A. Introduction

The very definition of ‘preferential trade agreements’ (PTAs) channels our attention almost exclusively to the relationship between PTAs and the WTO: PTAs are ‘preferential’ as compared to the WTO benchmark. While this relationship is an important one, the lasting proliferation of PTAs compels us to also look into a different direction. This contribution addresses an often overlooked question: What is the relationship between PTAs? More specifically, we inquire into what happens if two countries conclude not one but two (or more) PTAs with each other (‘double PTAs’)? Think of Canada and the United States concluding, first, the US-Canada Free Trade Agreement (FTA) and, second, the North American Free Trade Agreement (NAFTA); or, more recently, the United States and Mexico negotiating NAFTA and then the Trans-Pacific Partnership (TPP) or Trade in Services Agreement (TISA)?

To the extent that interactions between PTAs received legal attention, it concerned the relationship between PTAs concluded by different countries sets. Naumann (2006), for example, compared rules of origin between PTAs concluded by the European Union (EU) with several third countries. Successive PTAs between the same countries, however, have largely escaped legal scrutiny. This is understandable in so far as, historically, ‘double PTAs’ were of little practical significance. They occurred as by-products of shifting regional integration projects: as one forum fell in disuse without being formally terminated (e.g. the Latin American Integration Association), a new one was established (e.g. MERCOSUR) (see Kaltenthaler and Mora 2002). This changed only relatively recently with states purposely concluding ‘double PTAs’. Of particular significance is the move from what we call (somewhat
inaccurately)¹ ‘regional’ to ‘mega-regional’ trade agreements: two (or more) countries conclude a PTA and, subsequently, a second PTA is negotiated between a larger group of countries. Examples of this trend are current efforts to conclude the Common Market for Eastern and Southern Africa–East African Community–Southern African Development Community (COMESA-EAC-SADC) Tripartite in Africa and the TPP. ² Yet, as will be discussed below, this move from ‘regional’ to ‘mega-regional’ is just one subset of a growing universe of ‘double PTAs’.

Section B offers four reasons why the limits imposed by WTO rules on PTAs (as well as plurilateral trade agreements) must not be overrated. This should redirect attention away from the WTO–PTA relationship towards relations between PTAs. Section C describes the current network of PTAs in force, its structure and centrality features – using basic methods of network analysis – and also assesses the frequency of ‘double PTAs’. Section D analyses the possible reasons for concluding ‘double PTAs’. Section E assesses ways in which successive PTAs involving the same countries can inter-relate in legal terms.

B. Forget about the WTO: Does the WTO really restrict the conclusion of preferential and plurilateral trade agreements?

The vertical, top-down WTO–PTA relationship is, at least in legal terms, much overrated. The restrictions that WTO rules impose in respect of a subset of WTO Members concluding PTAs or, for that matter, plurilateral trade agreements (PAs),³ have at least four serious limitations.

Firstly, WTO Members – be it in committee or dispute settlement – do not really check or challenge whether PTAs actually comply with General Agreement on

¹ The terminology is inaccurate to the extent a first ‘regional’ trade agreement must not necessarily be between countries in the same geographical region (it could be the US–Australia FTA, followed by the TPP). It may further be inaccurate to the extent that ‘mega-regional’ covers any subsequent trade agreement that includes at least the two parties to the first trade agreement (but not all WTO Members); in other words, a ‘mega-regional’ trade agreement could have dozens of parties but could also have just three parties (the NAFTA is a good example, as the NAFTA followed after the US–Canada FTA).


³ By ‘plurilateral trade agreements’ (PAs), we understand all trade-related agreements concluded between a subset of WTO Members that are not notified under GATT Article XXIV, the Enabling Clause or GATS Article V. In most cases, PAs, rather than liberalising substantially all trade between partners, are sector- or topic-specific, such as the Agreement on Government Procurement (GPA) or the Information Technology Agreement (ITA). On this definition, PAs can exchange concessions on a discriminatory basis (as the GPA does, limiting benefits to GPA parties) or on an MFN basis (as the ITA does, extending benefits to all WTO Members).
Tariffs and Trade (GATT) Article XXIV, the Enabling Clause (pursuant to which PTAs exclusively between developing countries can be concluded) or General Agreement on Trade in Services (GATS) Article V.\(^4\) Moreover, GATT Article XXIV and, even more so, GATS Article V and, certainly, the Enabling Clause offer a great deal of wiggle room for WTO Members to conclude PTAs of all sorts. This is a widely known reality (Pauwelyn 2009).

Secondly, and often overlooked, WTO provisions on PTAs and PAs never prohibit such agreements. They only control when these agreements can be discriminatory, that is, reserve benefits to the parties to the PTA or PA, excluding other WTO Members.

If, for example, NAFTA were not to meet GATT Article XXIV conditions, NAFTA would not terminate or become invalid. GATT Article XXIV would simply not be available to justify, for example, US preferences granted to Canada but not to the EU. GATT Article I (most-favoured nation (MFN) treatment) would then oblige the United States to give NAFTA preferences also to the EU (or to get rid of NAFTA preferences in the first place\(^5\)). Put in legal terms, GATT Article XXIV is not a prohibition, but an exception. This follows the spirit of trade liberalisation that underlies the WTO: WTO Members are quite content when a country agrees to further liberalise trade; such further liberalisation must however be extended to all WTO Members unless the conditions in GATT Article XXIV are met. Not meeting these conditions does not invalidate the agreement; it only invalidates the Article XXIV exception to MFN. In the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) there is no Article XXIV-type exception to MFN to begin with. This means that TRIPS-plus (provisions in) PTAs – such as the Anti-Counterfeiting Trade Agreement (ACTA) – must be extended to all WTO Members. This automatic extension is the baseline for TRIPS-plus PTAs. A trade in goods PTA that does not meet Article XXIV conditions would only lead to the same default result: MFN extension (not invalidation of the PTA).

\(^4\) Since 2006 the WTO’s ambition has been lowered to that of transparency (see Hoekman, this volume, at p. 9: ‘with the advent of the Transparency Mechanism in 2006, there is no longer any effort by WTO Members to approve new PTAs’). With few exceptions, WTO Members have also refrained from challenging or even referring to PTAs in WTO dispute settlement.

\(^5\) Another way for the United States to keep NAFTA concessions preferential in this scenario would be to obtain a waiver under Article IX:3 of the WTO Agreement or a two-thirds majority decision under GATT Article XXIV:10. Following an adverse dispute settlement ruling, the United States could also maintain its MFN violation but negotiate compensation or agree to suffer retaliation.
A similar confusion may arise around Article X:9 of the WTO Agreement concerning so-called Plurilateral Trade Agreements (PAs). Article X:9 states that WTO Members can add a PA to Annex 4 ‘exclusively by consensus’. This does not, however, prohibit WTO Members from concluding a PA unless all WTO Members agree. Outside Annex 4 (think of the Information Technology Agreement (ITA)) or outside the WTO altogether (think of ACTA), a subgroup of WTO Members can agree to whatever plurilateral agreement they like. However, when such plurilateral agreement confers benefits subject to MFN, WTO rules mandate that these benefits be granted to all WTO Members. The consensus referred to under Article X:9 is not a precondition for concluding a plurilateral; it is a precondition for concluding a discriminatory plurilateral agreement that becomes part of the WTO treaty (i.e., part of Annex 4 but not extending its benefits to all WTO Members). The core legal effect of adding a plurilateral agreement to Annex 4 is, indeed, that it allows (but does not require) the plurilateral to deviate from MFN (another legal consequence is that, as part of the WTO treaty, the Dispute Settlement Understanding (DSU) becomes available to enforce the Annex 4 plurilateral agreement). Article II:3 of the Agreement Establishing the WTO explicitly provides that ‘[t]he Plurilateral Trade Agreements [in Annex 4] do not create either obligations or rights for Members that have not accepted them’. Article XVI of the same agreement further states that the provisions in this agreement (including Article II:3) ‘prevail’ over the provisions of

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6 Another way to conclude a discriminatory or preferential PA, without violating MFN, would be to obtain an explicit waiver under Article IX:3 of the WTO Agreement or for the PA to become a PTA, i.e., to meet GATT Article XXIV/GATS Article V, as is the intention for the TISA currently under negotiation (but often referred to as a PA).

