The Dialectical Relationship of Preferential and Multilateral Trade Agreements

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Abstract

Preferentialism and multilateralism are not two independent and succinct avenues in the pursuit of market access and regulatory policies. They historically build upon each other in a dialectical process, closely related and linked through regulatory bridges and references. They influence and direct each other in various ways. The paper mainly focuses on the evolution of international protection of intellectual property rights and of services. The multilateral regulation of the TRIPS and others derive from years of regulatory experience and high numbers of preferential agreements across the globe. The GATS and others, on the other hand, have entered the pluri- or multilateral stage early. Once regulation has reached the multilateral stage, preferentialism focuses on WTO-plus and -extra commitments. Both areas, however, show close interaction. The principle of MFN ensures that multilateralism and preferentialism do not evolve independently from each other. It produces significant spill-over effects of preferential agreements. Such effects and the need to develop uniform and coherent regulatory standards have led in parallel to a number of preferential, plurilateral and multilateral regulatory initiatives. We submit that the process will eventually encourage the return to multilateralism and negotiations in international fora, in particular the WTO while traditional market access may stay with preferential relations among Nations. Such burden-sharing between different regulatory fora should be reflected in future WTO rules providing the overall backbone of the system.

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A Introduction

Multilateralism and preferentialism often are perceived and depicted as succinct and alternative avenues in the pursuit of trade policies of market access, non-discrimination and market integration. Comparing the two, it is generally accepted that the multilateral avenue under Most-Favoured Nation Treatment (MFN) is preferable for the purpose of avoiding trade diversions. Governments only turn to preferential trade *faute de mieux* in the pursuit of achieving reciprocal and balanced trade relations where multilateralism is not available or fails. We currently witness high days of preferentialism and a proliferation of bilateral or plurilateral agreements for a number of well-known reasons:

(i) The stalling of the 2001 WTO Doha Development Agenda on core issues after more than a decade of negotiations under the new conditions of a multipolar world no longer controlled by transatlantic relations;

(ii) The 2001 accession of China to the WTO, her ascent to the world manufacturing house, and the need of many countries to protect their industries from Chinese competition (in particular in textiles) while willing to form free trade zones suitable to attract investment also to smaller countries;

(iii) The current negotiations on the plurilateral Transpacific Partnership (TPP) and on the Transatlantic Trade and Investment Partnership (T-TIP), both entailing nearly a third of world exports (Kotschwar and Schott 2013; Deutsch 2013:3), which amount to a culmination of contemporary efforts to stimulate trade and job creation by recourse to what amounts to a new plurilateralism among Nations.

Contemporary preferences for bilateral and plurilateral avenues, however, cannot ignore that they are and remain closely related to multilateralism and global trading rules. We argue that both are integral parts of the same process towards regulatory convergence as a side-effect of economic integration. Different regulatory aspects of multilateralism and preferentialism underline how strongly they are intertwined: much of the body of existing and emerging preferential agreements builds upon the common law of the multilateral systems, often even simply restating existing rules without going much beyond them, and sometimes even falling short of them. At the same time, new multilateral rules often are derived from models developed earlier in preferential trade agreements (PTAs). The MFN principle of the WTO strongly links both developments. It exerts *de facto* or *de jure* spill over effects of PTAs in regulatory matters. Standards developed and agreed in a preferential agreement deploy effects beyond the

Parties involved and provide the basis for general regulation applicable to third Parties alike. This is of key importance for regulatory convergence and a main factor in putting pressure on members to eventually reconvene multilateral trade negotiations. Enhanced transparency on the realities of global value chains will further promote this process. With a view to analyse such interaction, we provide a summary of the history of the dialectical relationship between preferentialism and multilateralism. We observe two main avenues for the regulatory dialogue between the preferential and the multilateral level: (i) multilateral regulation derived from experiences of preferential regulation, and (ii) multilateral regulation as a starting point for regulation at all.

B A Brief Historical Account

History shows that trade liberalization and trade regulation essentially follow two different paths: It may at its inception move from preferential relations to plurilateral and multilateral frameworks. Vice-versa, the impetus may be provided at the outset by multilateralism, eventually moving towards preferential relations building upon the multilateral edifice. While the former corresponds to normal relations of sovereign states in the Westphalian system, the latter often stems for fundamental paradigm shifts in particular after periods of war and struggle. The post-World War II order thus was framed multilaterally with the Bretton Woods Institutions and the General Agreement on Tariffs and Trade (GATT), largely replacing traditional peace treaties of past traditions. Both traditions can be observed in the history of different areas of trade regulation in international economic law. History even shows a movement in waves, meaning for example, from preferentialism toward multilateralism and then back again only to approach multilateralism over again. This shifting movement between multilateralism and preferentialism is what we call a dialectical relationship.

We illustrate the dialectical relationship of preferential and multilateral trade regulation mainly by means of two case studies: the regulation of Intellectual Property (IP) Protection constituted the first multilateral regulatory framework in international trade regulation established in 1983 and 1986 with the *Paris Convention on the Protection of Industrial Property* and the *Berne Convention on the Protection of Literary and Artistic Works*. Subsequent areas of trade regulation have done so too. The GATT of 1947 grew out of a number of PTAs. It eventually also provided the framework to negotiate the *Agreement on Trade Related Aspects of Intellectual Property Rights* (TRIPS). This agreement amounts to the epitome of multilateralism

and the emergence of global law on a very detailed level. IP protection thus serves as an example for preferential rules spreading to multilateral agreements.

The 1995 WTO General Agreement on Trade in Services (GATS), on the other hand, was the first agreement worldwide to introduce a comprehensive and sophisticated structure, definition and language for the regulation of trade in services. Instead of being influenced by years of experience of preferential trade regulation, the multilateral GATS influenced quite extensively the design and structure of subsequent PTAs. It, thus, serves as an example for multilateral provisions spreading to preferential agreements.

The following paragraphs illustrate the history of the dialectical relationship of preferential and multilateral trade regulation in detail, depicting parallels and differences between the different areas of regulation.

I. The Case of IP Protection: From Preferential to Multilateral Agreements

An inquiry into the historical relationship may start with the observation that PTAs – if at all – constitute the main form next to unilateral measures in the early days of international trade. This is true both for bilateral agreements liberalizing trade following the *Cobden Chevalier Agreement* in 1860, and the generation and web of bilateral *Friendship, Commerce and Navigation treaties* protecting investment and establishment (see e.g. Lampe 2011; Sachs 1984:195ff and Alschner 2013).

