Design by Diffusion: The level of legalism in Dispute Settlement Mechanisms in Preferential Trade Agreements

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How do states design dispute settlement mechanisms in preferential trade agreements? And why do they choose the design features they eventually decide upon? This study proposes to test established theories of institutional design with a new dataset, and explores the possibility of an alternative explanation: institutionalist theory considers acts of design to be unique and idiosyncratic acts. Yet, instances of institutional design may be related to other, previous instances of institutional design. Drawing on diffusion theory, this paper proposes a new set of hypotheses which allows to address the interrelatedness among individual acts of institutional design.

The arena of international trade governance is currently witnessing a major paradigm-shift. Multilateralism was the primary focal point for state interaction in the 1990's, culminating in the creation of the World Trade Organisation (WTO). While multilateralism seems stalled at the moment, the thrust of state interaction is now very much in preferentialism: states increasingly conclude bi- or plurilateral agreements on the liberalisation of trade and economic integration. In the last fifteen years, the number of active preferential trade agreements (PTA) has strongly increased to about 250 (Fiorentino, Verdeja et al. 2006; Whalley 2008). Such agreements are not a completely new feature of trade governance. In 1860, France and the United Kingdom concluded the Cobden-Chevalier treaty, a classical free trade agreement. The second half of the 20th century witnessed the European integration efforts of both the European Communities[1] and the European Free Trade Agreement. Yet, in recent years, such agreements have not only become much more numerous, but also changed considerably in content. Traditional liberalization efforts consisted mainly of mostly mutual tariff reduction, but nowadays include topics such as trade in services, intellectual property, investment, and labour and environmental standards.

The focus of this paper is on one specific aspect of trade preferentialism, namely the level of legalism of Dispute Settlement Mechanisms (DSM) in PTAs. This study will try to answer two questions: how do states design such mechanisms? And why do states choose the designs they sign up for? Almost all PTAs include some or other form of regularised/institutionalised cooperation between member states. And equally, almost all agreements dispose of a mechanism designed to settle interstate commercial disputes. These DSM take a wide variety of forms. As will be shown, states seem to assign PTAs increasingly well-developed mechanisms to solve interstate disputes.

By studying these mechanisms, we can capture the contours of a family of international institutions. International institutions are "relatively stable sets of related constitutive, regulative, and procedural norms and rules that pertain to the international system, the actors in the system, an their activities" (Duffield 2007, 7-8). The landscape of institutions is constantly evolving, and this research project aims at shedding light on one aspect of this evolution.

Trade preferentialism refers to a situation where a number of states commits to a mutual liberalization of trade, and these states create a specific, institutional relationship

[1] In line with WTO jargon, the term European Communities (EC) will be used in this study, instead of the more widely used term European Union (EU).

between them that is different from the institutional relation these states have with states outside the preferential relationship. Such 'special' relationships are usually formalized through PTAs[2]. These agreements may involve two or more states, sometimes even an entire region. Indeed, the concept of regionalism (Mansfield and Milner 1997) is sometimes used in a similar fashion as preferentialism is used here.

This paper will first explain the reasons for studying dispute settlement institutions (I). Then it will outline a new database that maps dispute settlement institution in trade agreements (II). Finally, a number of explanatory hypotheses on the causes of institutional design are presented (III).

Why dispute settlement?

Preferentialism offers many opportunities of analysis for IR scholars. But why focus on the design of DSM? This question is relevant as these mechanisms are not at the centre of the public debate on trade policy. Political actors, such as interest groups, rarely express themselves in favour or against a particular aspect of DSM design. In contrast, there are intense domestic political discussions on other issues of PTAs, most importantly market access. The distributional effects of trade liberalization, including at the preferential level, produce a political conflict between import-competing and export-seeking industries. Are the largely uncontroversial clauses on dispute settlement even worth the attention of scholars?

Another source of scepticism against the relevance of PTA DSM is the fact that few trade disputes have actually been addressed by legal procedures at the preferential level (Davey 2006). States usually reserve the option to settle disputes diplomatically, through direct negotiations. In addition, states have often preferred to bring their disputes to the multilateral forum of the WTO, even if they involve countries sharing a PTA. Are the preferential legal procedures thus simply paper tigers?

