



Legal Cross-Pollination between FTAs, Plurilaterals and the Multilateral Trading System



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Bilateral and Plurilateral Agreements: Supporting or Challenging the WTO?

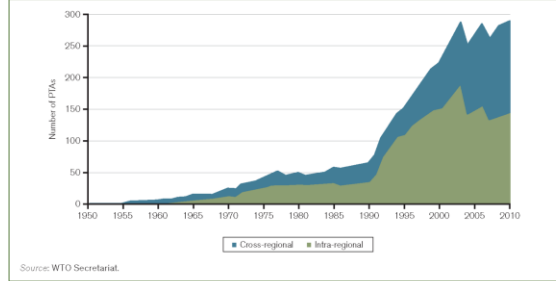
WTO, March 9, 2017

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Figure B.2: Cumulative number of intra- and cross-regional PTAs in force, 1950-2010, notified and non-notified PTAs



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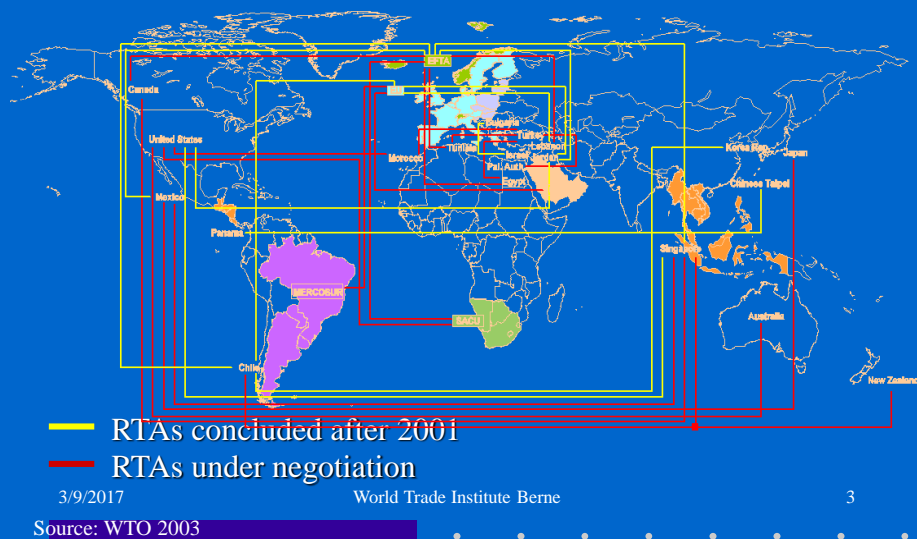
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• The Simple Wiring Diagram...

Cross Regional Preferential Trade Agreements (2003)



• WTI Data Base PTAs

- More than 700 PTAs identified, some 350 notified to WTO
- **Design of Trade Agreements (DESTA) Database**
- Mapping international trade agreements and exploring causes and effects
- <http://www.designoftradeagreements.org/www.designoftradeagreements.org/index.html>

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WORLD TRADE ORGANIZATION

World Trade Report 2011

The WTO and preferential trade agreements:
From co-existence to coherence

Trade Preferential Agreement

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4. How preferential is trade?

Trade between PTA members is growing as the number of agreements increase. About one half of world trade now takes place among PTA members.³¹ However, examining total trade flows between PTA partners overstates the amount of trade that takes place on a preferential basis. This is partly because tariff schedules of many PTA members increasingly contain duty-free MFN rates on which no further tariff reduction can be given. Hence, while the number of PTAs has been increasing, the importance of preferential trade has not kept pace. This development reflects a substantial reduction in MFN tariffs during the past two decades, either through multilateral trade negotiations or unilateral reductions.

- World Trade Report 2011 p. 72

CU: The EEC and EU: From functionalism to federalism

- 1951 European Steel and Coal Community
- 1956 European Economic Community and Euratom Treaty
- (1960: EFTA)
- 1966 Merger Agreement
- 1986 Single European Act
- 1992 European Union and successive Treaty revisions, (EEA Agreement)
- 2006 Failure of European Constitution
- 2007 Lisbon Treaty (EUT, TFEU, ECFR)

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PTA: Mercosur, NAFTA, CETA

- Free-trade Agreement US-Canada
- NAFTA (US, Canada, Mexico)
- Southern Common Market (MERCOSUR) Argentina, Brazil, Paraguay, Uruguay, potentially Bolivia, Chile, Venezuela, Colombia Peru
- South African Development Community (SADC) Angola, Botswana, Democratic Republic of Congo, Lesotho, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia, and Zimbabwe.
- South African Customs Union (SACU) RSA, Botswana, Lesotho, Namibia, Swaziland)
- APEC, ASEAN, bilateral developments
- Comprehensive Economic and Trade Agreement (EU-Canada 2017)
- **Weak or missing Secretariats and Dispute Settlement**