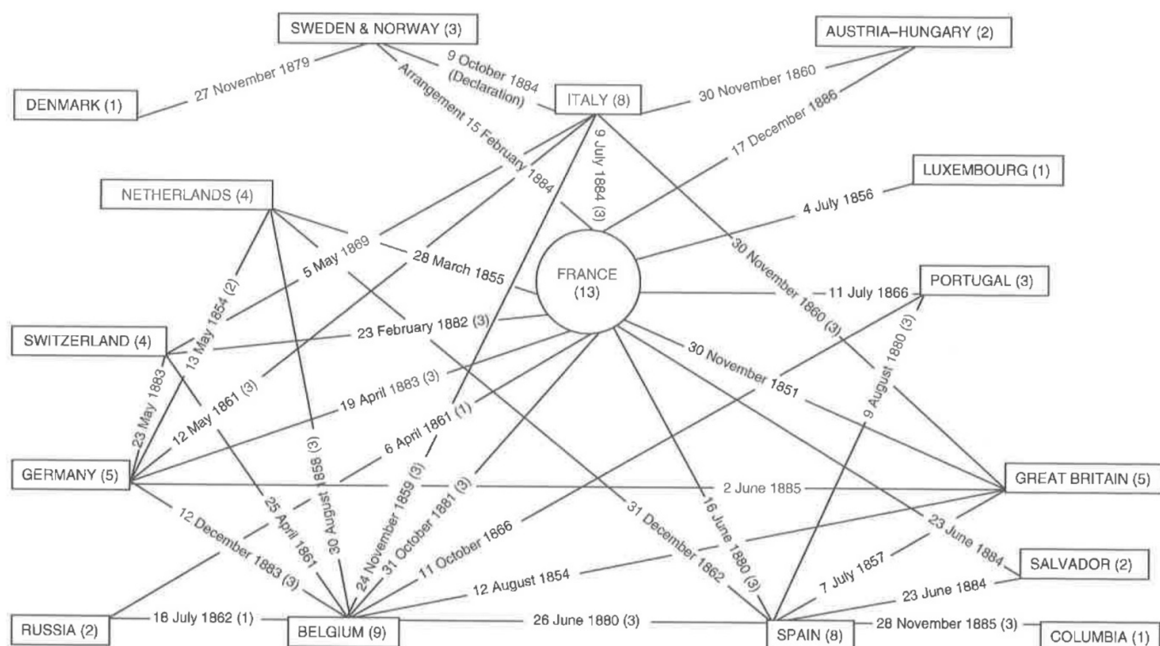
The history of a multilateral agreement usually is that the subject of regulation firstly was regulated on a bilateral and preferential basis. The proliferation of such agreements eventually forms a critical mass which provides the basis for consolidation and further plurilateral and multilateral developments. Once it was either generally agreed that the subject of regulation was of relevance for a larger number of states, or once the web of different preferential commitments had become so complex that the system was at risk to fail, the ground for multilateral efforts was prepared. Governments agreed that a multilateral regulation of the subject was timely and necessary. The process took into account the experience made on the preferential level. The advent of the GATT in 1947 is a prominent example. The trade rules embodied in GATT mainly stem from the experience of the generation of bilateral PTAs concluded by the United States between 1934 and 1945 under the *US Reciprocal Trade Agreement Act* 1934 (see e.g. Rhodes 1993:53ff). Art. 23 of GATT, establishing the concept of nullification and impairment and the concepts of violation and non-violation complaints were verbatim

copied from such trade agreements (see e.g. Tuthill et al. 1985:6). They still inform jurisprudence today and tell us where we come from.

The first multilateral agreements on trade-related issues were, however, the *Paris Convention on the Protection of Industrial Property* (1883) and the *Berne Convention on the Protection of Literary and Artistic Works* (1886). They derived from a series of PTAs which provided the critical mass for harmonization under the roof of a multilateral treaty. Their history roots in the invention of the printing press in Europe in the late 15th century and is marked by the search to strike a balance between privileges, later on individual rights, and the public domain and open access to the commercial use of information. While trade in printed books quickly took off, the emergence of cross-border protection of authors' rights was lagging behind, leaving imported copies unprotected abroad. Authors were left with little recourse since legal protection was only granted nationally (Löhr 2010:37ff). It was not until the late 18th century that the concept of intellectual property protection began to be recognized internationally.

While the number of national acts and case law on copyright and on industrial property (patents and trademarks) increased in the 19th century, rules varied in the scope of application, in the rights granted and in the duration of the rights granted (Ricketson and Ginsburg 2006:22ff). Since national law proved to be ineffective for cross-border protection within an expanding international market in Europe, legal security in the form of largely uniform levels of protection became more and more pressing.[1] Subsequently, a series of preferential agreements with the inclusion of the principles of MFN and national treatment (NT) were adopted in order to ensure a better harmonized legal environment for intellectual property. They had a minimizing impact on the imbalance between countries with high protection and countries with low protection. A bilateral system emerged with France (and her copyrights interests) at the heart of it (Ricketson and Ginsburg 2006:29-39):

[1] Famous authors and composers like Victor Hugo Emilie Zola, Giuseppe Verdi fought for the recognition of authors' rights and the prolonging of the period of protection to secure economic rights and income opportunities. Opponents argued that culture is in the public domain and should be open to everyone. They feared that exclusive rights for authors would raise prices and make works, arts and knowledge inaccessible.



(Source: Ricketson Sam and Jane C Ginsburg (2006), International Copyright and Neighbouring Rights: The Berne Convention and Beyond, 2ed Volume I, Oxford University Press)

These early PTAs were commonly signed among states originating from the same geographical and linguistic region. As the graph above illustrates, the number of PTAs had reached a critical mass by the second part of the 19th century. Coherent regulation became increasingly unmanageable and triggered discussions. The period of industrialization was an age of increasing international meetings on the subject (WIPO 2004:241-242). These platforms were used to demonstrate the need for cross-border recognition of intellectual property rights. Exemplary in this trend was the *International Exhibition of Industrial Property Inventions in Vienna* in 1873. It failed to take place since foreign exhibitors refused to attend: they were afraid that their ideas would be stolen and pirated for commercial use in other countries (WIPO 2004:241). The need for a harmonized international framework governing intellectual property rights, thus, became more and more evident.

This desire to coordinate patent and trade mark protection marked the birth of the first pluri- or multilateral convention on industrial property – the *Paris Convention for the Protection of*

Industrial Property[2] – in 1883 (Abbott/Cottier/Gurry 2011:3). More or less in parallel, multilateralization in IP protection culminated in the first multilateral convention on copyright, the *Berne Convention for the Protection of Literary and Artistic Works* in 1886 (Ricketson 2011:430-431). Both conventions ever since established the basis for IP protection in their respective member states. Both conventions established an international bureau for administering the treaties in Berne, which later merged into the World Intellectual Property Organization (WIPO), established in 1967 in Geneva.

The *Berne Convention* established a higher level of substantive harmonization than the *Paris Convention*; its rules still provide much of the basis for international copyright protection today (see Abbott/Cottier/Gurry 2011:3).[3] However, protection on industrial property, in particular of patents, remained deficient, yet efforts to further develop the international system failed in WIPO due to resistances of the newly independent and developing countries (Abbott/Cottier/Gurry 2011:3-5; Drahos 2001).

At the end of the *Tokyo Negotiation Round* of the GATT, negotiations were launched on a draft Anti-Counterfeit Code by the US and the EC. So far the GATT had not dealt with intellectual property protection except as a matter of regulation within GATT Art. III and of lawful trade restrictions within the general exceptions of GATT Art. XX.[4] The effort to conclude an Anti-Counterfeit Code failed, but eventually led to the negotiating mandate of Punte Del Este in 1996, taking up negotiations with a view to remove trade distortions mainly caused by the lack of protection of IP rights (Cottier 1991). Pending these efforts, no return to PTAs can be observed, except for including the protection of IP rights in bilateral investment agreements as a standard against arbitrary expropriation and regulatory taking (see United Nations 2007; see also Drahos 2001 and United Nations 2012:16 and 133; Nadakavukaren Schefer 2013; Dolzer and Schreuer 2012). Efforts of all industrialized countries clearly focused on the emerging negotiations under the umbrella of the Uruguay Round of the GATT.

While developing countries strongly resisted in the beginning, the effort initially led by the US obtained strong support from developed countries, in particular the EU, Japan and Swit-

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[2] It was initially signed by 14 members. Until World War II the membership stagnated at 19 members and later increased to 172 members.