The analysis of PTA DSM is important for at least four reasons: First of all, even without getting into the headlines, a number of the dispute resolution mechanisms in PTA are

[2] A distinction is sometimes made between different degrees of economic integration, ranging from a preferential trading area, a free trade area, a customs union, a common market to an economic and monetary union. See: Balassa, B. A. (1973). The Theory of Economic Integration. London, G. Allen & Unwin. The WTO uses only the term Regional Trade Agreements. For simplicity's sake, and in order to catch all degrees of integration, and also non-regional integration efforts, this text uses the term Preferential Trade Agreement (PTA).

quite active. The European Court of Justice (ECJ), as well as the European Free Trade Association (EFTA) Court are constantly carrying out their adjudicative functions. The former is considered to have been an important cornerstone of European integration (Burley and Mattli 1993). The latter, for instance, is currently dealing with the fallout of the collapse of the Icelandic banking system in 2008 and the repercussions this event has had on other European states. The overall number of cases adjudicated is small, but this does not make these mechanisms irrelevant.

A few reasons why the number of adjudicated cases is relatively small can be developed offhand: first of all, PTAs usually involve a relatively small number of states. Many of the agreements are bilateral, and the plurilateral treaties rarely involve more than ten states. If we assume that disputes involve only two countries at one time, the number of potential 'dispute dyads' for the WTO is much higher than for PTAs[3]. If we also assume that all states have the same probability of entering into a trade dispute, the potential for cases to be adjudicated is bound to be smaller at the preferential level.

In addition, it seems unlikely that country dyads with many ongoing trade disputes would enter a PTA. If they would do so, they would probably resolve some of these disputes while negotiating the PTA. In the absence of a PTA, disputes are thus bound to be adjudicated at the multilateral level. For illustration, at the WTO, a plurality of cases is brought either by the US or the EC against each other. Out of 81 cases the EC has brought to WTO dispute settlement, 31 were against the EC. For the US, the number it is 19 out of 91 cases[4]. The US and the EC do not share a PTA.

Second, one reason why the PTA DSM are sometimes considered 'paper tigers' is precisely because of their legal design: some PTA DSM are scarcely specified, especially in older agreements. It is of no surprise that these clauses are rarely used, and even less analysed by political scientists. However, as mentioned, newer PTAs often have more sophisticated mechanisms that allow for legalized dispute resolution, and not simply refer parties to mutual consultations in case of conflict. Legal design, and especially the specification of procedural clauses, is highly relevant for the probability of states bringing cases to legalized dispute resolution: On the multilateral level, the changes made to the panel system when the GATT was superseded by the WTO have led to a flurry of cases since 1995. The procedural changes

[3] The number of country dyads in an agreement that may enter into a dispute is (n*n-1)/2. For a bilateral agreement, the result is 1. For a trilateral agreement, there are 3 potential dyads. For the WTO, with currently 153 members, there are 11628 different conflict dyads possible.
[4] WTO (2009). Map of Disputes between WTO Members, WTO.

to the DSM introduced after the Uruguay Round were crucial for this development. In particular, GATT contracting parties decided to drop the requirement for consensus among all members for the adoption of panel reports. In addition, the inception of the Appellate Body gave the dispute settlement process a new dimension, featuring permanent sitting judges. In combination with features that had been in place before, especially the remedies at the disposal of a successful complainant, this system is now considered to have had a significant impact on state behaviour (Zangl 2008). Before these changes were made, the multilateral system did not see many cases complete the full procedure of the adjudication process.

Tracking the design of DSM at the preferential level allows us to grasp the technological evolution of these mechanisms. If the procedural design of PTA DSM evolves in a similar manner than at the multilateral level, it is not unthinkable that the number of cases adjudicated at the preferential level will increase. Nowadays, some of the PTA DSM can be easily blocked by one of the member states. The WTO experience has nonetheless shown that a few procedural changes can make a big difference. There is a clear need to track this rapidly evolving issue on the preferential level.