7 Appendix 1 to the DSU lists as ‘agreements covered by the understanding’ plurilateral trade agreements in Annex 4 to the WTO Agreement. However, the Appendix explicitly lists the four PAs that were part of Annex 4 in 1994 (when the DSU was concluded; since then, two of these PAs have been terminated). This seems to indicate that for a new PA, part of Annex 4, to become a ‘covered agreement’ subject to the DSU, the DSU would need to be amended to include in Appendix 1 the new PA. Amending the DSU requires the consensus of all WTO Members (including those not party to the PA) but takes effect upon approval by the WTO Ministerial Conference. Unlike, for example, TRIPS amendments, DSU amendments do not require ratification by individual WTO Members. See Article X:8 of the WTO Agreement. Such an amendment of the DSU could be made at the same time as the PA is included in Annex 4, both decisions requiring a consensus of all WTO Members. In addition, for each PA listed in Appendix 1 to the DSU to be subject to the DSU requires a decision by the parties to the PA in question ‘setting out the terms for the application of the Understanding [DSU] to the individual agreement, including any special or additional rules or procedures for inclusion in Appendix 2, as notified to the DSB’ (DSU Appendix 1, in fine). As a result, for a new PA part of Annex 4 to be subject to the DSU: (i) Appendix 1 to the DSU would need to be amended by consensus, and (ii) an explicit decision to that effect must be taken by the PA parties themselves (not including other WTO Members) detailing the DSU’s application to the PA.
any of the Multilateral Trade Agreements, including MFN provisions in, for example, GATT, the Agreement on Technical Barriers to Trade (TBT), GATS or TRIPS.

Thirdly, where a PTA/PA addresses matters not covered by the WTO (so-called ‘WTO-extra’) and not subject to one of the WTO’s limited MFN provisions – e.g. questions of competition, labour, the environment or certain aspects of foreign investment – the PTA/PA is not even subject to MFN. It can then be preferential even though, as a PTA, it does not meet the conditions in GATT Article XXIV (or GATS Article V) or, as a PA, it was never approved by consensus under Article X:9, nor part of Annex 4. Not all WTO agreements include an MFN clause (not, for example, the Agreement on Subsidies and Countervailing Measures (SCM) or the Agreement on Trade-Related Investment Measures (TRIMs)). Moreover, where they are found, MFN clauses only cover matters falling within the scope of the agreement (principle of *ejusdem generis*).\(^8\) GATT Article I:1 MFN, for example, only covers concessions in respect of (1) customs duties and charges and related rules and formalities, and (2) internal taxes and regulations covered by GATT Articles III:2 and 4. As a result, since GATT Article III:8 excludes government procurement (and domestic production subsidies) from the scope of Article III, government procurement is not subject to GATT MFN in the first place. Hence, the WTO Agreement on Government Procurement (GPA) is preferential (its benefits can be reserved to GPA parties and must not be extended to all WTO Members) for two reasons: (i) GATT Article I MFN does not apply to government procurement; (ii) in any event, as an Annex 4 agreement, the GPA does not ‘create either obligations or rights for Members that have not accepted’ the GPA, pursuant to Article II:3 of the Agreement Establishing the WTO.\(^9\)

Fourthly, the fact that PTA/PA provisions in the WTO – be it GATT Article XXIV or WTO Article X:9 – are not *prohibitions* but (MFN) *exceptions* also has

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\(^8\) See 1978 ILC Draft Articles on MFN Clauses, Article 9: ‘Under a [MFN] clause the beneficiary State acquires ... only those rights which fall within the limits of the subject matter of the clause’. (underlining added)

\(^9\) GATS Article II MFN has a broader scope of application than GATT Article I MFN, extending to concessions in respect of ‘any measure covered by this Agreement [GATS]’, elsewhere defined as all ‘measures affecting trade in services’ (but excluding e.g. services supplied in the exercise of governmental authority and government procurement of services, carved-out from GATS, and thus GATS MFN, in Article I:3(b) and Article XIII). TRIPS Article 4 MFN applies ‘with regard to the protection of intellectual property’ which is, however, more restrictively defined in footnote 4 as ‘matters affecting the availability, acquisition, scope, maintenance and enforcement of intellectual property rights as well as those matters affecting the use of intellectual property rights specifically addressed in this Agreement’.
crucial consequences for so-called ‘WTO-minus’ provisions in PTAs/PAs, that is, those where PTA/PA parties condone, amongst themselves, trade-related measures that would otherwise violate WTO rules (e.g. certain trade sanctions following human rights violations that would violate GATT Article XI and cannot be justified under GATT Article XX): WTO-minus provisions are valid/legal as between PTA/PA parties;\textsuperscript{10} since such provisions do not confer benefits (quite the opposite, they allow for more restrictions), WTO rules on MFN are not even violated; consequently, there is no need to invoke (let alone meet all the conditions in) the exception of GATT Article XXIV or to seek WTO consensus to add the plurilateral agreement to Annex 4.\textsuperscript{11}

The four caveats above seriously temper the importance of the WTO–PTA/PA relationship and, more specifically, the constraints that WTO provisions impose on PTAs/PAs. This makes the relation between PTAs all the more interesting and important. This is the question we examine next.

C. A network analysis of PTAs

To better understand the global system of PTAs, we turn to network analysis. Network analysis investigates the structure of a system based on the relationships (or ties) that connect its individual, constituent elements (or nodes). In our context, PTAs are the ties that connect countries as nodes, together forming the PTA network.

While the theoretical roots of network analysis date back to the eighteenth century, it was only very recently that scientists began to realise its full potential and versatility. Since the late 1990s, network analysis has been increasingly used by scholars in the social, natural and computer sciences to study systems of varying complexity ranging from patterns of friendship among members of a karate club (Zachary 1977), to the functioning of the brain or the Internet (Newman 2010, 3). Recently, network analysis has also been employed in the study of law, including the

\textsuperscript{10} But see Flett, in this volume, p. 6: ‘there should not normally be any WTO minus provisions in the FTA, and any doubtful provisions could be dealt with by interpreting them in conformity with WTO law’.

\textsuperscript{11} The question remains, however, what the WTO Appellate Body (AB) would do with such a WTO-minus provision in a PTA in a case where one of the PTA parties turns its back on its PTA commitments and challenges the trade restriction it consented to under the PTA as a violation of WTO rules. More specifically, would the AB be willing to refer to the PTA provision as a defence or legal impediment to finding a WTO violation? See Pauwelyn (2003).
network of the American federal judiciary (Katz and Stafford 2010), the authority of US Supreme Court decisions (Fowler and Jeon 2008) and, in the realm of international law, the network of international investment arbitrators (Puig 2014).

Network analysis comes with an elaborate toolkit that comprises both visualisations and computational measurements of network, node or tie properties. Together, they allow, among others, i) the identification of nodes that are particularly important (or central) in a system; ii) categorisation of the different relationships between nodes; iii) delineation of subgroups (or clusters) in a system and description of its overall density; and iv) determination of the robustness or vulnerability of systems to change. Network analysis can thus reveal novel insights into the current structure and historical evolution of a given system (Pauwelyn 2014).

The system of PTAs has, to our knowledge, not yet been subject to a network analysis. While we do not seek, in this chapter, to exhaust the network analysis toolbox, our investigation is a first step to employ network analytical instruments in order to confirm, challenge and add to the current state of knowledge of the PTA universe.