[3] While the Paris and Berne Conventions were widely adopted (with the US joining the latter convention only in 1986) other international agreements that were concurrently concluded achieved considerably less acceptance.

[4] See United States – Section 337 of the Tariff Act of 1930, Report by the Panel, adopted on 7 November 1989 *(L/6439 - 36S/345).*

zerland (Mercurio 2006:217ff). Coinciding with the end of the Cold War and the fall of the Berlin Wall, negotiations culminated in the conclusion of the multilateral *Agreement on Trade-Related Aspects of Intellectual Property Rights* (TRIPS) which entered into force in 1995. The multilateral agreement established extensive standards and fully incorporated the substantive provisions of the Berne and the Paris Convention. It forms part of the WTO and is fully subject to multilateral dispute settlement under the dispute settlement mechanism of the WTO. It amounts to the most advanced regulatory agreement henceforth, heralding a new age of international trade regulation in IP rights (Abbott/Cottier/Gurry 2011:4). At the same time, the TRIPS Agreement was designed as a minimal standard, thus allowing countries to adopt stronger protection of IP rights both unilaterally or in future PTAs.

The success of the TRIPS Agreement and the Uruguay Round in general provided the impetus for subsequent multilateral efforts within WIPO. In 1996 the WIPO entered into a cooperation agreement with the WTO and expanded its role by addressing evolving issues related to new technology and the internet that were previously omitted by the *Berne Convention* and that were not yet included in WTO-law. The *WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT)* were adopted in 1996, reinforcing protection against piracy. Another objective of these new treaties was to create consistency between WTO and WIPO rules (Abbott/Cottier/Gurry 2011:429ff).

At the same time, developing countries increasingly opposed integration, and efforts in multilateral fora declined. In particular, attempts to strengthen criteria on patenting inventions failed and a draft patent law treaty has remained unadopted (Reference WIPO). Efforts increasingly turned, in subsequent years, to bilateral and plurilateral efforts. The forum shifted. Apart from an amendment of the TRIPS negotiated for the implementation of the Doha Declaration of Public Health (Doha Declaration on the TRIPS agreement and public health adopted on 14 November 2001, WT/MIN(01)/DEC/2, adopted on November 20, 2001), all efforts within the WTO failed. Equally, negotiations became protracted, and progress in treaty was limited to the adoption of a treaty defining fair use for handicapped people in copyright law (Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled, VIP/DC/8 Rev., adopted on July 31, 2013).

Based upon the TRIPS, IP protection became a standard item and concern in PTAs, introducing so called TRIPS plus standards of additional protection. Partly these rules filled lacunae

in the TRIPS (such as test data protection).[5] Partly, they curtailed rights existing under the agreement (such as parallel imports or flexibilities in plant variety protection).[6]

In respect of enforcing IP rights, industrialized countries negotiated the Anti-Counterfeiting Trade Agreement (ACTA) with a view to create a new plurilateral benchmark which eventually could be used as a reference in bilateral negotiations in particular with emerging countries (Yu 2011:1). The draft of ACTA was negotiated by a group of developed countries outside the context of existing institutions (Kaminski 2011:1-5; Drahos 2001). ACTA was designed as a plurilateral agreement on IP rights, aiming at a higher level of international standards of protection and at better enforcement. ACTA builds on the language of TRIPS but introduces its own institution. As a plurilateral agreement it was meant to lie outside the context of the institutional checks-and-balances built into the WTO (Kaminski 2009). Thus, just like the shift from WIPO to WTO has been exacted by powerful countries, the agenda to shift from WTO to ACTA was pushed by the same group of countries. ACTA eventually failed mainly due to resistance in the European Parliament. Negotiations were not sufficiently inclusive and an emerging community of internet users were afraid to have their liberties impaired (e.g. Bridy 2012).

In conclusion, the evolution of international IP protection thus clearly shows a dialectical relationship of preferential, bilateral, plurilateral and multilateral fora over decades. The cycle of alternating preferentialism and multilateralism creates opportunities for additional gains through shifting the forum of regulation: it allows for faster and facilitated negotiations and for the consolidation of gains. Developed countries seek fragmenting developing country coalitions and take advantage of the bargaining asymmetries in bilateral negotiations. The strategy of developed countries lies in forcing developing countries to enter into compromises in favour of developed countries' interests (Drahos 2003). One of the reasons why developing countries negotiate PTAs, and enter into bilateral compromises in IPRs is that they seek advantages in other areas, but also have to react to the pressure resulting from unilateralism of other countries (Abbott/Cottier/Gurry 2011:34 ff.). This is referred to as the 'global ratchet' by Drahos (2003:7; also Mercurio 2006:222-223).

Both multilateral and preferential rules are closely knit by the principle of MFN. The clause in TRIPS Art. 4 does not include an exception for PTAs. As a consequence, any PTA negoti-

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[5] E.g. *US-Chile (2004)* establishes a patent-registration linkage and exclusive rights to pharmaceutical test data.

[6] See for example Agreement between the USA and the Hashemite Kingdom of Jordan on the Establishment of a Free Trade Area, signed by both parties in October, 2000.

ated outside the multilateral context that contains higher IP standards assists in the resetting of international standards and is particularly crucial for negotiations with developing countries as they will have to grant the protection that they agreed on in a compromise to all other nations. Once a critical mass of PTAs is reached, TRIPS-plus standards will in turn become new minimum standards that will benefit the countries in negotiating stronger multilateral IP protection in another round of WTO negotiations (Mercurio 2006:223; Abbott/Cottier/Gurry 2011:5).[7] Preferential standards on IP protection, both on substantive protection and in terms of enforcement thus entail significant spill-over effects.

Thus, we conclude that the policies of international intellectual property rights are embedded in a circle of alternation between preferential and multilateral standard-setting: higher level of standards of protection in preferentialism and harmonization of regulation through multilateral consolidation of minimum standards. Such processes can take place concurrently as has been seen with the evolution of the Berne Convention and the TRIPS (Drahos 2001:7; Mercurio 2006:235; also Helfer 2004). The challenges for the future, however, entail the question whether the dialectical process inevitably leads to ever increasing standards of protection, ignoring equally legitimate concerns of competition and open access to information. The dynamics led to a debate on necessary ceilings of IP rights (Kur and Ruse-Kahn 2008; Ruse-Khan 2009). They inherently need to be introduced by a future generation of multilateral rules in a revised TRIPS, forming part of an overall approach reflecting the dialectical relationship of multilateral and bilateral rules.[8]

II. The Case of Liberalising Trade in Services: From Multilateral to Preferential Trade Agreements

The first PTAs mentioning services trade all involve the EC[9], starting with the *EC Treaty of Rome* in 1957 and continuing aside from association agreements, with the economic partnership agreements between the EC and African countries. The Caribbean countries followed

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[7] The effects of the evolution of TRIPS-Plus standards are mainly detrimental to developing countries as they will be challenged with a reduction of flexibilities and will thus face difficulties in particular with regard to public health. The only way for developing countries to counteract the gaining weight of developed countries' coalitions is to form coalitions among themselves. Reaching consolidation of stronger IP protection on a multilateral level, thus, remains unrealistic under the auspices of the WTO at the present time.

[8] See below Chapter IV(C).