Third, the DSM contained in the PTA also fulfil a function in the absence of fully adjudicated cases. Yet, even a procedurally blocked panel process can have an impact on states' trade policy. As has been pointed out by authors studying the early settlement of trade conflicts (meaning before they reach the panel/appellate stage), the mere presence of dispute settlement institutions exerts an influence on potential violators of an agreement (Busch and Reinhardt 2000). These scholars advocate that "the shadow of the law" has an impact on state's negotiation position in case of a dispute. Disputes may be settled diplomatically, but the presence of the DSM in the agreement acts as a deterrent for the party who is in violation of the rules to pursue the matter into an arbitration procedure.

Finally, there is a gap in the academic literature with regard to this new family of international institutions. States are now bound to their peers not only on the multilateral, but also on the bilateral and plurilateral level. The variance among the DSM in these agreements contains important information about states' preferences for or against the legalization of international relations. Filling this gap allows us to shed light on the design features states choose to include in the trade institutions they subscribe to, and thus contribute to the growing literature on institutional design and the legalisation of international relations. Therefore,

studying ex ante (before actual disputes arise) behaviour of states with regard to their preference for higher or lower levels of legalism is an important, if so far neglected, aspect of the endeavour to understand international relations in general and trade governance in particular.

Mapping PTA DSM: The need for a new dataset

Although the design of PTAs as a field of research is still relatively new, the rise of preferentialism has led to a few studies that approach these agreements from a comparative perspective. The aim is usually to describe and evaluate the substantive provisions and clauses in these agreements. These studies can be divided in vertical and horizontal comparisons. The former refers to books and edited volumes that analyse individual PTAs. Horizontal studies pick out certain issue-areas, such as tariff reduction, technical barriers to trade or intellectual property rights protection and compare the way they are treated in a number of PTAs. The present study also situates itself within this horizontal perspective.

Unfortunately, the existing 'horizontal' literature on PTA design often suffers from narrow or in some cases abritrary case selection (de Mestral 2006; Garcia Bercero 2006; Robles 2006; Ziegler 2006; Morgan 2007; Biukovic 2008; Donaldson and Lester 2009; Lester and Mercurio 2009; Munin 2010) or offers rather unstructured comparison (Gantz 2009). Other studies leave out the question of DSM altogether (Estevadeordal, Suominen et al. 2009; Heydon and Woolcock 2009).

A recent report by Horn, Mavroidis and Sapir (2009) conducts a detailed mapping of the content of 28 PTAs concluded by either the US or the EC. They adopt Sampson and Woolcock's (2003) WTO-plus measure in order to assess whether PTA commitments in fields ranging from tariffs to anti-corruption cooperation go beyond the multilateral level. The main focus of their effort is to gauge whether preferential commitments are actually enforceable. The enforceability hinges at the more or less precise wording of legal clauses, and whether certain domains are covered by the PTAs DSM. It is even more surprising, then, that the authors did not analyse and map the DSM of these same agreements, for they vary greatly in terms of substantive and procedural aspects. The design of the DSM, arguably the most important aspect of the enforceability of substantive clauses, is completely neglected.

In addition, most of the literature discusses differences in PTAs without attempting to explain how the differences among the agreements can be explained. Causal explanations of PTA design are rare, and mostly confined to particular agreements. The results of this kind of research consist of detailed listings and discussions of particular legal clauses in the agreements. What is lacking is a more fundamental problematization of the causal mechanisms behind PTA design.

The only large-N, structured comparison of PTA DSM design so far is James McCall Smith's ground-breaking International Organization article (2000). Smith measures the level of legalism in PTA DSM by constructing an index which varies on five echelons from 'none' to 'very high'. This measure enables the classification of DSM in a continuum from purely diplomatic (meaning interstate negotiations) to more strongly legalised design (such as the European Court of Justice, a standing tribunal).