I. Our dataset

To investigate the PTA network we rely on a simplified version of the WTO database on RTAs. The WTO RTA dataset lists 260 PTAs that are in force. From the list we eliminated 12 entries because of the particular nature of the agreements e.g. EU enlargement treaties. We disaggregated the remaining 248 PTAs according to their underlying bilateral ties or dyads (e.g. NAFTA represents three bilateral ties connecting the United States–Canada, United States–Mexico and Canada–Mexico).

12 The RTA database is available at: rtais.wto.org/UI/PublicMaintainRTAHome.aspx. The terminology used by the WTO is somewhat confusing and different from that in this volume: What we call PTAs are referred to by the WTO as RTAs. The WTO uses the term PTAs for ‘preferential trade arrangements’ which are unilateral trade preferences granted by a country to other countries such as under the Generalized System of Preferences (GSP).

13 As of 15 October 2013.

14 In addition to accession and enlargement treaties, we excluded the Global System of Trade Preferences among Developing Countries (1988) and the Protocol on Trade Negotiations (1971) from our analysis as both agreements with their large and diverse membership are very different from the other treaties in the database and hence cannot usefully be compared to other PTAs.

15 For multiparty PTAs, we do not rely on a simple list of countries party to such an agreement as this could misrepresent the underlying legal relations. The Association of Southeast Asian Nations (ASEAN)–China FTA, for instance, would be misrepresented as applicable also in intra-ASEAN relations. Instead, we maintain the true constellation of legal relations, by using membership in a
To simplify our analysis further, we consider the EU-28 as one single WTO Member, so that we are left with 131 WTO Members.

Our dataset involves 187 states or customs unions. The most active countries in today’s PTA network are the EU (34 agreements), the European Free Trade Association (EFTA) states (Switzerland: 27, Iceland: 26, Norway: 26, Liechtenstein: 25), closely followed by Chile (22), Turkey (19) and Singapore (19). The United States only ranks twelfth with 14 PTAs in force. Two WTO Members in the dataset have no PTAs in force: Mongolia and Mauritania.

II. The PTA network

While it is common knowledge that most WTO Members are also party to a PTA, little is known about how tightly- or loosely-knit the PTA network is. In network analysis this idea is expressed by a network’s density, which describes what percentage of possible node relations is actually covered by a tie. Out of a maximum number of 8,515 bilateral relations between the 131 WTO Members that could be covered by a PTA, 10.4% or 889 ties of intra-WTO bilateral relations are covered by at least one PTA. Hence, the PTA network covers about every tenth bilateral intra-WTO relationship. In comparison, the investment treaty network is roughly twice as dense with 20 per cent of bilateral relations (as between all countries, not just WTO Members) being covered by investment treaties (UNCTAD 2011, 102).

We next look at how the PTAs are distributed (for all countries not just WTO Members). Were PTA relations to be randomly distributed in the system then we would expect to find only a small share of countries with very many or with very few PTAs; most states would have a medium number of PTAs – graphically this distribution is known as the ‘bell curve’. This is not what we find however. The distribution of PTAs rather more closely, albeit not perfectly, resembles a ‘power law’ curve in which we find that a few countries have many PTAs while many other countries have few PTAs (Figure 20.1). Put differently, rather than a ‘democratic’ network in which most countries have the same number of PTAs, there are a few ‘hub’ countries which dominate the PTA network (see Barabási and Bonabeau 2003).

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regional grouping on one side (e.g. ASEAN members disaggregated) and the other contracting state (e.g. China) on the other side. We assume that all members of that grouping have signed and ratified the agreement in question.
The PTA network shares this (approximate) characteristic of power law distribution with many other complex systems like the Internet (Matwyshyn 2003). There are two principle reasons why complex systems have such a structure. First, as these systems grow over time, older nodes have more opportunities to acquire new links than the newcomers that have just joined the system (Barabási and Bonabeau 2003, 54–55). Second, new connections follow the logic of ‘preferential attachment’ – those nodes that are already well-linked are more likely to attract new ties. Put differently, the ‘rich get richer’ (Barabási and Bonabeau 2003, 55). Applied to our context, one of the reasons why the EU has so many PTAs is that it began concluding PTAs early on and another is that other countries wanted to improve their position in the network by seeking a PTA with the well-connected hub EU.

Networks that follow a power law logic also display unique characteristics (Barabási and Bonabeau 2003, 55–58). They are extremely robust in the face of a random attack on or a withdrawal of nodes. Were a country like Cuba or Mali to terminate its PTAs, the PTA network would remain largely intact. In contrast, these networks are extremely vulnerable when it comes to attacks on or withdrawal of the most central nodes. The structure of the PTA network would be fundamentally altered were the EU to withdraw from its treaties. Power law distribution also has an effect
on diffusion within the system. New norms that are adopted by hub countries are more likely to spread within the network than legal innovation undertaken by peripheral members. Hence, any reform or modification of the PTA network has to be channelled through the central countries in order to be effective.

We turn next to what network analysis is perhaps best known for – its visualisations. For this we prepared a matrix that describes whether a country dyad is covered by a PTA. Figure 20.2 depicts the resulting global PTA network using a ‘stress minimisation’ algorithm visualising the shortest paths between nodes. We colour-code for WTO membership and weigh the size of each country’s circle by the number of ties it has (the more ties it has, the larger the circle). The visualisation shows a network that is characterised by regional clusters that are grouped around the EU as pivoting point.

**Figure 20.2**: The global PTA network

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16 Today, a range of network analysis software is freely available. Our visualisations are produced with VISONE.
This basic visualisation of the PTA network yields a number of interesting insights.

- **Regionalism still dominates PTA structures.** Most clusters of PTAs correspond to specific regions. This should temper the statement that there is already a shift taking place from ‘regional’ to ‘inter-’ or ‘mega-regional’ PTAs. A notable exception is that the countries of South-East and East Asia form a larger cluster with countries from the Americas (right-hand side of the network).

- **WTO membership has little influence on a country’s participation in regional PTAs notified by WTO Members or the number of ties covered by PTAs.** Non-WTO Members are not left out of the global network of PTAs concluded by WTO Members. On the contrary, some non-WTO Members, like Libya, as a node between Arab and African region PTAs, occupy central positions in the network.

- **Europe is the centre of the network.** The most central node and pivoting point in the PTA network is the EU; closely adjacent are the EFTA members; the United States, in contrast, appears sidelined.

These results find further support when we look at some of the network’s computed measures. The first measure we consider is centrality which expresses a node’s importance in a system. There are a range of different centrality measures – each using different node attributes to assess a node’s importance. Table 20.1 summarises three centrality measures of the top 15 countries in the PTA network: i) degree centrality (the sum of ties that a country has); ii) betweenness centrality (which measures the extent to which a node lies on paths between other nodes) and iii) eigenvector centrality (which does not simply count the number of ties a country has, but also looks at the importance of the nodes/countries with which that country has ties, giving each node a score proportional to the sum of the scores of its neighbours). A country may have a large eigenvector either if it ‘has many neighbors or because it has important neighbors (or both)’ (Newman 2010, 170).

These measures confirm the importance of the EU in the global PTA network. At the same time, the comparatively low eigenvector score of the EU (rank 4)
highlights that many EU PTAs have been concluded with minor trading partners. EU PTAs with major players like the US, China, Japan or ASEAN still remain to be concluded. Other somewhat counter-intuitive results, like the high ranking of North African countries such as Egypt, Libya and Sudan, can be explained by the fact that these countries are members of several multi-party (in contrast to bilateral) PTAs which place them centrally in certain regions without, however, attaining global relevance.