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TPP and TTIP, RCEP en cours

- Trans Pacific Partnership negotiations (TPP) (10 Asian and Latin America countries, US dropped out in 2017)
- Transatlantic Trade and Investment Partnership (TTIP) (EU and US)
- Regional Comprehensive Economic Partnership (China, Pacific States)
- If successful, these agreements will set new global standards which eventually will be eventually multilateralized in WTO

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CETA and TTIP: Relationship to WTO

- CETA and TTIP build upon the law of WTO and contributes to the common law of international trade
- Adopts WTO generations of trade barriers (tariffs, non-tariffs, behind-the-border (IPRs and TRIPs) and moves beyond (TTIP)
- Referencing to WTO jurisprudence of panels and the AB (CETA)
- Exclusion of domestic subsidies in goods and services due to freeriding effects

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TTIP: Regulatory Convergence Draft 2015

- Early information and hearings
- Stakeholder consultation
- Impact assessment
- Possible extension to federal state level
- Focal Points
- Tools
 - Mutual recognition of equivalence
 - Harmonization by recourse to international standards or approximation
 - Regulatory Cooperation Body (RCB)

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TTIP: Objectives of Regulatory Cooperation 2015

Section I: Objectives, definitions and scope

Article 1 - General Objectives and Principles

1. The general objectives of this Chapter² are:
 - a) To reinforce regulatory cooperation thereby facilitating trade and investment in a way that supports the Parties' efforts to stimulate growth and jobs, while pursuing a high level of protection of inter alia: the environment; consumers; human, animal and plant life, ~~and health and safety-working conditions~~; personal data; cybersecurity; cultural diversity; ~~or as well as~~ preserving financial stability;
 - b) To reduce unnecessarily burdensome, duplicative or divergent regulatory requirements affecting trade or investment, particularly given their impact on small and medium sized enterprises, by promoting the compatibility of envisaged and existing EU and US regulatory acts;
 - c) To promote an effective, pro-competitive regulatory environment, which is transparent and predictable for citizens and economic operators;

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Dialectical Relationship

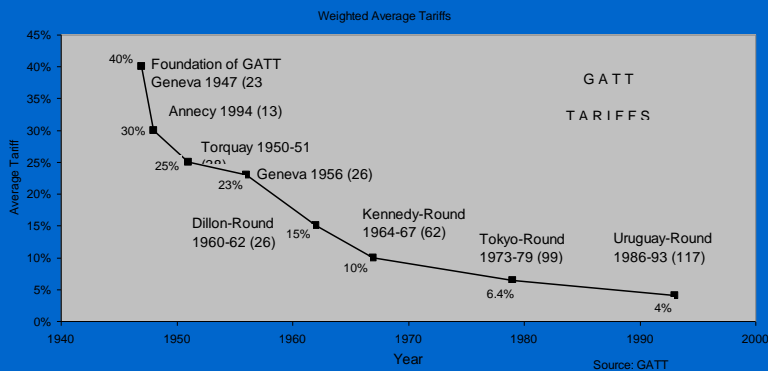
- Multilateralism and Preferentialism mutually supportive over time:
 - 1883 and 1886 IPR Conventions (Paris and Berne) based upon set of bilateral agreements
 - GATT 1947 based upon US Reciprocal Trade Agreements
 - TBT Agreement based upon EFTA Tampere Convention
 - Preferential Trade in Services based upon 1995 GATS Agreement
 - TTIP /TTP/RCEP: Future Multilateralization Effects in WTO to be expected (2020-2030)

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Tariff reductions in the industrial sector (developed countries)

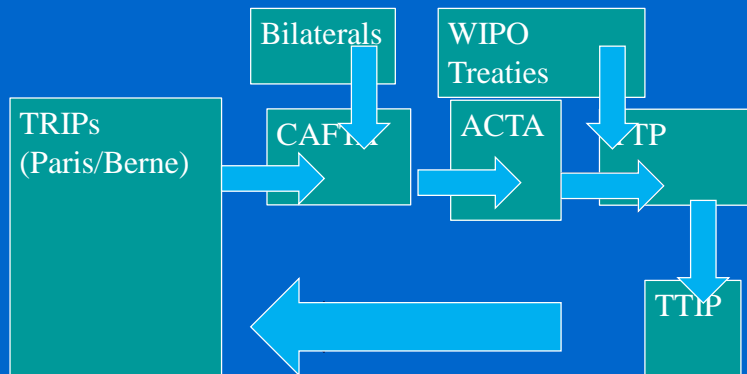


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Post TRIPs Process



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WTO: Perceptions and Realities