In order to shed light on the question how states design PTA DSM, a new dataset has been developed, based on Smith's work[5]. Over 140 PTA DSM signed between 1990 and 2010 were coded for their level of legalism. This new data was then merged with Smith's dataset. Smith covered 62 PTAs, signed in the time period between 1957 and 1995. Thus, the new dataset contains just over 200 PTAs DSM and codes them for their level of legalism. Figure 1 shows the overall breakdown of these DSM into the five categories defined by Smith. It is apparent that PTAs with highly or very highly legalised means of dispute adjudication, such as the EC, remain the exception. The most common legal design chosen for PTA DSM is the medium level of legalism. It also has to be noted that PTAs with no or only lowly legalised means of conflict resolution outnumber, on aggregate, all other design choices combined. One can therefore conclude that institutions governing preferential trade relations are not in general highly legalised, and the majority of PTA feature either no or lowly legalised DSM.

Yet, if we break out the datapoints over time, we find that the choice of legal design varies (Figure 2). In other words, there are periods when certain design choices occur more frequently than others. We can note that before 1997, the predominant form of DSM design seems to have been a total absence of third-party legal review. After 1998, PTAs without adjudicative functions decline and disappear after 2006. Similarly, we can observe that the most common form of DSM since the beginning of the Millennium is medium-level legalism. The result is that design features seem to appear at least partially grouped, or clustered.

[5] More details on coding rules and other data-related issues concerning Smith's work can be found in the Annex.