Table 20.1: Centrality of countries in the PTA network

<table>
<thead>
<tr>
<th>Top 15</th>
<th>Centrality</th>
<th>Betweenness</th>
<th>Eigenvector</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>EU</td>
<td>80</td>
<td>EU</td>
</tr>
<tr>
<td>2.</td>
<td>Egypt</td>
<td>39</td>
<td>Ivory Coast</td>
</tr>
<tr>
<td>3.</td>
<td>Chile</td>
<td>34</td>
<td>Turkey</td>
</tr>
<tr>
<td>4.</td>
<td>Sudan</td>
<td>34</td>
<td>Korea, Repub. of</td>
</tr>
<tr>
<td>5.</td>
<td>Libya</td>
<td>33</td>
<td>Chile</td>
</tr>
<tr>
<td>6.</td>
<td>Switzerland</td>
<td>32</td>
<td>Cameroon</td>
</tr>
<tr>
<td>7.</td>
<td>Iceland</td>
<td>31</td>
<td>Fiji</td>
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<tr>
<td>8.</td>
<td>Norway</td>
<td>31</td>
<td>Papua New Guinea</td>
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<tr>
<td>9.</td>
<td>Liechtenstein</td>
<td>30</td>
<td>Egypt</td>
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<tr>
<td>10.</td>
<td>Swaziland</td>
<td>30</td>
<td>Switzerland</td>
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<tr>
<td>11.</td>
<td>Turkey</td>
<td>30</td>
<td>Iceland</td>
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<tr>
<td>12.</td>
<td>Mauritius</td>
<td>28</td>
<td>Norway</td>
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<td>13.</td>
<td>New Zealand</td>
<td>28</td>
<td>Liechtenstein</td>
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<tr>
<td>14.</td>
<td>Australia</td>
<td>27</td>
<td>Singapore</td>
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<tr>
<td>15.</td>
<td>Malawi</td>
<td>27</td>
<td>Australia</td>
</tr>
</tbody>
</table>

III. The ‘depth’ of the PTA network

Up to now we have treated all PTAs as equal. Now we refine our analysis by taking into account the different ‘depths’ of PTAs. Some agreements go further than others in advancing trade liberalisation and economic integration. As a measurement, we use the depth index proposed by Dür, Baccini and Elsig ranging from 0 (shallow agreement) to 7 (deep agreement) (Dür, Baccini and Elsig 2014).\(^{17}\) For 44 of our

\(^{17}\) The depth measure is an additive index of seven variables: i) whether the agreement foresees a reduction of all tariffs to zero and ii) whether it contains substantive provisions in six areas (services, investment, standards, public procurement, competition and intellectual property rights).
sample of 248 PTAs in force, the Dür et al. dataset contains no depth measure, leaving us with 204 entries.

In Figure 20.3, we reproduce the visualisation of the PTA network, but, this time, the size of a country circle is not the degree centrality of a country (as above), but the average depth of the PTAs signed by that country. The visualisation of the ties and the colour-coding remains unchanged.

Figure 20.3: Who signs the deepest agreements on average?

The visualisation provides a more nuanced view of the PTA network.

- **Quality trumps quantity?** The EU, as the most central player, signs more shallow agreements on average than the United States, Taiwan, Dominican

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18 We calculate the average using only the agreements for which we have depth data. There are some drawbacks in using the average depth of PTAs in force, since countries with few, but deep PTAs may be portrayed as having ‘deeper’ agreements than a country that has multiple PTAs, some being very shallow and others being very deep. Countries that have only signed PTAs for which we have no depth data are coded as ‘0’ depth.
Republic or South Korea. This may be because the EU signed a number of shallow agreements in its early years. Recent EU agreements tend to be deeper. Vice versa, countries like the United States, Taiwan, Singapore, South Korea, Canada and Japan may be able to compensate for their lack of centrality by offering deeper agreements that liberalise trade further than those of more centrally situated countries.

- **Strong disparities in depth between regions.** In Asia and the Americas deep PTAs abound. In contrast, PTAs in Africa, the Middle East and Central Asia remain generally shallow.

- **Some disparities in depth within regions.** Even though countries tend to cluster together regionally in the PTA network, they often remain far apart when it comes to treaty depth. China has much deeper agreements than India. Chile has signed deeper PTAs than Peru.

Shifting our focus from the network’s nodes to the ties, Figure 20.4 displays the average depth of each bilateral relationship. Darker colours indicate greater depth. We again use the average, since some relationships, as explained in further detail below, are governed by more than one PTA.¹⁹

**Figure 20.4:** The depth of PTAs

¹⁹ The average is a suitable measure since only 2.6% of our overlapping PTA ties display a difference of depth of more than ‘3’. Depth entries that are not available are coded as ‘0’.
The visualisation confirms that, especially in the Americas and South-East Asia, PTAs tend to be deep. A few countries form hubs from which deep PTAs spread. Figure 20.5 visualises this deep PTA network (depth of 6–7), the size of the country circle indicating degree centrality. The EU, the US, Chile, Mexico, Singapore, Australia and New Zealand are central players in this network. Also noteworthy is the absence of non-WTO Members (apart from the Bahamas) in this network.

Figure 20.5: The network of deep PTAs
The fact that the deep PTA network is dominated by a few interconnected players and consists almost exclusively of WTO Members may be favourable to multilateralism. Many of the rules enshrined in deep PTAs are what is called ‘WTO-extra’ commitments covering issues that may become the subject of future rule-making at the multilateral level. The fact that these rules are crafted today by a handful of inter-connected hub-countries\(^\text{20}\) rather than isolated clusters of independent rule-makers, is likely to facilitate the convergence of views and the emergence of a coherent body of WTO-extra norms. As these deep PTA rule-makers are also centrally positioned in the network as a whole, they are more likely to play a significant role in the diffusion of new norms. Hence, having a small club, instead of isolated islands, of rule-makers may favour consensus-building for multilateral negotiations.

\(\text{IV. The turn to mega-regionals}\)

\(^{20}\text{Figure 20.5 also indicates that, currently, the EU is not fully integrated into the triangle formed by the United States, Chile and Australia. This in turn suggests that different models or clusters of deep PTAs exist. See also Dür, Haftel and Baccini’s contribution in this volume. The conclusion of the EU–US TTIP would change this network constellation.}\)
While historically the PTA phenomenon was mainly associated with regionalism, ongoing negotiations are likely to change this dramatically. The TPP, the Transatlantic Trade and Investment Partnership (TTIP) and the Regional Comprehensive Economic Partnership (RCEP) are likely to have a major impact on the existing PTA network. These envisaged agreements are often referred to as ‘mega’ regionals, not only because they aim to connect regions rather than just countries, but also because their economic impact is likely to be significant.

To assess their impact on the PTA network, we engage in a thought experiment. What happens to the PTA network if we add the TTIP, TPP and RCEP to our dataset?\textsuperscript{21} The results are depicted in Figure 20.6 which focuses on the part of the network most affected by this change.

\textbf{Figure 20.6:} An Asia-America cluster emerges through mega-regionals

The conclusion of these three agreements will move the United States closer to the network’s centre and the nodes of the Asia-Pacific region will cluster together. The proliferation of mega-regionals will thus lead to a tighter global PTA network. If the trend continues, existing clusters will converge, transforming the pivot-cluster

\textsuperscript{21} We are well aware of the limitations of this thought experiment. Since our database includes only agreements that are in force, the PTA network in force will have changed by the time TTIP, TPP and RCEP are ratified. Moreover, we are merely cherry picking three regionals amongst a range of agreements under negotiation. The results of our thought experiment should thus been taken as a mere illustration of a possible future trend.
network into a ‘ball of wool’-like PTA network that will more closely resemble today’s network of investment treaties (Figure 20.7).

**Figure 20.7**: Mega-regionals are likely to transform the PTA network to resemble what the BIT network already looks like

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**D. The phenomenon of ‘double PTAs’**

A highly under-researched aspect of the PTA universe is the multiple PTAs that govern the same bilateral relationship. For the sake of simplicity we use the shorthand ‘double PTAs’ although sometimes more than two agreements overlap. The phenomenon of ‘double PTAs’ is widespread in the PTA network. Every fifth bilateral relationship governed by a PTA tie is subject to more than one PTA (corresponding to 4.3% of all possible intra-WTO bilateral relations). Seventy-eight WTO Members (or 3/5 of the 131 WTO Members) have at least one bilateral relationship covered by multiple PTAs and 99 out of the 248 PTAs from the WTO database are affected by this overlap (i.e. overlap with at least one other PTA in at least one bilateral relationship). These statistics underscore the relative frequency of ‘double PTAs’ both in overall numbers and with respect to the number of WTO Members that actually face this overlap.  