[9] *EC Treaty of Rome (1957)*, *EC Greece Association Agreement (1961)*, *Yaoundé I (1963)*, *Arusha Agreement II (1969)*, and *Yaoundé II (1996)*.

suit[10], and in 1985, the US concluded their first PTA in services.[11] Generally, however, services trade regulation is a relatively young discipline. It mainly developed within the case law of the European Court of Justice on freedom of services, but lags behind other areas, in particular trade in goods and free movement of persons, in terms of legislative measures and levels of market access within the EU.[12] Similarly, the field was of minor importance in PTAs. The main impetus came from multilateralism in this field.

Parallel to the first preferential attempts to regulate trade in services, research developed in academia. Hugh Corbet, who had established 1968 the Trade Policy Research Centre in London, commissioned Brian Griffiths from the London School of Economics to undertake a study of international flows of services and restriction on transactions in the services sector. The resulting book called 'Invisible Barriers to Invisible Trade' (published in 1975) became the starting point for much of the subsequent work in the field of services trade liberalization. More or less in parallel, the OECD countries identified the need for action in light of the increasing importance of the sector in order to ensure liberalization and non-discrimination in the services sector, and the US adopted the strategy to include services in international trade negotiations. Consequently, the *Tokyo Round* resulted in a few references to services, however, only insofar as they affected trade in goods (see Feketekuty 1988:296-304).

The following years were mainly aimed at providing background information on services trade. In the 1980ies, the US conducted bilateral consultations and negotiations over services trade liberalization with both Canada and Israel. These negotiations also served as a 'dress rehearsal' for the multilateral negotiations (Feketekuty 1988:313). During the process of collecting information on trade liberalization in services, all the industrialized countries came to the conclusion that services trade is in their interest. Thus, they aimed at putting services trade on the agenda of the GATT for new multilateral trade negotiations.

However, in 1984 this attempt failed because no consensus could be reached between developed and developing countries. Only after many meetings with developing countries, the agenda for the *Uruguay Round* of multilateral trade negotiations, including negotiations over services trade liberalization, was approved 1986 in Punta Del Este, and subsequently led to

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[10] *CARICOM (1973)* and *Organisation of Eastern Caribbean States (1981)*.

[11] *Israel – US (1985)*.

[12] See the debate on the so called Bolkestein Directive, Proposal for a Directive of the European Parliament and of the Council on Services in the Internal Market, Brussels, March 5 2004 ****, before the Directive was adopted subject to substantial modifications, ****.

the establishment – separate from the GATT – of the multilateral treaty for trade in services, the GATS (Feketekuty 1988:321).

To date, there has not been achieved much substantial trade liberalization through the GATS because country-schedules by and large codify existing domestic legislation. True trade liberalization in services has mainly been achieved through the negotiating process of WTO accession and through PTAs. Despite the comparative advantages of the GATS vis-à-vis PTAs (dispute settlement process, policy coordination between ministries, and securing of domestic policy reforms) (Adlung 2007), it is primarily viewed as an exercise in binding the *status quo* (Stephenson 2002:192). Thus, as multilateral negotiations over trade liberalization in services have not yet produced the desired outcome, and as services trade regulation is still a relatively young discipline in international economic law, countries have increasingly focused on pushing trade liberalization in services forward through PTAs.

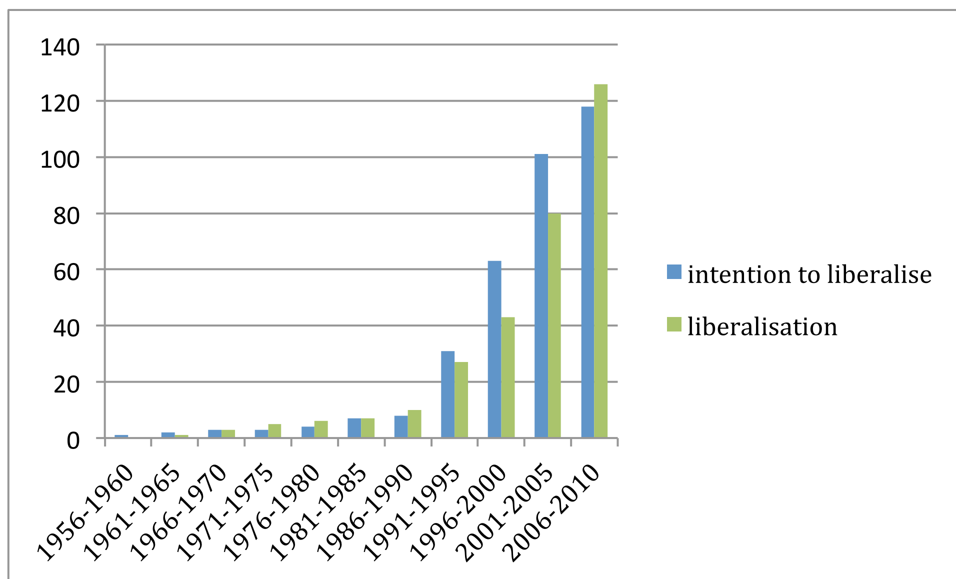
Yet, it is important to stress that GATS initially developed and defined the conceptual terms and notions of trade liberalization and regulation. Ever since its adoption, the agreement and its disciplines have coined and shaped subsequent efforts at liberalization. PTAs build upon the conceptual framework developed during the multilateral talks of the Uruguay Round, either using positive or negative list for scheduling commitments.

Parallel to increasing preferentialism in services trade regulation, the plurilateral initiative behind the *Trade in Services Agreement* (TISA), seeks to bind GATS-plus levels while exerting pressure on the multilateral level for taking up negotiations again. Since *TISA* is expected to go substantially beyond the scope of GATS regulation, there is a potential that it introduces innovative and new regulation. It, thus, perfectly fits into the dialectical relationship described here between preferentialism and multilateralism.

While industrialized countries like the EC and the US initiated multilateral negotiations over trade liberalization in services, they have also been among the first nations to conclude PTAs in services. In South America, with its tradition of regional integration, the trend points rather towards consolidation and deepening of the existing frameworks – by e.g. adding services to an existing PTA in goods – than towards negotiating new agreements. In Asia-Pacific, on the other hand, a large number of mostly bilateral – new – PTAs in goods and services are being negotiated or have recently come into force (Crawford and Fiorentino 2005:10-13). In South Asia, India has been the main focus of PTA activities, shifting only relatively slowly from a focus on goods and agriculture to services (Chanda 2011). Finally, PTA dynamics in Africa

and in the Middle East show signs of global trends, namely that of consolidation of existing agreements and expanding across the globe (Crawford and Fiorentino 2005:13). However, services remain generally underrepresented in economic integration efforts on the African continent, and in Arab countries.

Table 1 below illustrates that before the *Uruguay Round*, little was happening internationally with respect to the regulation of cross-border trade in services. Around 1990, only ten PTAs with binding commitments in trade liberalization in services existed, and only eight PTAs listed services trade liberalization as a goal for the future. Additionally, seven of those ten agreements with commitments in trade liberalization in services involve the EC. In parallel to the final phase of the *Uruguay Round*, between 1990 and 1995, preferential trade liberalization in services is taking off: In these five years, 23 new agreements are listing services trade liberalization as a goal for the future, and 17 PTAs with substantial commitments in services trade liberalization were concluded. Among these 17 agreements are the early corner stones of international trade regulation of services trade, the *EC Maastricht Treaty (1992)*, the *European Economic Area (1992)* and *NAFTA (1992)*.



Source: Derived from DESTA dataset[13] and WTO[14].