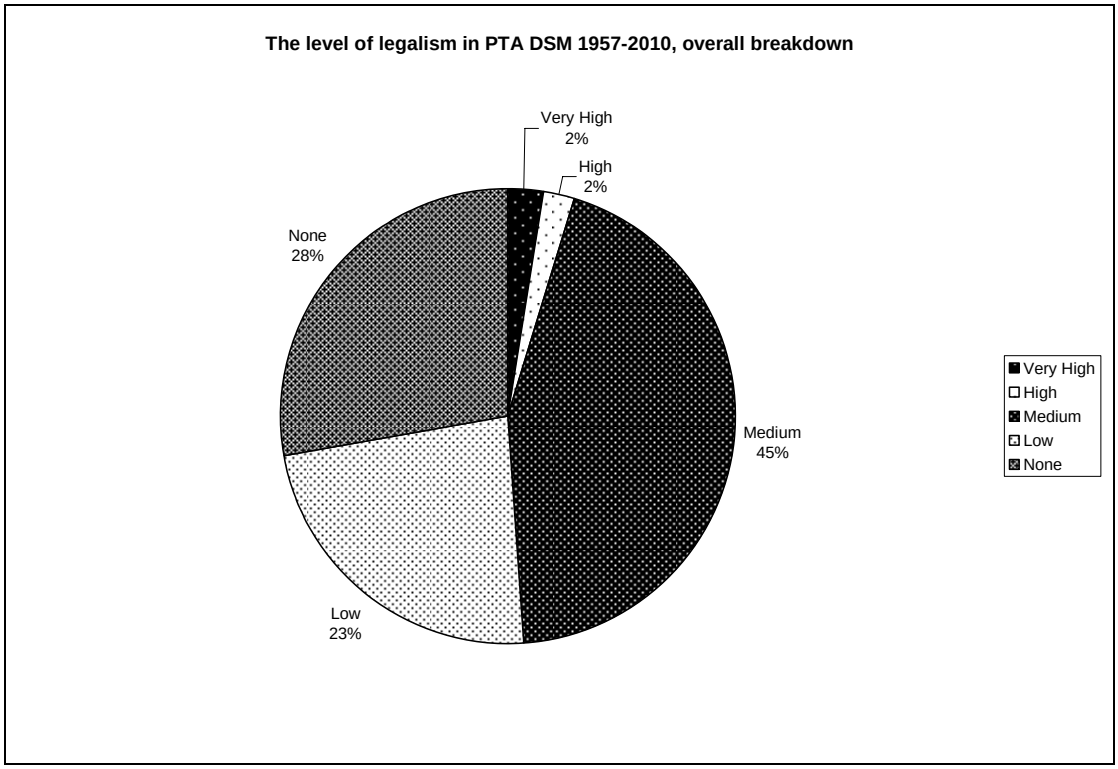

Figure 1

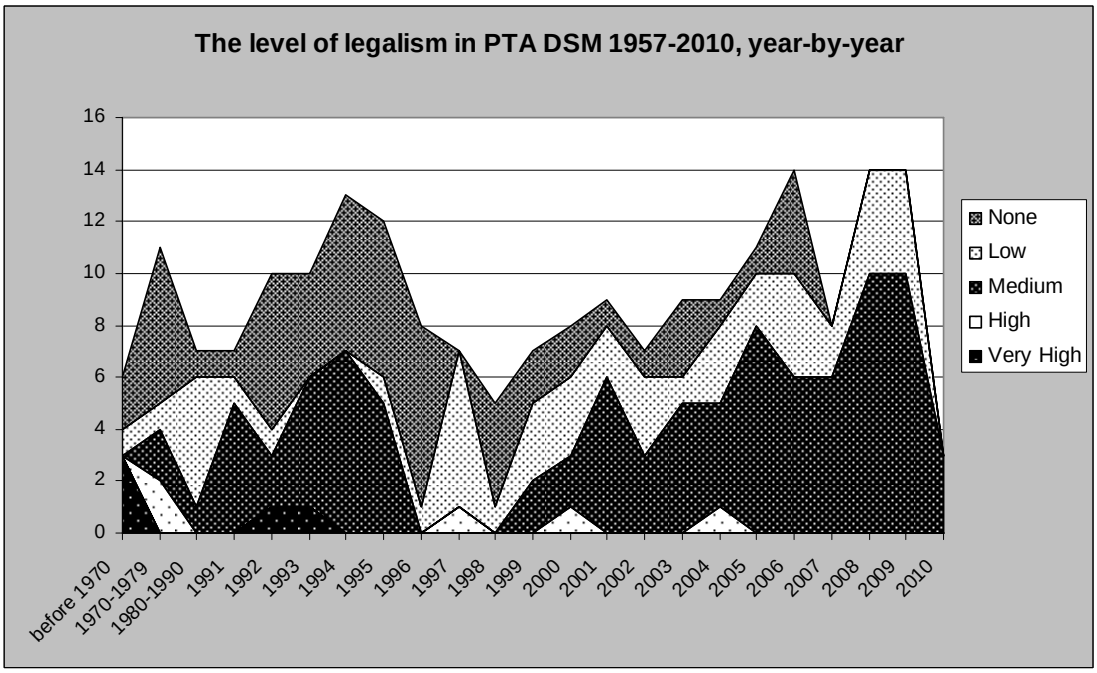

Figure 2

Elements of Explanation

What explains the choice of institutional design by states? This section presents a set of hypothesis that could bring us forward in seeking to clarify this puzzle. First, we discuss existing work from the field of institutional economics, and its application to international institutions. The second part presents a novel explanatory model of institutional design, based on diffusion theory.

The study of institutions has deep roots in economic scholarship. Oliver Williamson considers that the economic transaction, defined as occurring when "a good or service is transferred across a technologically separable interface" (Williamson 1985, 1) ought to be at the centre of scholars' interest. Williamson claims that with appropriate governance structures in place, transaction costs can be economised, making economic transactions more efficient. Institutions, such as contracts and courts, are one important aspect of this governance structure. They create order, mitigate conflict, and allow the realization of mutual gains (Williamson 2000).

The Yarbroughs have applied this general analytical framework to the study of trade institutions (Yarbrough and Yarbrough 1986). For these authors, problems of contract compliance are part of the transaction costs. Enforcement structures are thus important aspects of the appropriate governance structure of transactions. One way brought forward on how to deal with enforcement costs is the inclusion of DSM in trade agreements (Yarbrough and Yarbrough 1997). The authors conceptualize the strategic behaviour of members of a trade agreement as resembling the incentives of actors in a prisoner's dilemma. Each party can gain by defecting if the counterpart remains in compliance. However, if both parties defect, overall gains are lower than in the case of mutual compliance. In order to achieve or maintain the situation of mutual compliance, states might choose the inclusion of a DSM in their trade agreements.