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22 This number still underestimates the prevalence of ‘double PTAs’ in two ways. First, since not every PTA actually in force is notified to the WTO, we may miss some of the existing overlap. Second, because the WTO database only covers PTAs that have entered into force, the signed but not yet effective agreements are not taken into account. Hence, the phenomenon of ‘double PTAs’ is likely to be even more widespread.
I. The double PTA network

Figures 20.8, 20.9 and 20.10 depict the network of ‘double PTAs’. In each Figure we colour-code for the number of overlapping PTAs (which range from 2 to 5 overlapping treaties). The more PTAs overlap, the darker will be the tie. Interestingly, ‘double PTAs’ concentrate on the regional level and thus far do not exist intra-regionally (Figure 20.9). The Asian web of ‘double PTAs’ is noteworthy as it spans across sub-regions of the continent. In Figure 20.10 we extend our thought experiment on mega-regionals to the double PTA network. We observe a merger of the Asian and the American ‘double PTA’ clusters into a greater Pacific area. Also, with the conclusion of the TPP the United States would, for the first time, become a member of overlapping PTAs. Hence, the turn to mega-regionals is likely to further increase the frequency of overlapping PTAs.

Figure 20.8: Double PTAs in the PTA network
Figure 20.9: The double PTA network

Figure 20.10: The Double PTA network after the conclusion of mega-regionals (extract)\textsuperscript{23}

\textsuperscript{23} Regions other than South and East Asia and South America remain unchanged as compared to Figure 8.
The overlap of PTAs raises a number of intriguing questions. Why do countries enter into overlapping agreements in the first place? Why do some regions seem to have a dense network of overlapping agreements while others do not? Do overlapping PTAs necessarily increase trade liberalisation and economic integration? What are the legal issues arising from overlapping PTAs? We will address each of these questions in turn.

II. Categorising ‘double PTAs’

There are both economic and non-economic factors explaining a country’s move to conclude ‘double PTAs’. These typically coincide and are empirically difficult to disentangle. To provide one example, the ongoing TPP negotiations are driven in part by the expectation of large economic benefits – the United States alone expects gains
from the TPP of USD 14 billion by 2025. 24 At the same time, the United States is also pursuing political and strategic objectives in shaping the ‘Pacific Century’. Similarly, other Pacific countries expect an increase of trade flows arising from TPP; but there is also considerable ‘social’ pull for countries to join the TPP-negotiations regardless of ensuing economic benefits in order to be in the club rather than left out. 25 Nevertheless, a closer look at the universe of existing double PTAs suggests that the mix of political and functional economic considerations differs considerably among agreements, countries and regions. In this section, we propose a tentative categorisation of double PTAs, distinguishing between those driven by mainly (i) historical/political motives, and (ii) functional/economic goals.

III. Double PTAs as a mainly historical/political phenomenon

‘Double PTAs’ not only result from careful economic calculation, but can also be the product (and sometimes the by-product) of political considerations. Some ‘double PTAs’ are the result of historical accidents, others are purposely orchestrated to form new alliances and still others may have been mere photo opportunities.

1. Skeletons in the cupboard

Like skeletons in the cupboard, some ‘double PTAs’ are the remnants of failed, or less successful, regional economic integration efforts primarily dating back to the 1970s and 1980s. For example, in 1975 the Asia Pacific Trade Agreement (APTA) was signed, re-grouping six countries, including China, South Korea, Lao People's Democratic Republic (PDR) and India. While APTA is still used as a framework for regional economic cooperation, 26 the member states have turned to other, more dynamic, venues to advance their regional economic integration agenda. Whereas

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25 The TPP started off as an FTA negotiation between Brunei, Chile, New Zealand and Singapore in 2005. In 2008, the United States entered into talks with these four countries with a view to joining the grouping. Since then the TPP has developed considerable centrifugal force. Australia, Peru and Vietnam joined the negotiations in 2008, Malaysia in 2010, Mexico and Canada in 2012 and Japan in March 2013. At the time of writing, speculations abound as to whether South Korea and China, amongs others, will join the talks.

26 Several APTA framework agreements were signed between 2009 and 2011 on investment, services and trade facilitation. See www.unescap.org/tid/apta.asp.
China, South Korea and India each seek to expand their own PTA network through bilateral treaties, including in the region, Lao PDR joined ASEAN to further regional integration. Similarly the 1980 Latin American Integration Association (LAIA) is today outstripped by MERCOSUR and the Andean Community.

Skeletons in the cupboard type ‘double PTAs’ are recognisable by a wide gap in depth: the early agreement being much more shallow than the later agreement. To take one of the above examples, LAIA has a coded depth of only ‘0’ in the Dür et al. dataset (very shallow). In contrast, MERCOSUR, if one adds its goods and its services components, is much deeper being coded as ‘5’. Albeit displaying less integrative depth than MERCOSUR, the Andean Community also goes considerably further than LAIA and is coded as ‘2’. Where countries abandon (but do not terminate) stifled negotiation fora for more dynamic regional groupings, skeletons in the cupboard continue to give rise to ‘double-PTAs’.

2. Paper tigers

Some of the ‘double PTAs’ in place today may also be mere paper tigers. The density of ‘double PTAs’ in the WTO database is highest among Commonwealth of Independent States (CIS) countries. However, these overlapping PTAs do not translate into deeper economic integration. Of the five PTAs in force between Russia and Belarus, the three treaties that have been coded by Dür et al. display similar levels of depth (either ‘1’ or ‘2’). This finds further support when we look at the Horn et al. dataset of coded PTA-content (Horn, Mavroidis and Sapir 2010). A comparison of the 1994 CIS Treaty with Ukraine’s subsequent PTAs with Belarus, Kazakhstan, Turkmenistan and Russia reveals that the earlier CIS Treaty actually contains deeper WTO-plus commitments than three of the four subsequent PTAs. While three of the PTAs also cover competition policy in contrast to the CIS, this is the only WTO-extra area covered in the PTAs. Hence, bilateral PTAs overlapping with the 1994 CIS Treaty add little or nothing to the degree of liberalisation and harmonisation achieved by the 1994 CIS Treaty. Therefore, ‘double-PTAs’, or in this

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27 These include the Eurasian Economic Community, the Russian Federation–Belarus FTA, Russian Federation–Belarus–Kazakhstan Custom Union, the Common Economic Zone treaty and the 2011 Commonwealth of Independent States FTA, which entered into force in 2012. Unfortunately, the 2011 treaty has not yet been coded so we use its 1994 predecessor, which has been coded, for the purpose of this analysis.

case even quadruple or quintuple PTAs, do not necessarily translate into deeper levels of integration, but are sometimes mere paper tigers.

3. Bridge between regions

A final group of ‘double PTAs’ at the mid-point between political and economic motivations result from countries serving as bridges between regions. Although the PTA network reveals that PTAs in force today are still based on regionalism, these regions are not always neatly separated, but intersect at their edges. ‘Double PTAs’ then arise between the countries that lie at that intersection. This is particularly common in Africa. Egypt, Libya and Sudan, for instance, are all linked by their membership in both the Pan-Arab Free Trade Area (PAFTA) and Common Market for Eastern and Southern Africa (COMESA). Similarly, Swaziland and Mauritius are both members of the Southern African Development Community (SADC) and COMESA. Since these countries build bridges between two multi-member PTAs, they are important for regional networks – that is why these countries tend to have high eigenvector scores (see Table 20.1 above).