[13] DESTA: Dür, Andreas, Leonardo Baccini, Manfred Elsig, Karolina Milewicz 2013. The Design of International Trade Agreements: Introducing a New Dataset, Manuscript, University of Bern.

[14] Notified RTAs [online], Available at: http://rtais.wto.org/UI/PublicMaintainRTAHome.aspx [last visited March 16 2014].

The *EC Treaty of Rome*, presumably the first trade agreement with a separate chapter on services trade, already provided a pretty comprehensive definition of services trade, even indicating that services can be delivered through different ways[15]:

> Services within the meaning of this Treaty shall be deemed to be services normally supplied for remuneration, to the extent that they are not governed by the provisions relating to the free movement of goods, capital and persons. Services shall include in particular: (a) activities of an industrial character; (b) activities of a commercial character; (c) artisan activities; and (d) activities of the liberal professions. Without prejudice to the provisions of the Chapter relating to the right of establishment, a person supplying a service may, in order to carry out that service, temporarily exercise his activity in the State where the service is supplied, under the same conditions as are imposed by that State on its own nationals.

It is interesting to note that at least in Europe, from the very beginning of trade regulation of services, mode 4 supply of services (temporary movement of natural persons) was considered so essential that it was explicitly mentioned.

This initial structure and language of the regulation of services trade was later introduced by the EC in its Economic Partnership Agreements (EPAs) across the globe. The chapter on services in *Yaoundé I* e.g. introduces MFN,[16] and establishes a binding commitment[17] in liberalising the provision of services:[18]

> Services within the meaning of this Convention shall be deemed to be services normally provided against remuneration, in so far as they are not governed by the provisions relating to trade, the right of establishment and movements of capital. Services shall include in particular activities of an industrial character, activities of a commercial character, artisan activities and activities of the liberal professions, excluding wage-earning activities.

More or less the same language and structure appears in the *Arusha Agreement II*, with some clarifications, such as the term 'employed persons' (instead of 'wage-earning activities').[19] *Yaoundé II* furthermore strengthens MFN by stating that both *de facto* and *de jure* discrimina-

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[15] *EC Treaty of Rome (1957)*, Art. 60.

[16] *Yaoundé I (1964)*, Art. 30.

[17] *Yaoundé I (1964)*, Art. 29.

[18] *Yaoundé I (1964)*, Art. 32.

[19] *Arusha Agreement II (1969)*, Art. 19.

tion is to be abandoned.[20] However, *Yaoundé II* still uses the same definition of services as did *Yaoundé I*. Also, *Lomé I* and *Lomé II* follow more or less the language and structure of *Yaoundé I* and *Yaoundé II*.

In *Lomé III* and *Lomé IV*, services are given special attention with a separate chapter referring to the importance of services for economic development, and by outlining the most development-effective services sectors. Interestingly, in *Lomé III* and *Lomé IV*, commitments in services trade liberalisation have disappeared again from the agreement. It remains striking, that the parties to *Lomé* did not consider it necessary to include a definition of the term 'services' in the agreement.

While a definition of services is entirely missing, *EC – Turkey*, introduced the first stand-still obligation on services trade:[21]

> The Contracting Parties shall refrain from introducing as between themselves new restrictions on the freedom of establishment and the free supply of services.

CARICOM, presumably worldwide the first agreement including regulation of trade in services in which the EC is not a party to, establishes its own language for preferential treatment, while building upon the European definition of services:[22]

> 1. Each Member State agrees as far as practicable to extend to persons belonging to other Member States preferential treatment over persons belonging to States outside the Common Market with regard to the provision of services. 2. For the purposes of this Article the term "services" shall be considered as services for remuneration provided that they are not governed by provisions relating to trade, the right of establishment or movement of capital and includes, in particular, activities of an industrial or commercial character, artisan activities and activities of the professions, excluding activities of employed persons.

While the *Organisation of East Caribbean States* introduces 'the abolition, as between Member States, of the obstacles to the free movement of persons, services and capital'[23] as a principle of the common market, it refers later in the treaty only specifically to the free movement

[20] *Yaoundé II (1969)*, Art. 31.

[21] *EC – Turkey (1970)*, Additional Protocol, Art. 41.

[22] *CARICOM (1973)*, Art. 36.

[23] *Organisation of Eastern Caribbean States (1981)*, Agreement establishing the East Caribbean Common Market, Art. 3(c).

of persons,[24] and to transportation.[25] Thus, as an exception to the rule, partial services trade liberalisation is established, with a specific focus on one sector and one aspect of services trade.

Israel – US, then, is the first agreement establishing a comprehensive and encompassing structure for the regulation of services trade liberalisation. Given the novelty of the rules, it was first added as a separate – legally not binding – declaration to the main treaty of *Israel – US*. The declaration provided in general for NT,[26] it provided for a detailed definition of services and services sectors,[27] it also included transparency provisions[28] and it set a date for the review of the effectiveness of the measures in the declaration.[29] Through the transparency provision, a first form of a negative list approach is introduced: The parties to the agreement are required to notify the other party about non-conforming measures which will be upheld even after signing the declaration.[30] Furthermore, the definition and list of services is interesting:[31]

> Definition: Trade in services takes place when a service is exported from the supplier nation and is imported into the other nation. Services encompass, but are not limited to, transportation; travel and tourism services; communications; banking services, insurance; other financial activities; professional services, such as consulting in construction, engineering, accounting, medicine, education, and law, and the providing of other professional services such as management consulting; computer services; motion pictures; advertising.

The different modes of supply, however, are completely missing from the agreement. Furthermore, there is no general definition of the term 'service', rather, services are defined via

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[24] *Organisation of Eastern Caribbean States (1981)*, Agreement establishing the East Caribbean Common Market, Art. 12.

[25] *Organisation of Eastern Caribbean States (1981)*, Agreement establishing the East Caribbean Common Market, Art. 16.

[26] *Israel – US (1985)*, Declaration on Trade in Services, Art. 3: 'Each Party will endeavor to assure that trade in services with the other nation is governed by the principle of national treatment.'

[27] *Israel – US (1985)*, Declaration on Trade in Services, Art. 1.

[28] *Israel – US (1985)*, Declaration on Trade in Services, Art. 7: 'Each Party will make public its domestic laws and regulations affecting trade in services and notify the other Party of laws and regulations which discriminate against a service exported from the other nation.'

[29] *Israel – US (1985)*, Declaration on Trade in Services, Art. 9: 'The parties will review the effectiveness of this Declaration not later than eighteen months from the date that this Declaration is signed.'

[30] *Israel – US (1985)*, Declaration on Trade in Services, Art. 7.

[31] *Israel – US (1985)*, Declaration on Trade in Services, Art. 1.

sectors and subsectors and the parties to the declaration supposedly understand the same under the term of 'service'.

The protocol on trade in services of the *Australia New Zealand Closer Economic Relations Agreement (ANZCERTA)* adopted in 1988 finally establishes legally binding, far reaching, detailed liberalisation of trade in services, based on a negative list approach. It defines the provision of services as follows:[32]

> Provision of services includes: (a) the production, distribution, marketing, sale and delivery of a service; and (b) for the purpose of the activities referred to in the previous sub-paragraph of this paragraph: (i) access to and use of domestic distribution systems; and (ii) rights of establishment.

It basically opens the entire services market for liberalisation, providing for non-restricted market access, NT, and MFN.[33] The few exemptions to this general rule are listed in a separate annex to the protocol, and it is fairly safe to say that the *ANZCERTA* is liberalising services trade to an extent which up until 1988 was absolutely unique.