- Doha Development Agenda stalling
- Forum Shifting to PTA in particular TTIP, TTP
- Multipolar World
- WTO and multilateralism increasingly perceived irrelevant until 2016

- No major protectionism during and after Financial and Debt Crisis
- New Members
- New Agreements
- Central Role of WTO Dispute Settlement
- **WTO Law is the Foundation of all modern RTAs**

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Constitutional Functions of WTO

- Article XXIV GATT
- Exclusively CU and FTA:
 - substantially all the trade
 - Elimination of all trade barriers
 - No increase of external barriers (CU: whole)
- Article V GATS
- Exclusively EIA
 - substantial sectoral coverage
 - elimination of substantially all discrimination
 - No increase of external barriers
- Article Vbis GATS

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WTO: In-Built Preferences

- Plurilateral Agreements (Government Procurement)
- Mutual Recognition Agreements, Articles 6.3. TBT, 4.2. SPS
- Conditional MFN: Recognition of qualifications, Article VII GATS
- Countervailing Duties (AD, SCM)
- Safeguard Measures, Article 5:2(b) ASG
- TRIPS: Footnote 1 (Customs Unions)
- Waivers, Article IX(3) WTO Agreement
- S&D
- Trade Facilitation: Variable Geometry
- Critical Mass (TISA)?
- Dispute Settlement: Unilateral Withdrawal of Concessions (DSU)

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Enforcement DSU

- Even if hierarchy exists, it cannot be enforced in case of violation:
 - compensation
 - withdrawal of concessions
 - Absence of specific remedies
 - Absence of standing of secretariat in DSU
- States and negotiators are not at all subject to effective constitutional constraints

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Compliance: Contractual Fragmentation

- Proliferation of Trade Agreements not compliant with constitutional requirements
- Failure to discipline and approve agreements in WTO Committee on Regional Trade Agreements
- Article 12 Understanding: Issue of Justiciability (*Turkey - Textiles*)
- Essentially horizontal treaty relations:

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Efforts at Reform Doha Agenda

- Limited Efforts made in NG on Rules:
 - Specify the concept of substantially all the trade (agriculture)
 - Specify the concept of other restrictive regulations of commerce
 - Procedural issues (notifications)
- Lack of discussion of conceptual issues
- Sutherland Report 2005: Stern warnings!

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Historical Reminder

- Equal sovereignty of States in international law: power to discriminate
- Trade agreements throughout history - essentially preferential agreements (colonial preferences)
- Treaty law: equal footing and absence of hierarchy and mandatory rules (contractual nature of international law)

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Vienna Convention (VCLT)

- | | |
|---|---|
| <ul style="list-style-type: none"> • Article 30 • Successive Treaties on same subject matter: • Lex posterior, subject to specific treaty language • Non-application to third Parties • customary law? | <ul style="list-style-type: none"> • Article 41 • Bilateral modification of multilateral treaty Obligations • permitted or not prohibited • pactum tertiis nec nocent • customary law? |
|---|---|

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Implications

- Unsettled hierarchy of WTO rules and RTAs in WTO law
- Accidental results of lex posterior rule in relation to trade rounds results
- Predominance of WTO rules under Article 41 VCLT (*Primauté*) due to explicit authorisation to use RTAs?

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Context: Article 31:3(c) VCLT

- (c) any relevant rules of international law applicable in the relations between the parties.
- 4.A special meaning shall be given to a term if it is established that the parties so intended.

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Peru – Additional Duty on Imports on Certain Agricultural Products (WT/DS457/AB/R, 20.7.15)

5.98. Peru's argues that the FTA and ILC Articles 20 and 45 constitute relevant rules of international law applicable in the relations between the parties within the meaning of Article 31(3)(c) of the Vienna Convention and that, in addition, the FTA constitutes a "subsequent agreement between the parties" under Article 31(3)(a). In this respect, Peru's arguments require us to address the threshold question of whether the FTA and ILC Articles 20 and 45 are instruments that could be taken into account "together with the context" under Article 31(3)(a) and (c) of the Vienna Convention in the interpretation of Article 4.2 of the Agreement on Agriculture and Article II:1(b) of the GATT 1994.

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5.105. Having concluded that the FTA and ILC Articles 20 and 45 are not "relevant" to the interpretation of Article 4.2 of the Agreement on Agriculture and Article II:1(b) of the GATT 1994 within the meaning of Article 31(3)(c) of the Vienna Convention, and that the FTA does not qualify as a subsequent agreement "regarding the interpretation" of these provisions within the meaning of Article 31(3)(a), there is no need for us to address whether the FTA and ILC Articles 20 and 45 are "rules of international law applicable in the relations between the parties", or the meaning of the term "parties" in both Article 31(3)(a) and (c) of the Vienna Convention. Similarly, there is no need for us to address whether the FTA can be considered as an "agreement" within the meaning of Article 31(3)(a) for purposes of Article 4.2 and Article II:1(b).

