Molinuevo, “East Asian Preferential Trade.”

45 Adlung and Miroudot, “Poison in the Wine?”.

46 Hoakman and Mattoo, “Liberalizing Trade in Services.”

47 Ibid.

48 Adlung and Morrison, “Less than the GATS.”

industries would require increased regulatory capacity but not others. The same authors that argue for increased technical assistance readily admit that it is often already embedded in the GMPTAs, though they argue it is insufficient.⁴⁹ Lastly, GMPTAs are most frequently created between developing and developed partners.⁵⁰ It may be possible that developing nations do not have the regulatory capacity to adequately follow a compliant PTA, but there is no reason to believe that the major powers of the world lack the expertise and resources to realize that they are agreeing to PTAs that violate the WTO rules.

Scholars supporting the managerial school have also pointed to time-constraints and simple error as explanations for GMPTA creation. Adlung and Miroudot have suggested that states may have simply forgotten to add in certain concessions or may have mistakenly deleted them.⁵¹ If GMPTAs were the exception and not the rule there might be more to this idea, but considering that there are dozens if not hundreds of GMPTAs this is exceedingly unlikely to be a major cause of GMPTA creation. The same could be said for time-constraints.⁵² States set their own deadlines for negotiations and while external political concerns may force negotiators to pick up the pace, “from a merely technical perspective, it would be relatively easy to eliminate any GATS-minus commitments.”⁵³ Error and time-constraints cannot explain the existence of GMPTAs across regions and economic development stages.

The managerial school also argues that socio-economic changes over time may cause states to violate international law either unintentionally or intentionally.⁵⁴ Scholars looking at GMPTAs in particular have argued that developing states may have been overly ambitious when setting concessions levels during the Uruguay round.⁵⁵ This argument has more explanatory power than the idea that the legal code is too ambiguous even for the most developed and experienced states or that states lack the capacity to adhere to the WTO rules. Yet, this last point by the managerial school is already explained by the control variables well established in the literature. There are obvious socio-economic reasons for states to pursue protectionist policies that have already been discussed. It makes sense for states to want to reverse their generous promises if given the chance.

Why Developed Nations Sign GATS-Minus Trade Agreements

There are clear and obvious internal political motives for a nation to want to include GATS-Minus provisions, but why would major economic powers agree to such provisions that do not benefit them economically? Given that it is fair to assume that the three largest economies in the world, the US, Japan and China, all have the expertise and resources

49 Hoakman and Mattoo, “Liberalizing Trade in Services.”

50 Ibid.

51 Adlung and Miroudot, “Poison in the Wine?”

52 Adlung and Morrison, “Less than the GATS.”

53 Adlung and Miroudot, “Poison in the Wine?”

54 Chayes and Chayes, “On Compliance.”

55 Adlung and Morrison, “Less than the GATS.”

to conclude trade agreements inline with WTO rules, why are they repeatedly doing the opposite? According to a WTO in-house study in 2012, the great majority of agreements concluded by these three economic giants are GMPTAs.⁵⁶ All of China's agreements analyzed, with the exception of that concluded with New Zealand, violated some WTO rule regarding PTA creation. While Japan's agreements faired better comparatively, the majority of their agreements were also in violation. For the US, nine out of ten agreements were in someway GATS-Minus.⁵⁷

More interestingly, there is a great deal of overlap in the partners these nations have chosen to sign PTAs with, many of them GMPTAs. Figures 1, 2 and 3, from the WTO Regional Trade Agreement Database, show the service agreement partner nations for each of the three major economies. China and Japan clearly have a great deal of overlap, especially in SE Asia. However all three have agreements with Australia, Singapore, Peru and Chile. Clearly all three have major interests, both economic and strategic, in the Pacific Rim.

The simple fact that these three powers have overlapping trade agreement partners could be innocuous. Given the larger security context, however, this seems unlikely. Sally has argued that, "Foreign-policy motives have loomed large, though with justifications that are all too vague," and is not the first to acknowledge "bitter nationalist rivalries" that exist in East Asia.⁵⁸ As stated earlier, this paper is not intended to argue one way or another whether there is a balance of power struggle in East Asia, but the perception that it exists and the clearly tense relations between these three nations is undeniable.