In the same year, the *Canada – US* agreement was concluded, which includes similar language to the *ANZCERTA*, while at the same time not providing for full market access and being based on a positive list approach. Regulation is sophisticated and aside from a positive listing, some services sectors are also listed with a separate annex in the agreement. On the scope and coverage, *Canada – US* says:[34]

> 1. This Chapter shall apply to any measure of a Party related to the provision of a covered service by or on behalf of a person of the other Party within or into the territory of the Party. 2. In this Chapter, provision of a covered services includes: a) the production, distribution, sale, marketing and delivery of a covered service and the purchase or use thereof; b) access to, and use of, domestic distribution systems; c) the establishment of a commercial presence (other than an investment) for the purpose of distributing, marketing, delivering, or facilitating a covered service; and d) subject to Chapter Sixteen (Investment), any investment for the provision of a covered service and any activity associated with the provision of a covered service.

Thus, *Canada – US* generally covers all modes of supply albeit listing them still in a rather indirect manner. NT is generally provided,[35] however, no distinction between market access

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[32] *ANZCERTA (1988)*, Protocol on Trade in Services, Art. 3.

[33] *ANZCERTA (1988)*, Protocol on Trade in Services, Art. 4-6.

[34] *Canada – US (1988)*, Art. 1401.

[35] *Canada – US (1988)*, Art. 1402.

regulation and NT regulation is made. Due to the positive list approach, liberalisation is only applied to the services sectors which are listed by either party to the agreement. Thus, in general, *Canada – US* is less liberal than *ANZCERTA*.

Finally, while the *EC Maastricht Treaty* and the *EEA* were more or less aligned with the European agreements preceding them, the *NAFTA* treaty introduced a number of new aspects of trade regulation of services. Arguably, the *NAFTA* quite substantially served as a role model for the GATS. For instance, the *NAFTA* is the first agreement which introduces more or less the identical definition of the modes of supply of the GATS:[36]

> cross-border provision of a service or cross-border trade in services means the provision of a service: (a) from the territory of a Party into the territory of another Party, (b) in the territory of a Party by a person of that Party to a person of another Party, or (c) by a national of a Party in the territory of another Party, but does not include the provision of a service in the territory of a Party by an investment, as defined in Article 1139 (Investment Definitions), in that territory;

Contrary to *Canada – US*, the *NAFTA* re-introduced the negative list approach, together with the separate annexes to the services chapter for specific sectors of services trade. It establishes NT[37] and MFN,[38] and it addresses the challenges of behind the border barriers to trade with an extensive provision on licensing and certification.[39]

Judging from this overview of the first provisions regulating services trade, it becomes obvious that it was not a single PTA which served as a blueprint for the GATS. Furthermore, while indeed a couple of preferential attempts to regulate services trade preceded, experiences with services trade regulation must have been limited to say the least at the time that services were added to the *Uruguay Round*. Thus, the GATS is not only the first multilateral agreement regulating services trade, it is also the first agreement worldwide establishing coherent and specific regulation of services trade. While the GATS was inspired by previous agreements on the bilateral and regional level, it nevertheless introduced a unique structure and a unique set of general rules.

The willingness to negotiate a multilateral agreement on trade in services was, other than in intellectual property protection, not fostered by the simple need for multilateral rules in order

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[36] *NAFTA (1992)*, Art. 1213.

[37] *NAFTA (1992)*, Art. 1202.

[38] *NAFTA (1992)*, Art. 1203.

[39] *NAFTA (1992)*, Art. 1210.

to bring coherence into a confusing web of different provisions stemming from a high number of PTAs. Rather it stems from the conviction that services trade became important for the world economy and that regulation was finally in the interest of everyone.

Therefore, the GATS serves as a prime example of the potential of a multilateral forum to take up new areas of regulation immediately and establishing basic rules and commitments for everyone from the very beginning. It is, however, generally agreed that due to the *Doha Round* being stuck later, the initial momentum of the GATS has faded in the meantime: The agreement was meant to provide the basic stepping stone for a global regulatory framework of services trade regulation. Until today, the world is waiting for the next building stone to follow the initial agreement; preferentialism has taken up the lead in regulation of services trade and presumably will impact on a next stage of multilateral services trade regulation in much the same way as preferentialism impacted on the TRIPS.

C Emerging Patterns of the Dialectical Relationship

Following the establishment of the WTO, PTAs often focused on so called WTO plus elements, strongly building upon the body of WTO law. It was a matter of filling *lacunae*, or securing particular interests, in particular in the field of IP, which be achieved bilaterally, but not in a multilateral context. It is here that many of these agreements are concluded among major markets and non-contiguous countries. The idea of regional integration was expanded to transcontinental preferential trade. Henceforth, it was appropriate to speak of PTAs and to look at Regional Trade Agreements (RTAs) as a subcategory.

PTAs were partly induced for political reasons. Partly, they responded to the needs of globalization, which no longer primarily seeks more integrated markets with adjacent neighbouring countries. This became particularly true for Latin America and Africa where ties with distant markets often are closer than with neighbouring countries operating under different political rule. A new generation of bilateral PTAs emerged during the *Doha Development Round* initiated in 2001, but stalling since 2006. The accession of China in 2001 fundamentally changed the basic equation of the multilateral system and reduced the willingness of WTO Members to negotiate multilaterally. As a consequence, countries continued their policies of preferentialism.

Recently, a new dimension of new plurilateral agreements was added. In 2010, negotiations on the Trans-Pacific Partnership (TPP) commenced. These negotiations include twelve coun-

tries in North America, Latin America and Asia, including the US and Japan.[40] In July 2013, the EC and the US commenced negotiations for the Transatlantic Trade and Investment Partnership (T-TIP), technically a preferential agreement yet encompassing 50 US States and 28 EU Member States. These countries account for 50% of World Trade and 30% of World GDP (T-TIP: Hansen-Kuhn and Suppan 2013 and TPP: Voon 2013).

These emerging patterns differ from previous periods in a number of respects. Firstly, the TPP and the T-TIP are negotiated among countries which in the past stood for the backbone of the multilateral system. No longer are preferential agreements typically concluded between a large market and smaller ones, the latter adjusting to the templates and regulations of the larger one. Secondly, these negotiations are neither multilateral nor bilateral in the traditional sense. They form a new generation of plurilateralism, entailing the interest of a considerable number of different countries in necessarily complex negotiations. Measuring against universalism at the WTO, they appear to be exponents of what may be called minilateralism or, more exactly, mini-multilateralism (Herman 2011, Drache 2011, Powell and Low 2011, Naim 2009). Thirdly, the architecture of these future agreements inherently includes a sophisticated institutional architecture which goes beyond traditional patterns of bilateral agreements. In T-TIP, regulatory convergence is considered to be a horizontal and on-going task, which may only begin with the conclusion of treaty negotiations (BusinessEurope 2013). Innovative channels for exchanging information, mutual dialogue on planned and suggested legislation and regulation, joint initiatives in international standard-setting bodies and inquiry points – all under the umbrella of a joint Regulatory Cooperation Council – are new ideas in the field. None of them are supposed to reduce constitutional rule-making powers in legislation and regulation on either side of the Atlantic. Yet, an on-going and informed dialogue may lay the foundation for common solutions and global leadership where it seems feasible, be it technical barriers to trade, services, intellectual property or investment protection. The framework could evolve into a transatlantic forum of regular and continued interaction. It stresses the idea that on-going processes and dialogue – rather than fixed rules – increasingly shape modern agreements.