5.106. We note, however, that Peru has not yet ratified the FTA. In this respect, it is not clear whether Peru can be considered as a "party" to the FTA. Moreover, we express reservations as to whether the provisions of the FTA (in particular paragraph 9 of Annex 2.3), which could arguably be construed as to allow Peru to maintain the PRS in its bilateral relations with Guatemala, can be used under Article 31(3) of the Vienna Convention in establishing the *common* intention of WTO Members underlying the provisions of Article 4.2 of the Agreement on Agriculture and Article II:1(b) of the GATT 1994. In our view, such an approach would suggest that WTO provisions can be interpreted differently, depending on the Members to which they apply and on their rights and obligations under an FTA to which they are parties.

Assessing Fundamental Interests

- Members pursue short term interests of maximising flexibility of RTA rules, implementation and enforcement
- Shared long-term interests in viability of overall multilateral system:
 - WTO essential backbone linking regional trading blocks
 - limitation of trade diversion while allowing regional integration for economic and political ends

Monitoring Existing Agreements

- The evolution of the common law of international trade calls for stronger institutions beyond dispute settlement:
- Proactive role of the WTO Secretariat in monitoring existing agreements
 - TPRM
 - Dispute Settlement: A voice for the Secretariat and enhanced transparency
 - Guardian of the system: right to lodge consultations and complaints against failing members

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Towards a World Trade Court

- From Fragmentation to Coherence
 - Art. 3.2 DSU and the status of non-WTO law in dispute settlement
 - Weak status of dispute settlement in Preferential Trade Agreements (except EU)
 - Expanding the jurisdiction of the WTO to Preferential Trade Agreements including investment protection law
 - Institutional implications and cost structures

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The Importance of Central Institutions

- The experience of Roman Law and the *Glossatores*
- The formation of the Common Law (UK)
- The process of modern codification in Civil Law
- The evolution of EU Law
- All depending on strong central legal institutions, scholarship and civil society support

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Future WTO Negotiations

- Due to decline of MFN, market access negotiations will likely continue to take place in preferential fora and settings
- Non-tariff barriers: market size and spill-over effects
- WTO member need to focus on USPs of multilateralism and related Organisations:
 - Multilateral Know-how and expertise of the WTO
 - Trade Community in Geneva and NGOs
 - Areas with MFN and spill-over effects:
 - Conditions of competition (subsidies, IPRs, competition policy)
 - Technical regulations, food standards, domestic regulation of services
 - Behind the Border Issues in cooperation with other IOs

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Farewell to Trade Rounds: Building Blocks

- With market access (tariffs, QRs) and services dealt with mainly preferentially, the rationale for trade rounds no longer exist
- Instead: Sectorial negotiations and on-going quasi legislative processes (building upon past experience: Financial Services, Telecom, GPA, Access to Essential Drugs, ITA, TISA, EGS, Electronic Commerce)
- Integrated approach covering goods, services, investment, competition, government procurement (e.g. climate change mitigation and adaptation): Technology Transfer Agreement, Electricity Agreement; Agreement on Fossil Fuels (Subsidy Reductions); Agreement on Air Traffic (Services and competition law, subsidies)
- Incremental approach with long term goals defined (Building Blocks)

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Modifying Consensus Diplomacy

- The shift to PTAs is partly caused by rigidity within WTO talks
- Return to WTO talks requires more flexible attitudes
- Diplomacy should adopt consensus-minus as established under DSU and/or weighted voting
- Formally blocking consensus should be subject to vital interests, reasoned statements and need to confirmation upon cooling-off

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Conceptual Reform Proposals

- Clarification of hierarchy of rules (supremacy of WTO law)
- Specific remedies (MFN, withdrawal)
- Examination of RTAs prior to ratification
- Adopted approval by CTRA establishes presumption of WTO compatibility
- Right of WTO Secretariat to challenge inconsistent Agreements
- Linkage to broader consensus problem in WTO

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Conclusions

- Mutual supportiveness of WTO and PTAs (dialectical relationship)
- Integrated approach to trade regulation: towards a common law of international trade
- Need to strengthen central institutions, in particular WTO dispute settlement: extending jurisdiction to PTAs (including investment protection)
- Sectorial negotiations
- Qualified consensus practices in WTO

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- Thank you for your attention!
 - thomas.cottier@wti.org
- Thomas Cottier, Charlotte Gasser-Sieber, Gabriela Wermelinger, The dialectical relationship of preferential and multilateral trade agreements, in: Andreas Dür & Manfred Elsig (eds.), Trade Cooperation: The Purpose, Design and Effects of Preferential Trade Agreements 465-496 (Cambridge: Cambridge University Press 2015)