The authors propose four different idealtypes of DSM, ranging on a continuum between 'pure self-help' mechanisms and 'pure third-party adjudication'. When moving along this continuum, states are faced with a trade-off: When choosing 'pure third-party adjudication', they opt for a higher probability of compliance with the treaty by their counterpart, but have to forgo the opportunity to defect themselves. The resulting DSM is a reflection of the incentive structure of the countries. This structure may well change over time, giving way to a different institutional setup.

The Yarbrough's conceptualisation of DSM in trade agreements is the foundation for Smith's (2000) abovementioned study. He takes up the Yarbroughs' assumption that states, when designing PTA DSM, are faced with a trade-off between the benefits of improved treaty compliance (when the level of legalism is high) and the costs of diminished policy discretion (when the level of legalism is low).

Smith proposes an explanatory model as to why states choose certain levels of legalism. He tests three main hypotheses, derived from transaction cost theory: due to rising uncertainty concerns and transaction costs with an increased number of actors, he conjectures that when a PTA has many members, states choose highly legalised DSM. Power asymmetry among members makes strongly legalised DSM less likely, since powerful states are unwilling to diminish their policy discretion, and may, in case of non-compliance, be able to nudge their smaller partner into compliance also in the absence of a DSM. Finally, and drawing inter alia on Downs, Rocke and Barsoom (1996), he analyses whether the depth of economic integration has an effect on DSM design.

His findings show that while the number of states does not seem to have a conclusive influence on DSM design, the level of economic integration and asymmetry between PTA partners are good predictors. Given the important developments in the field of preferentialism that have occurred since Smith's study, the new dataset described above will be used to test his hypotheses anew.

> H1: PTAs that are marked by higher level of proposed economic integration have a higher probability of including DSM with a higher level of legalism.

> H2: PTAs marked by a relatively higher level of asymmetry between members contain DSM with a lower level of legalism.

Is there need for a different theory?

One major tenet of theoretical approaches based on economic transactions is the emphasis on the idiosyncrasy of the individual transaction. To paraphrase Williamson: in order to govern transactions efficiently, governance structures should reflect the unique nature of the concerned transaction. This assumption also inspires existing theories on the design of international institutions (Abbott, Keohane et al. 2000; Koremenos, Lipson et al. 2001).

Extrapolated to DSM design, and confirmed by the approach chosen by both the Yarbroughs and Smith, this means that each PTA DSM has to be considered an instance of institutional design completely separate from other moments of PTA DSM design. Yet this emphasis on idiosyncrasy and uniqueness may be inappropriate and lead to inferior explanatory results.

As stated, the number of PTAs has steadily increased in the last fifteen years. Certain states are particularly active in 'mass-producing' such agreements. Furthermore, such agreements often enjoy considerable similarity. It is thus justified to ask whether the design of one PTA DSM is indeed an independent act from designing other PTA DSM. If this is not the case, what causal interaction can we observe among these design acts?

Since the hypotheses generated from the transaction cost literature are not concerned with the effect of one PTA on another, we need to find a different theoretical framework that allows us to take into account this aspect of design.

This project proposes to analyse the clustering of institutional design features as processes of diffusion. Diffusion mechanisms have come under the increased scrutiny of scholars of international political economy (Levi-Faur 2003; Elkins and Simmons 2005; Simmons, Dobbin et al. 2008), addressing a broad range of issues from topics such as financial liberalisation to public sector downsizing.

Research in the field of diffusion focuses on finding out whether the temporally or spatially clustered incidence of similar institutions or policies is accidental, and, if not, to identify the mechanisms that lead to interrelatedness of incidences. Diffusion scholars usually refer to their null-hypothesis as a situation where the clustered adoption of similar policies is not interrelated (Braun and Gilardi 2006, 299). In other words, this situation occurs if state A adopts a certain policy, and this has no impact on the adoption of a similar policy in state B. If, however, the occurrence of a policy in state B is to some extent linked to the occurrence of a similar policy in state A, the null-hypothesis can be rejected. The task of researchers is then to find out how the occurrence is interrelated, to define the type of mechanism by which the interrelatedness can be explained, and to track the diffusion process empirically. Adopted to the issue under scrutiny here, the null-hypothesis for diffusion of institutional design features could thus be as follows:

H3: The clustered occurrence of similar legal designs of PTA DSM within the universe of PTA DSM is not interrelated.