While these future agreements legally amount to PTAs, they in essence amount to a new type of global regionalism which cannot be compared to prior states of preferential trade – except

[40] Negotiations were commenced by Chile, New Zealand, Singapore, Brunei, US, Australia, Vietnam and Peru and were eventually expanded to include Malaysia, Canada, Mexico and Japan.

for the foundation of GATT in 1947 among them 24 countries mutually pledging MFN treatment. If they remain within the boundaries set by existing trade and investment law, and if they remain reluctant for other countries to join, they may – instead of replacing the WTO – eventually provide enough incentive both due to regulatory pressure, but also due to economic interests, to finally substantially taking up again trade negotiations on the universal multilateral level. This is largely due to the nature of regulatory tasks ahead.

Historically, parallel negotiations of the world leading economies in multiple regulatory fora to this extent – within the multilateral WTO, the plurilateral TISA, ACTA, TPP or T-TIP, and the preferential level – is unseen before. Interestingly enough, this development was sparked by the establishment of the WTO with all its multilateral agreements in the mid-1990ies. Ever since, countries have shown an increasing interest in the regulation of trade relations, be it on a preferential, a plurilateral or a multilateral basis. Given that a possible parallel evolution of regulation in multiple fora creates new challenges for the preservation of regulatory coherence, the regulatory dialogue between multilateralism and preferentialism today is of a different nature than it used to be. Generally, trade regulation is facing a new challenge today, the one of regulatory burden-sharing between the different levels of regulation which currently apply to trade relations.

D The Power of the Subject Matter

I. The Impact of Regulating Behind the Border Issues

Much of the topics addressed by modern bilateral and plurilateral trade and investment agreements today relate to what we call *behind the border* issues (Cottier forthcoming 2014). While tariffs remain important in selected areas and in agriculture, main trade barriers today result from non-tariff measures, differences of regulation and the absence of harmonized standards. This is true both for trade in goods and in services. Increasingly, methods of process and production (PPMs) move centre stage and define market access for products in light of policy concerns such as labour standards or the protection of the environment and climate change mitigation. The structure of regulatory challenges will change patterns of negotiations essentially for three following reasons.

Firstly, countries negotiating *behind the border* issues within PTAs are likely to adjust to the rules and standards of larger markets. The US, the EC and other large markets thus offer their

succinct templates, based upon which agreements are formed. Smaller countries and markets regularly adjust to these templates. A country negotiating with two or more large markets may therefore find itself in a position to adopt different templates on the same behind the border issue. The general nature of regulation of the matter, however, does not allow adopting two different standards in domestic legislation. It is, for example, not possible to adopt a system protecting geographical indications with one entity, and a system of collective marks with another, both responding to different criteria. Domestic legislation is bound to be uniform and apply in the same manner to all addressees from home and abroad in the same manner. The regulation of non-tariff barriers thus deploys significant spill-over effects. Bilaterally negotiated settlements will be equally implemented to the benefit of third parties, yet short of reciprocal treatment. The need to operate on a single and uniform legal standard in domestic law for practical reasons thus deploys a significant *de facto* MFN effect. Partly, these effects are even legally mandatory, as the example of intellectual property showed. Enhanced standards of protection in PTAs are to be extended to all members of the WTO alike.[41]

Secondly, as the proliferation of PTAs continues, more and more countries will face the problem of accepting divergent templates. They will learn and conclude that by far the best solution will be to negotiate on the basis of a template which is multilaterally defined and alike to all different partners (see also Relaño 2006:99). We therefore submit that in the long run members of the WTO will return to Geneva and will take up negotiations on behind the border issues multilaterally. In a dialectical relationship, the tide will turn and return to the WTO. We need to take into account the regulatory shift, and the legal nature of future regulatory issues. It may well be that classical issues of market access, in particular tariff and quantitative restrictions, will remain a matter of preferentialism under WTO law and mainly be left to PTAs. The foundations of standard setting and norms and standards having the effect of harmonization or mutual recognition may, however, increasingly shift to WTO and multilateral negotiations.

Thirdly, the world economy of the 21st century may not any more require foremost the establishment of regional or transcontinental preferential markets, but rather needs a regulatory framework which fosters and enables global added value chains. Increasing insights into the structure of division of labour, increasingly blurring distinctions between trade in goods and services will call for a coherent regulatory framework allowing optimal allocation of re-

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[41] See Chapter II(A).

sources and economies of scale in the production and distribution of goods and services. Existing fragmentation by means of rules of origins, trade remedies depending upon the particular origin of a good will become increasingly difficult to apply.

Insights in the interest of returning to universal multilateralism of the WTO will change attitudes to negotiations. Members no longer will block and veto negotiations, but carefully balance pros and cons with preferential negotiations which often leave them off in a less advantageous position than what can be expected from a balanced multilateral process. We are likely to see a different attitude to norm making, and a more flexible approach in bringing about compromise avoiding stalemate. The present Doha Development Agenda is largely influenced and coined by new blocking powers which governments are able to operate. The insight into the downside, and the price to pay for and in PTAs, and the problem of responding to diverging templates, is likely to bring about changing attitudes in a learning process.

Trade negotiations in the WTO will change accordingly. No longer will it be a matter of formal trade rounds primarily seeking market access. Rather, it will be a matter of norm-making comparable to the process of legislation in different and separate fields which are not inherently connected. WTO is likely to see an on-going legislative process with results, success and failures, alternating on a project by project basis. Negotiations on different services sectors, combined negotiations and trade and energy, no longer distinguishing goods, services, IPRs and investment, linking trade and production standards in labour relations and environmental protection and climate change, or the emergence of disciplines on anti-trust and unfair competition will coin the daily life of norm making in the WTO.

WTO negotiations are likely to be strongly influenced by existing bilateral and plurilateral agreements. Modern universalism in the WTO may increasingly serve as a mechanism for binding and extending the *status quo* to other Parties in order to simplify global trade relations and ensure a minimum level of regulatory coherence. In this respect, the content of the T-TIP and the TTP are of particular interest: once these two mega-regionals have agreed to a certain regulatory structure, it will be hard for the rest of the world to maintain different regulations. It is, thus, likely that the T-TIP and the TTP will influence multilateral regulation strongly in the future. While this is a natural consequence of the dialectical relationship of multilateralism and preferentialism, the regulatory consequences of the T-TIP and the TTP for the rest of the world are likely not to take into account the interests of other countries, in particular small developing and least developed countries. If negotiations on these regulatory issues would have taken place in the WTO, they would have had a way to influence the out-

come. As it looks right now, the stalling of the Doha Round deprived the group of economically less powerful countries of their chance to actively participate in rule making.

II. Identifying Areas of Legitimate Preferential Market Access

Not all areas are equally suitable to return to universal trade regulation. Paradoxically, classical non-regulatory market issues, in particular the reduction of tariff protection, of quantitative restrictions in goods and services are likely to stay with PTAs. For instance, in the area of services trade, authors around the world agree that certain services sectors are more suitable than others for both multilateral regulation or for multilateral liberalisation to the benefit of all WTO members (e.g. Sauvé and Shingal 2011; van der Marel and Shepherd 2013). There lies a potential in using the flexibilities already present in the current regulatory framework of the WTO in order to do justice to the levels of suitability of the different areas of trade regulation. These flexibilities can be found for instance in Art. V GATS. The provision allows for sectorial liberalisation of trade in services in a PTA, given that a number of requirements are met (Sieber-Gasser forthcoming). Or they can be found in GATS Art. VII, which dealing with the recognition of diploma. Such recognition involves a high level of mutual trust and thus is primarily suitable for preferential avenues. The same holds true for Mutual Recognition Agreements which reciprocally recognise product standards and modes of testing. Generally, the recognition of standards and diplomas may likely not be suitable for multilateral application in the near future.