IV. Double PTAs as a mainly functional/economic phenomenon

The core economic reason for WTO Members to conclude PTAs has been to further liberalise or to integrate more deeply as between two or a subset of like-minded WTO Members, especially in the absence of progress at the multilateral WTO level. Think of the EU or NAFTA as compared to the WTO. In contrast, multiple economic integration motives may explain why two countries engage in a second PTA. These reasons for concluding ‘double PTAs’ can be classified into at least four broad groups. Importantly, different provisions in a second PTA may be explained by different reasons. Moreover, the reasons why some dyads of countries exist within a mega-regional may be different from those that apply to other dyads within the same agreement.

1. Deeper integration
There are at least three ways in which double PTAs can deepen integration between two countries. First, two countries may simply decide to conclude a second PTA or a new PTA between themselves to further liberalise or integrate their trade relations (if this second, overlapping PTA does not really add anything, it would fall under the ‘paper tiger’-type set out earlier).

Second, following an original PTA, countries may decide to join a broader and deeper mega-regional trade agreement (with more state parties than the first). In so doing, they deepen their integration with both existing PTA partners and new countries (with which they had no prior PTA relationship). For instance, by concluding the ASEAN–Australia–New Zealand FTA (AANZFTA), Australia and New Zealand undertook investment commitments that they had not assumed under their prior bilateral PTA.\(^{29}\) Also the Japan–ASEAN FTA contains WTO-plus and WTO-extra commitments, e.g. on the environment, agriculture or energy, not present in some of the overlapping, earlier PTAs of individual ASEAN members with Japan.\(^{30}\) A potential future example would be the United States and Mexico in the TPP further dropping tariffs, quotas or other trade restrictions still allowed under NAFTA.

Third, and conversely, two countries may be part of a broad regional PTA and subsequently decide to further integrate only between themselves. For example, in 2005 the ASEAN–China FTA was concluded and three years later in 2008 the ASEAN member Singapore signed an additional FTA with China. As compared to the ASEAN–China Agreement, the China–Singapore FTA contains much deeper WTO-plus commitments, e.g. in the fields of SPS or TBT furthering the harmonisation of standards, and more extensive legally enforceable WTO-extra obligations, e.g. on industrial cooperation as well as immigration issues.\(^{31}\) Similar trends may be observed in Africa where some member states of the Economic Community of West African States (ECOWAS) (integration depth ‘2’) decided in 1994 to integrate further amongst themselves signing the West African Economic and Monetary Union (WAEMU) Treaty (integration depth ‘4’).

\(^{29}\) In the meantime, both countries have agreed on an Investment Protocol to be part of the Australia–New Zealand Closer Economic Relations Trade Agreement. However, the Protocol (in contrast to AANZFTA) does not provide for investor–state arbitration.

\(^{30}\) The WTO-extra commitments, however, are excluded from dispute settlement.

\(^{31}\) See Horn et al. database, supra note 28.
2. Minimum floor expansion

Double PTAs may also result from a mega-regional trade agreement to extend a minimum floor of liberalisation and rule-convergence to a larger group of countries. In that scenario, as between the parties to both PTAs, the later (mega-regional) PTA is less (not more) liberalising. For example, as between Canada and the United States, certain NAFTA commitments could continue to go deeper than subsequent TPP obligations. Obviously, as between these parties and third parties that only joined the later mega-regional (e.g., as between the United States and Malaysia), trade is further liberalised through the creation of a minimum floor.

Such arrangements may be particularly frequent where earlier, regional PTAs regroup countries with very different levels of development. Here mega-regionals can set rules based on the lowest common denominator, while allowing countries to go beyond a ‘one-size fits all’-approach in bilateral or sub-regional PTAs. That may be one of the reasons why we observe a higher frequency of ‘double PTAs’ involving ASEAN members, which include low-income economies (Cambodia), lower-middle-income economies (Lao PDR, Indonesia, the Philippines, Vietnam), upper-middle-income economies (Malaysia, Thailand) and high-income economies (Brunei, Singapore).

Scenarios where PTAs expand to include new members so as to set common minimum floor rules are a good example of ‘multilateralising regionalism’. They represent a broader process of consolidation through PTA creation, as opposed to the conventional story of PTA creation often portraying PTAs as necessarily a further step in the fragmentation of international trade regulation.

3. Backsliding

A second PTA between the same two countries may also reintroduce or tolerate the (re)introduction of trade restrictions that were previously outlawed under the first PTA. This could happen, for example, by including broader exceptions in the second PTA or carving out particular measures or sectors from the second PTA that were covered in the first (think of TPP excluding all tobacco measures from its scope of application, whereas such measures are disciplined in NAFTA and earlier PTAs).
Here, the later PTA is – between the same two countries – less liberalising than the first.

4. Legal innovation

In some situations it is difficult to decide whether one provision is more or less liberalising or leads to deeper integration than another. Sometimes PTAs simply define or address an issue differently. These differences can be accidental or introduced on purpose, with the intention of changing the meaning of a treaty provision as compared to a previous PTA.

This process is particularly apparent in the recent investment chapters of PTAs, where clarifications on the meaning of ‘investment’, ‘fair and equitable treatment’ or ‘expropriation’ are introduced,\(^\text{32}\) but are absent in earlier bilateral agreements involving the same parties (or a subset thereof). Depending on the form that these clarifications take, they may also be understood as a backsliding on investment protection commitments.

**Table 20.2:** Reasons for concluding ‘double PTAs’\(^\text{33}\)

<table>
<thead>
<tr>
<th>Historical/Political Factors</th>
<th>Functional/Economic Factors</th>
</tr>
</thead>
<tbody>
<tr>
<td>1) ‘Skeletons in the cupboard’ remnants of failed/less successful regional economic integration efforts</td>
<td>1) <strong>Deeper Integration</strong> increase existing liberalisation commitments</td>
</tr>
<tr>
<td>2) <strong>Paper tigers</strong> successive, overlapping PTAs that do not deepen regional economic integration levels</td>
<td>2) <strong>Minimum Floor Expansion</strong> expand a set of liberalisation commitments to a larger group</td>
</tr>
<tr>
<td>3) <strong>Bridge between regions</strong> overlapping PTAs concluded pursuant to different regional economic integration efforts</td>
<td>3) <strong>Backsliding</strong> re-introduce previously liberalised trade restrictions</td>
</tr>
<tr>
<td>4) <strong>Legal Innovation</strong> refine and clarify treaty language</td>
<td></td>
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</tbody>
</table>

\(^\text{32}\) See, for instance, AANZFTA, Chapter 11, which contains numerous clarifying notes, e.g. Article 6 (2) and footnotes 1–4, 7–9, 12–13, 15.

\(^\text{33}\) Note that more than one reason may explain the conclusion of a ‘double PTAs’ and that different provisions in the same agreement may be motivated by different factors.
V. Legal issues arising from ‘double PTAs’

The legal relationship between WTO and PTA rules remains relatively simple: they co-exist. Firstly, in the relation between PTA parties and other WTO Members, as discussed above, for a PTA to be preferential (i.e. to exclude other WTO Members), the PTA must comply with GATT Article XXIV, the Enabling Clause or GATS Article V. If it fails to do so, the PTA remains valid but if, and to the extent MFN applies, concessions exchanged in the PTA must be extended to all WTO Members. Secondly, in terms of conflict or priority rules in the relation between PTA parties, a PTA can explicitly provide that it prevails over WTO rules (as NAFTA does) or, in the event there is silence on this matter, can be presumed to be lex specialis (the more specific rule) and in most cases also lex posterior (the rule later in time) so that PTA rules normally prevail over WTO rules.

In contrast, the relationship between successive PTAs that include the same two parties can take many different forms with varying degrees of complexity. Bifurcated into two broad categories, there are scenarios where successive PTAs are consolidated so that only one PTA is in force at any given time (‘one PTA at a time’) versus scenarios where two PTAs coexist (‘two PTAs side-by-side’). In the ‘one PTA at a time’ scenario, successive PTAs do not add to the fragmentation or overlap of international trade rules. In contrast, the ‘two PTAs side-by-side’ scenario leads to a formal ‘double PTA’ situation (as visualised above) and may, depending on the circumstances, ‘multilateralise regionalism’ or further fragment the trade system.