Four diffusion mechanisms

While there are many different denominations for diffusion processes (Shipan and Volden 2008), scholars have started to focalise their research along four potential avenues for explaining interrelatedness: coercion, competition, learning and emulation (Simmons, Dobbin et al. 2008).

Coercion refers to the spread of practices (such as policies) through pressure exercised by powerful actors on less powerful ones. Examples include IMF conditionality or EU accession negotiations. With regard to PTA DSM, this would mean that the more powerful state is able to impose its preferred legal design upon the 'junior partner' in the agreement. In the literature on PTAs, reference is sometimes made to an agreement landscape that resembles 'hubs and spokes' (Baldwin 2008). This structure refers to a single entity (hub), which concludes a series of agreements with other countries (spokes). The hub-and-spoke structure is sometimes seen as dominated by a powerful state or group of state that extends its reach upon the markets around the world, especially since the spokes are not necessarily connected among each other. Given that such hub-and-spoke systems are often characterized by strong power asymmetries, we could expect that diffusion in this setting would mean that the 'hub' imposes its preferred DSM design on the 'spoke' country.

H4: Clusters of PTA DSM involving a relatively more powerful state feature similarly designed PTA DSM.
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Competition among entities has been identified as one possible source of diffusion. Elkins, Guzman and Simmons (2006) argue that the competition for foreign capital drives developing countries to sign Bilateral Investment Treaties (BITs). Can competitive dynamics account for explaining the level of legalism in preferential trade dispute settlement? The first question to answer if we were to identify such dynamics is "Competition for what?" It is not straightforward what states gain or lose by adopting a particularly designed DSM. One way of looking at PTAs is to gauge them in terms of credibility of commitment. Hicks and Kim (2009) have developed a theoretical framework where they analyse PTAs as devises for governments to enhance their credibility of commitment to free trade vis-à-vis both domestic

and international partners. In their measurement of credibility of commitment, the authors conceptualise highly legalised DSM as increasing the credibility of governments' commitment to compliance and thus free(er) trade.

If we assume that governments conclude trade pacts in order to gain access to export markets and to protect their exporting sector from discrimination, and if we assume that governments have to compete with their peers for access to these markets, a competitive dynamic for PTA formation emerges. States have to keep up with their peer's efforts to open up markets for exporters. This logic comes close to what Baldwin (1995) calls the domino effect of regionalism and the theory of Dür and Baccini about governments trying to avoid their exporters being discriminated (2009). This argument can be taken one step further: governments compete for credibility of commitment to free trade. A government that signals a higher commitment to adhering to the rules of a PTA has bigger chances for signing a PTA with another country than less commited rivals. These states will then strive to match this level of legalism in their PTAs, in order to avoid being left out of the game. If we then conceive of a higher degree of legalism in a PTA DSM as a tool for enhancing credibility, we are presented with a competitive reason why states would like to sign PTAs with similarly legalised DSM.

> H5: When negotiating a PTA with a state that has a PTA with another state that is a direct competitor for market access, states propose DSM with a similar level of legalism.

Learning functions through the updating of beliefs about causal relationships and the adaptation of policies according to the data gathered (Meseguer 2005). With regard to the diffusion of legalism, one can think that policymakers see particular DSM designs as especially helpful for the achievement of their goals. If policymakers come to realise that a different DSM design would be more helpful for the achievement of certain goals, they would then revise that design.

With regard to PTA DSM, one can speculate that certain events have influenced policymakers view on legalism. The creation of the multilateral dispute settlement mechanism under the WTO Dispute Settlement Understanding certainly was a key moment for trade bureaucrats (Garcia Bercero 2006). In addition, it is well imaginable that the experiences

these officials have made with this mechanism feed into the decisions they take on dispute settlement in the preferential area.