Another area of legitimate preferential market access may be seen in PTAs involving LDCs and developing countries: Depending on the level of economic development and on the structure of the economy, preferentialism may justifiably for a limited period of time be the more appropriate forum for trade regulation and economic integration, than multilateralism. The legal basis for preferentialism driven by development policies can be found in the Special and Differential Treatment in WTO-law, or in specific provisions explicitly addressing LDCs and developing countries (see e.g. Slaughter 2004; Feichtner 2012; Cullet 2003; Low 2007; Cottier 2006).

There might also be an area of trade regulation in which *de facto* preferential market access is embedded in the subject of regulation. We think, for instance, of government procurement or IP protection: There are areas of trade regulation, which today assume a certain level of development which has not yet been reached by all members of the WTO. In these cases, Non-

Tariff Barriers to Trade create a *de facto* preferential market access for those countries which can afford to meet certain standards. Thus, different levels of specialization and technological capacity naturally lead to increasing preferentialism in the sectors which are most affected by technological change (e.g. Egger and Shingal 2013).

Thus, multilateralism will generally be increasingly busy with questions of regulatory coherence in the future, while market access commitments will increasingly be found in PTAs. In parallel to this development, certain areas of trade regulation may move entirely to the most adequate forum of regulation: for some areas this is the multilateral forum, while other areas of trade regulation may remain and stay in the realm of preferentialism.

III. Constitutionalising WTO Rules

From the beginning, the multilateral system was meant to evolve 'in tandem of MFN and of preferential relations within regions'. Regional developments have served as major incentives for trade liberalisation on the multilateral level, such as the creation of the EC Common Market in 1957. PTAs are more than an exception to the rule. They should be regulated and governed in a way that allows them to serve as laboratories for future WTO disciplines, rendering them stepping stones to multilateralism (Cottier 2005:597).

Seeking a proper balance between trade creation and trade diversion of PTAs, WTO law expounds basic and well known requirements in order to justify departures from MFN under GATT Art. XXIV and GATS Art. V. The multilateral trading system essentially channels preferential trade to two lawful avenues: customs unions and free trade agreements. The law seeks to avoid *ad hoc* and selective privileges and requires agreements to be comprehensive, entailing substantially all the trade, and substantial sectorial coverage. It requires the gradual abolishment of all tariffs and quantitative restrictions, and does not allow compensation by burdening third parties (Cottier and Oesch 2004; Islam and Alam 2009).

More flexible rules exist for agreements among developing countries. Yet, the rules essentially provide a framework to which PTAs should comply. The framework inherently entails that WTO rules override subsequent PTAs and render their application and operation dependent upon compliance. Yet, in reality and in contemporary law, no such hierarchy exists.

Today, PTAs are on par with WTO law. They often are later in time, and prevail under the doctrine of *lex specialis*. Violations of WTO law do not impair the validity and application of these agreements. Among parties to a PTA, the disciplines of WTO law thus are without im-

pact, as none of the parties to the PTA is inclined to challenge the agreement under WTO law. Third parties, claiming MFN may do so. Yet, case law shows considerable reluctance to engage in litigation. There is what may be called a silent conspiracy to leave WTO disciplines without precision (Cottier and Oesch 2004:370ff).[42] Virtually all members of WTO are involved today in PTAs and do not wish to limit policy space. Efforts were made to enhance the scrutiny of PTAs upon notification. The secretariat today is mandated to assess compatibility. Yet, the law stops short of attaching any strings to such review, and members at best will simply deny approval of conformity as it is the case with almost all PTAs notified so far with a single exception (e.g. Stevens and Kennan 2001; Abass 2004).

The current framework and the way it is handled greatly contribute to the entanglement of trade policy with a great number of agreements not compatible with WTO law. To same extent, it is possible to read WTO law as being superior under the Vienna Convention on the Law of Treaties (Cottier and Foltea 2006). Greater coherence, however, would suggest introducing a clause into the WTO agreement comparable to Art. 103 of the UN Charter. The provision establishes the primacy of obligations under the UN Charter, pre-empting rules entailed in other international agreements. A comparable provision in the WTO agreement would state that all PTAs concluded are subject to the disciplines of WTO law. Another idea in this context is to extend jurisdiction of the WTO to encompass PTAs, thus developing the WTO dispute settlement system into an equivalent of a World Trade Court.[43]

Currently, we are far from a consensus on that point. Yet, as evidence of trade diversion induced by non-compatible PTAs may increase over time, showing the costs of preferentialism, the international community may learn that a proper and dialectical balance of multilateral and preferential trade agreements provides long-term benefits to all. Again, it is a matter of tearing down Chinese walls and move towards greater coherence.

D Conclusions

[42] The most prominent cases, among others, are *EC – Bananas*, WT/DS27, which established, that no measure was a priori excluded from the scope of application of the GATS (see also Mattoo 2000:53ff); *Turkey – Textiles*, WT/DS34/AB/R, para. 48, in which the Appellate Body said that 'substantially all the trade' is not the same as all the trade, but also considerably more than merely some of the trade; and *Canada – Autos*, WT/DS139/R, WT/DS142/R, para. 10.271, which ruled that a PTA based on GATS Art. V had to establish higher levels of liberalization among its members than the GATS.

[43] See the contribution by James Flett in this volume.

We conclude by calling for a rather more relaxed and confident attitude towards the future of multilateralism in trade regulation based on the evidence of a long-lasting, stable, dialectical relationship between preferentialism and universal multilateralism. Historically, the two avenues are closely linked to each other and their relationship – although characterised by regulatory waves into one or another direction – proves to be a stable and consistent one. While developments normally develop from bilateralism to multilateralism, the opposite can be equally observed in choosing appropriate fora for rule-making. Both avenues are essentially part of the same process: the convergence of the global market. MFN, which is spread throughout the vast majority of multilateral and preferential trade agreements, introduces an automatism towards *de jure* and *de facto* multilateralization. It exerts considerable spill-over effects of preferential trade regulation.

We suggest a shift in the focus of multilateral trade negotiations on regulatory issues as opposed to increasing liberalisation, and on measures conducive to global value added production. A number of factors speak in favour of enhancing recourse to multilateral fora. The shift to non-tariff barriers induces the need to adopt uniform templates and regulations unable to discriminate among different countries. Lessons will be learnt that non-tariff barriers and regulatory convergence is best addressed multilaterally as countries face difficulties in adapting their own legislation and regulations to often diverging templates emanating from different international agreements with different partners. Incoherent preferential regulation at some point becomes unmanageable (spaghetti bowl effect) and ties the two avenues closely together. Successful conclusions of plurilateral agreements encompassing major parts of world trade will foster convergence and recourse to WTO negotiations. At the same time, we outline, how flexibilities in WTO law can be used where close relations and mutual trust form the basis of relations. There are succinct areas which will remain more suitable for preferential trade. They entail market access issues and areas where mutual trust is critical, such as access to labour market or mutual recognition of product standards. On this basis, the relationship of multilateral and preferential rules call for further clarification and a more constitutional understanding of the relationship which subjects PTAs to the multilateral disciplines of WTO rules.

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