1. Consolidation: one PTA at a time

i. Termination

34 For an in depth discussion of overlapping investment treaties including PTAs with an investment chapter, see Wolfgang Alschner. 2014. ‘Regionalism and Overlap in Investment Treaty Law – Towards Consolidation or Contradiction?’ Journal of International Economic Law 17(2).
The later PTA can simply terminate the earlier one. TPP could terminate NAFTA and become the new agreement regulating US–Mexico trade. In this scenario, only the second PTA remains in existence. There is no question of overlap or conflict. Termination has the advantage of clarity and finality. Termination remains, however, relatively rare. One example is the Mexico–Central America FTA which, in Article 21.7, terminates existing bilateral FTAs between Mexico and El Salvador, Guatemala, Honduras and Nicaragua. It may become a more frequent option in light of the EU’s policy to replace bilateral (investment) treaties concluded by EU members with EU negotiated PTAs. The transition from GATT to WTO also used termination (of GATT and related Codes) as the legal solution regulating the inter-relationship between GATT and WTO. Such termination, however, only makes sense in the context of certain reasons to conclude a second PTA. For some (not all) ‘deeper integration’ scenarios (where, assuming that the second PTA goes further than the first, the first may well terminate). In contrast, it would not necessarily make sense, for example, in the ‘minimum floor expansion’ context (if TPP is broader but not deeper than NAFTA, there is no reason to terminate NAFTA). Besides termination that is explicitly provided for in the later treaty, termination can also be implied.

35 See EU Regulation No 1219/2012 of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries, Official Journal of the European Union 20 Dec 2012, L 351/40, recital 5. The EU proposal in the leaked investment chapter of the Canada-EU Trade Agreement (CETA) Article X.18 reads in this regard:

‘Relationship with other Agreements
1. This Agreement replaces the agreements between Member States of the European Union and Canada listed in Annex (Y). The provisions of such agreements shall cease to apply from the date of entry into force of this Agreement.
2. In the event of the provisional application of this agreement, the application of the provisions of the agreements mentioned in paragraph 1) shall be suspended as of the date of provisional application of this agreement in accordance with Article X [Final Provisions] and until such agreements are replaced in accordance with the provisions of paragraph 1). The suspension shall be terminated in the event the provisional application is terminated.
3. Notwithstanding paragraphs 1 and 2, claims may be submitted pursuant to the provisions of the agreements listed in Annex (Y), regarding treatment accorded while the said agreements were in force, pursuant to the rules and procedures established in them, and provided that no more than three (3) years have elapsed since the date of suspension of the agreement pursuant to paragraph 2, or if the agreement is not suspended pursuant to paragraph 2, the date of entry into force of this Agreement. Where a claim has been submitted to arbitration under an agreement listed in Annex (Y), the provisions of such agreement shall remain applicable to the extent necessary for the purposes of the arbitration and the execution and enforcement of any award.’

The leaked text is available at www.tradejustice.ca/leakeddocs/

following the rules of Article 59:1 of the Vienna Convention on the Law of Treaties (VCLT).37

ii. Accession

Instead of concluding an entirely new PTA amongst a broader group of countries, an existing PTA could be amended and expanded to include new members. The second (e.g. mega-regional) PTA could then be achieved through accession. Instead of negotiating an entirely new TPP, countries could ‘accede’ to NAFTA. Although accession provisions in PTAs are quite common and their usage may seem like a natural way to move from regional to mega-regional trade agreements, in practice, accession by new members to an existing PTA is extremely rare (the major exception being the EU). Like termination, accession has the advantage of simplicity: only one PTA is/remains in force. Whereas termination may, in some treaties, trigger so-called ‘survival clauses’ (e.g. in bilateral investment treaties (BITs)), amendment or accession is not likely to have this effect.

iii. Suspension

Another option is for the second PTA (e.g. a mega-regional) to suspend the operation of an earlier PTA (regional) and to do so for as long as the second PTA remains in place. As with termination and accession, following suspension, only one PTA exists at any given time. The advantage of suspension (over termination), however, is that the earlier PTA would revive in the case that the second PTA, for whatever reason, ends. This avoids having to renegotiate (bilateral) PTA relations where (a broader, regional) PTA fails. Suspension is used primarily in PTA investment chapters with respect to earlier BITs so as to safeguard continuous investment protection in case the PTA fails (in which case the old BIT ‘revives’).38

37 Article 59:1 VCLT provides: ‘A treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject matter and: (a) it appears from the later treaty or is otherwise established that the parties intended that the matter should be governed by that treaty; or (b) the provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time’.

iv. Incorporation

A final option consists in partially consolidating two PTAs by incorporating certain chapters of one PTA in the other PTA as well. The China–Singapore FTA is a case in point, incorporating, *mutatis mutandis*, the ASEAN–China FTA investment chapter Article 84(1) rather than devising new investment disciplines. This still leaves two PTAs in coexistence, but when it comes to the specific disciplines incorporated we only have one set of PTA disciplines (not two). This is why we classify incorporation under the ‘one PTA at a time scenario’. Incorporation can be efficient because it directs negotiators’ attention to areas where differentiation (e.g. deeper integration or legal innovation) of overlapping treaty layers is warranted. It also helps to streamline a country’s legal commitments.

2. Coexistence: two PTAs side-by-side

In formal ‘double PTA’ scenarios (such as those depicted in Figures 20.8 to 20.10) the earlier PTA remains in place. Here, a number of complications arise. Aside from the costs to traders of finding the relevant rules applicable to their transactions, and costs to states of managing (and complying with) overlapping commitments, the two most worrisome complications concern the overlap and interaction of parallel dispute settlement fora and what to do in case of contradictory norms.

i. Overlap and interaction of parallel PTA dispute settlement fora

The existence of parallel adjudication mechanisms is well known in the context of WTO–PTA relations, but how does the issue play out in ‘double PTA’ cases? In principle, the same tools that govern, for example, the relationship between WTO panels and NAFTA panels could also manage the relationship between a NAFTA and a TPP panel. This is also done in practice. Chapter 17, Article 5 of the ASEAN–Australia FTA, for example, provides the following choice of forum clause:

Where a dispute concerning any matter arises under *this Agreement and under another international agreement* to which the Parties to the dispute are party, the Complaining Party may select the forum in which to address
that matter and that forum shall be used to the exclusion of other possible fora in respect of that matter.

Such a broad choice of forum clause, if recognised by the Panel hearing the case, would bar a complainant from re-litigating the same dispute either at the WTO or at a parallel PTA.

Importantly, overlapping trade disputes are not the only possible litigation arising from ‘double PTAs’. As many recent PTAs also contain investment chapters that include a state’s consent to investor-state arbitration, coordination issues may also arise between (i) investor-state tribunals and trade tribunals under two different treaties between the same parties (Pauwelyn 2006), and (ii) investor-state tribunals that are concurrently or subsequently seized by the same investor over the same measure against the same host state yet under two different treaties.

Although parallel investment litigation is not unknown, the famous Central European Media Enterprises Ltd. (CME)/Lauder arbitrations being a notorious example,\(^{39}\) it has thus far been perceived as a problem of nationality planning where one corporate entity purposely structures its investment using multiple ‘home countries’ to benefit from several investment treaties. In the case of ‘double-PTAs’, however, such sophistication is unnecessary as the same investor with the same nationality can bring a claim to two different fora (there is only one ‘home state’ but two applicable PTAs are in force with the same ‘host state’). The situation is thus more akin to (although certainly not exactly the same as) the coordination issues arising out of the interaction between domestic courts and international arbitral tribunals. Here too, at least \textit{a priori}, the same dispute with identical parties could be litigated at two different levels. It follows that the tools to manage interaction between domestic courts and arbitral tribunals may also help to solve conflicts between ‘double PTAs’.