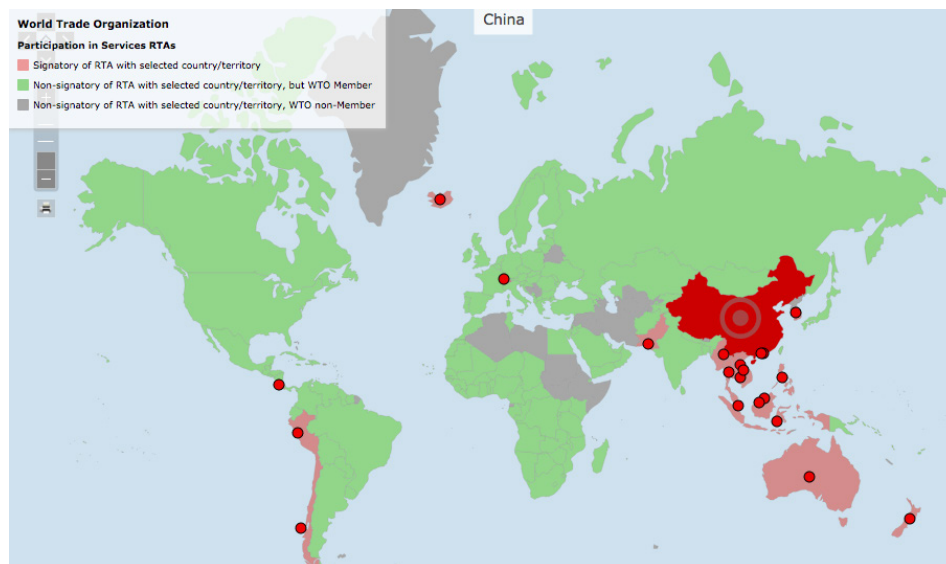


Figure 1 – China's Service Agreements.
Source: WTO Regional Trade Agreement Database.

56 Adlung and Miroudot, "Poison in the Wine?".

57 Ibid.

58 Sally, "Economic Integration."

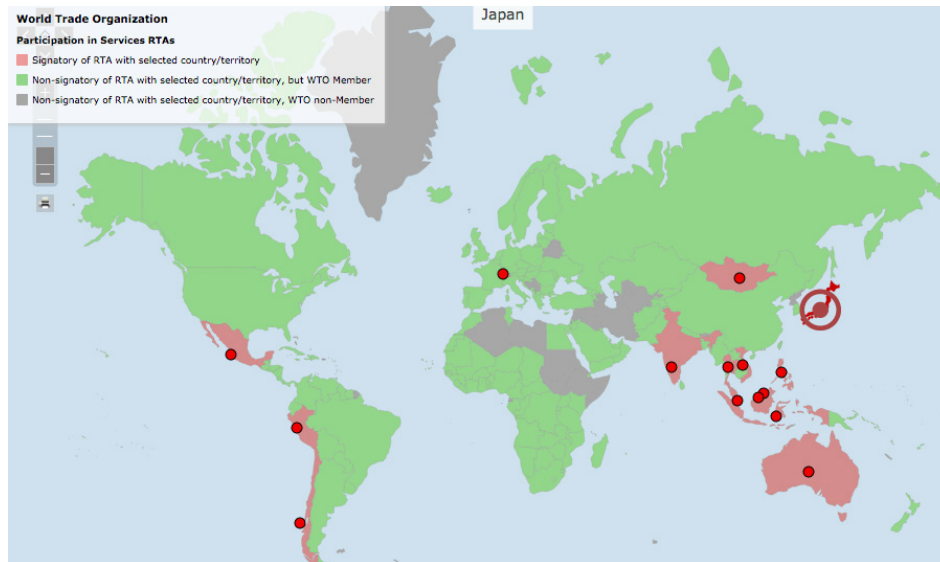


Figure 2 – Japan’s Service Agreements.
Source: WTO Regional Trade Agreement Database.

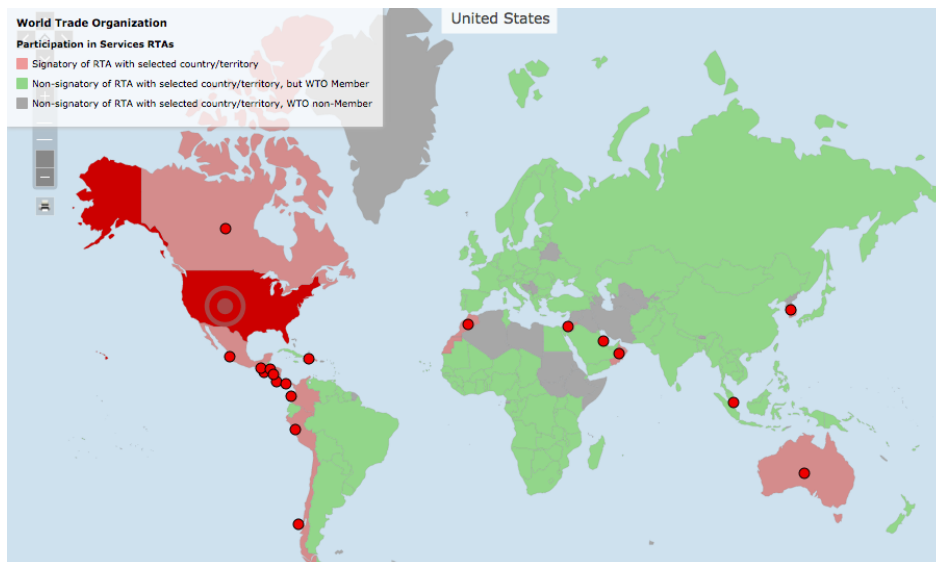


Figure 3 – The United States’ Service Agreements.
Source: WTO Regional Trade Agreement Database.

Conclusion

GATS-minus PTAs exist among partner nations of varying development and across regions.⁵⁹ The most common GMPTA is between a developing and a developed state.⁶⁰ The managerial school has argued that legal ambiguity, lack of capacity and socio-economic changes over time are the primary cause of GMPTA creation. However, even these scholars allow for the idea that other non-economic factors and specifically geopolitical strategies may also play a role in GMPTA creation.⁶¹ Scholars are clinging

59 Adlung and Morrison, “Less than the GATS.”

60 Adlung and Miroudot, “Poison in the Wine?”.

61 Fink and Molinuevo, “East Asian Preferential Trade.”; Hoakman and Mattoo, “Liberalizing Trade in Services.”; Adlung and Miroudot, “Poison in the Wine?”; Adlung and Morrison, “Less than the GATS.”

to the managerial school when more clearly understood and obvious factors could justify GMPTA creation.

The managerial school is overstating the role ambiguity plays given the fact that most GMPTAs involve at least one developed state. The idea that even the most experienced and developed nations cannot deal with the legal ambiguity in the GATS is not a credible argument. Research has shown that developing nations often lack the capacity to both understand international law and enforce it.⁶² However, in the case of GMPTAs developing nations are not the only states guilty of involvement. Lastly, socio-economic changes over time as a variable is not unique to the managerial school's argument and is in fact already included in PTA creation models.

While the managerial school emphasizes unintentional violations, in the case of GMPTAs states have clear motivation to protect politically sensitive sectors. Scholars are ignoring or downplaying the most obvious cause for violation and instead suggest that developing states are backward and ignorant and in need of paternalistic aid from developed nations. Rather than belittle developing nations as incompetent, it would be wise to consider all nations as rational actors. Additionally, the managerial school provides no insights into why developed nations would accept and sign agreements that violate international law.

The motivation for a state to protect certain industries despite being in violation is quite clear. The motivation for partner states to accept GATS-minus provisions is less so. However, unless we are to believe that even the architects of the WTO are confused by its legal code and lack the capacity to enforce the rules, another explanation must exist. It is very unlikely that developed states are consistently making clerical errors when developing treaties of such importance. By negotiating treaties that leave economic gains that are not only allowed but required in order to comply with the WTO, developed and developing nations alike are demonstrating that economic gains from trade are certainly not the only concern at hand and likely a secondary concern to geopolitical strategies and increased political cooperation between PTA partners.

The analysis in this paper points to domestic political concerns as the primary motivation for states to seek GATS-minus provisions and international security concerns as the primary motivation for other states to accept such provisions. The US, Japan and the west more broadly are clearly concerned with the rise of China and, either as a response to western suspicions, or because of its predetermined intentions, China is also concerned with securing political influence in Asia and beyond. Whether China actually has intentions of reshaping the international order is essentially irrelevant. The perception is there and both the major powers and lesser powers are seeking political influence over economic gains when formulating economic policy as part of a larger strategic agenda.

This is particularly problematic for the WTO and the international economic order

62 Kuruvila, "Developing Countries."

that was forged in the wake of World War II and that the US claims to protect. Along with worries that GMPTAs will function as stumbling blocks to progress in the Doha round, the existence of numerous GMPTAs that are going unchallenged undermines the institutional reputation of the WTO. GMPTA creation has become so prevalent that it seems unlikely that any state will bring a challenge to the dispute settlement mechanism for fear of creating a backlash of disputes against its own GMPTAs. If all states are complicit in violating international law then the world cannot look to states to rectify the situation. The WTO as one of the most institutionally powerful international organizations should increase its vigilance, if nothing else than for fear of becoming irrelevant.

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