The most relevant among these tools are waiver clauses. The ASEAN Comprehensive Investment Agreement, for instance, provides in Article 34(1)c) that the notice of arbitration must be:

accompanied by the disputing investor’s written waiver of the disputing investor’s right to initiate or continue any proceedings before the courts or administrative tribunals of the disputing Member State, or other dispute settlement procedures, of any proceeding with respect to any measure alleged to constitute a breach referred to in Article 32 (Claim by an Investor of a Member State).

Hence, the waiver extends to ‘other dispute settlement procedures’ than those of the host state, preventing an investor from initiating new proceedings under a parallel PTA. The leaked TPP investment chapter is similar but even more explicit. Footnote 21 to Article 12.20 states that: ‘For greater certainty, this [i.e. other dispute settlement procedures] includes any dispute settlement mechanism under any existing trade or bilateral investment agreement.’

Whether or not a waiver will effectively bar an investor from seizing a parallel arbitral forum under an overlapping treaty depends on the wording of the waiver. The trilateral China–Japan–South Korea investment agreement, for instance, limits its waiver to ‘any right to initiate before any competent court of the disputing Contracting Party with respect to any measure of the disputing Contracting Party’. This arguably still permits the submission of a claim to a parallel arbitral tribunal under an overlapping agreement.

ii. Conflict of PTA norms

Whereas in the WTO–PTA relationship as between PTA parties the logical approach is to assume priority of the (more liberalising, more recent) PTA over WTO rules (with the exception, of course, of the MFN issue discussed above which goes beyond PTA parties and affects third countries member of the WTO), in the ‘double PTA’ case, it is not so clear that the later PTA must always prevail. Depending on the

40 Article 15 (6), italics added.
reasons discussed above for concluding the second PTA, different priority rules could be arrived at.

Where the later PTA is motivated by the ‘minimum floor consolidation scenario’, it makes sense to explicitly provide that the earlier (deeper) PTA prevails. To avoid any ‘backsliding’, the later PTA may also provide that to the extent a provision in an earlier PTA is more trade liberalising, the earlier PTA prevails. Conversely, in situations of ‘legal innovation’ and conscious ‘backsliding’, it makes sense to explicitly provide that the second PTA prevails. The same is normally true also for the ‘deeper integration’ scenario. In reality, it is often difficult to discern whether a change in the substantive treaty content is motivated by ‘legal innovation’ or ‘conscious backsliding’ rather than the desire to set a minimum standard. What conflict rules are chosen may therefore provide useful insights into the motivation behind the conclusion of ‘double PTAs’.

The earlier/original PTA prevails. The majority of regional and mega-regional treaties encountered today affirm existing obligations, which according to VCLT Article 30(2) will lead the earlier (usually bilateral) treaty to prevail. The ASEAN–Australia–New Zealand FTA for example states in Ch. 18 Article 2:

1. Each Party reaffirms its rights and obligations under the WTO Agreement and other agreements to which the Parties are party.

2. Nothing in this Agreement shall be construed to derogate from any right or obligation of a Party under the WTO Agreement and other agreements to which the Parties are party.41

The Agreement goes on to affirm the right of member countries to conclude future bilateral agreements. This treaty practice thus suggests that minimum standard setting through (mega) regional treaties combined with deeper integration in bilateral agreements is the main force behind such ‘double PTAs’. To that extent, the ‘double PTA’ phenomenon represents a process of consolidation or gradual

41 Similarly, Article 20 ASEAN–China FTA (Trade in goods).
‘multilateralisation of regionalism’ rather than a further step in the fragmentation of international trade regulation.

**The more favorable PTA prevails.** Rather than adopting a time-based approach, the ASEAN–Japan PTA solves conflicts with a view to promoting deeper integration stipulating in Article 10 (2) that:

> ‘Nothing in this Agreement shall be construed to derogate from any obligation of a Party vis-à-vis another Party under agreements to which these Parties are parties, if such an obligation entitles the latter Party to treatment more favourable than that accorded by this Agreement.’ (emphasis added)

**Ad hoc negotiation in case of conflict.** Either self-standing as in the Singapore–Australia FTA 42 or in connection with the reaffirmation of existing obligations, 43 a number of agreements provide for ad hoc consultations among the state parties in case of an inconsistency with a view to finding a mutually agreeable solution.

**Silence.** To be avoided whenever possible, negotiators of the second PTA could also leave the question of conflict or overlap open. This is the case for instance with the PTA concluded between India and Sri Lanka in 1999, which does not mention the overlapping Asia Pacific Trade Agreement. Such silence would trigger the fallback conflict rules of public international law (Pauwelyn 2004). There is a presumption against conflict and interpretation methods can be used to read two PTA provisions harmoniously. Where no ambiguity or room for interpretation exists and a genuine conflict arises (that is not explicitly regulated in either treaty) in normal cases (and as between parties to both PTAs) the more recent PTA prevails (Article 30 VCLT). However, if the provision in the earlier PTA is more specific (or the earlier PTA is between a smaller group of countries), there is scope to apply the *lex specialis* principle to the effect that the earlier (not the later) PTA prevails. To avoid the uncertainty related to this situation, PTA negotiators should explicitly regulate PTA

42 Chapter 17, Article 5: ‘In the event of any inconsistency between this Agreement and any other agreement to which both Parties are parties, the Parties shall immediately consult with each other with a view to finding a mutually satisfactory solution in accordance with customary rules of public international law.’

43 E.g. ASEAN–Australia–New Zealand, Chapter 18, Article 2(3).
overlaps in the respective treaties, depending on the scenarios or reasons for concluding a second PTA, as discussed above. Remaining silent shifts the task from negotiators to adjudicators and may lead to surprising results. That said, also adjudicators should take account of the diverse reasons for concluding ‘double PTAs’ in their ultimate decision. Conflict rules in public international law can be reduced to the question of what the state parties really intended or what the current expression of state will is. To arrive at this current expression of state will, it is likely to be important to examine the reasons why different PTAs were concluded.

E. Conclusion

Ever since the creation of the WTO, scholarly research has focused primarily on the relations between the WTO and PTAs. The recent trend of states concluding ‘mega-regional’ trade agreement now warrants a shift of attention to the relationship among PTAs. One of the new issues that will require further scholarly work is the increasingly wide-spread phenomenon of double PTAs. In this chapter, we have offered a first insight into the universe of double PTAs and the reasons for their emergence and proliferation. We also highlighted the different strategies that states adopt in consolidating (or not) overlapping PTAs as well as the legal implications that arise if parallel trade agreement involving the same parties co-exist. In that context, negotiators and scholars have to think ahead and decide how the norms and dispute settlement mechanisms of overlapping PTAs are supposed to interact.

Let us be clear, however, that this new research agenda, in spite of our provocative title, is not oblivious to or entirely detached from the debate on the relationship between PTAs and the WTO or between regionalism and multilateralism. Quite to the contrary, a more sophisticated understanding of how PTAs interact will allow us to better assess how regionalism can be a stepping stone or stumbling block for multilateralism. On the one hand, our network analysis revealed that the rules of tomorrow are made in deep PTAs by a limited group of countries that are centrally placed in the network. Hence, we should expect a relatively homogenous process of WTO-extra norm creation and diffusion. On the other hand, the fact that many of these norms are made and diffused outside of the WTO and without the input of many countries also raises concerns as to their global relevance and legitimacy.
The recent success of the Bali WTO Ministerial Conference gives rise to hope that the WTO’s negotiating arm is not as crippled as it was for many years. At the same time, the newly-gained momentum is not likely to readily translate into negotiated advances in other areas within and beyond the Doha Agenda. This is why the increasingly complex network of PTAs deserves our full attention both to identify the myriad of challenges it gives rise to and to enhance its potential for multilateralism.
References


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