> H6: Policymakers' perception on whether previous PTA DSM designs with a high (low) level of legalism have been (un)successful in achieving their goals will lead them to design future PTA DSM with a higher (lower) level of legalism.

Another process of diffusion is emulation. This mechanisms aims at explaining the clustered appearance of similar incidences by emphasising policymakers' view of certain policies as more appropriate, or more legitimate, than others. Innovations spread across society because actors perceive them as superior to current practices, and change their course of action so as to appear more in line with what is right to do. Weyland (2005, 270) describes emulation as a normative imitation approach, where "decision makers attempt to gain international legitimacy by importing advanced innovations and thus demonstrating the emulating country's modernity and compliance with new international norms". As opposed to diffusion mechanisms based on learning, emulation processes do not rely on policymakers gaining new information about causal relationships between policies and outcomes. Rather, the clustered appearance of certain policies is due to their increased perception as appropriate.

> H7: Policymaker's beliefs about the appropriate level of legalism in PTA DSM lead to states adopting PTA DSM with higher (lower) levels of legalism. Shifts in such believes may lead to states opting for higher (lower) levels of legalism in PTA DSM, including when reforming existing PTAs that featured a lower (higher) level of legalism.

Conclusion

The significant increase in the number of PTAs has opened up new avenues of research. The question why states have moved from multilateralism to preferentialism has occupied scholars for some time now. This paper goes beyond this (important) question and proposes to take a closer look at the legal design of dispute settlement institutions in PTAs. A new dataset that measures the level of legalism in PTA DSM portrays the design choices states have made when designing such agreements.

This data, in turn, allows to make conjectures about the rationales driving institutional design. The clustered appearance of certain design features suggests that instances of institutional design are not independent, as is generally assumed in the literature. Instead,

processes of coercion, competition, learning and emulation might be more helpful to explain the causes of institutional design.

Annex: Dataset, sources and coding rules

Coding rules for the 'level of legalism' index:
Smith's coding scheme contains five categories according to which the overall index of the level of legalism is constructed. In other words, he asks five questions of the dispute settlement instrument that is included in the relevant international treaties (Smith 2000, p. 155):

- Is there a possibility for third-party adjudication?
- Are rulings by dispute settlement mechanisms binding?
- Is the adjudication procedure automatic (i.e. not blockable by states) and how are judges appointed?
- Which kinds of actors have access to third-party adjudication?
- Which types of remedies are at the disposal of parties to enforce compliance with third-party rulings?

These five indicators help to describe the variation among PTA DSM. In order to assign each mechanism a level of legalism (very low, low, medium, high, very high), Smith relies on especially salient features of DSM design, as captured in the five questions mentioned above:
If third-party adjudication is not possible, the level of legalism is none.
If third-party adjudication is possible, but not binding, the level of legalism is low.
If third-party adjudication is possible, and binding, the level of legalism is medium.
If third-party adjudication is carried out by a standing tribunal, the level of legalism is high.
If third-party adjudication is carried out by a standing tribunal and treaty organs and private parties have standing (in addition to states), the level of legalism is very high.

This way of accumulating the five indicators into an overall index might seem arbitrary at first sight. It is theoretically possible that one determining feature is present, while another is not, making aggregation impossible. Imagine a PTA with a standing tribunal (salient feature for high level of legalism) but whose rulings are non-binding (salient feature for low level of legalism). It appears though, and here I agree with Smith, that, although they are hypothetically possible, such cases do not exist in reality. They are illogical: If there is no option for third-party arbitration, the question whether parties other than states have standing does not need to be answered. This 'cascading' aspect of the measurement allows the aggregation of the indicators into an overall index of legalism. A first effort of coded PTAs can be found in the sample below.

The sources are the original texts of the treaties in question. Many of these documents can be found in the WTO database on Regional Trade Agreements (WTO 2010). Other texts can be found on government websites or in the United Nations treaty database (UN 2010).

Sample of Dataset:

Level of Legalism in PTA DSM								
Year (entry into force)	**Participants**	**Third party review?**	**Third party review Binding?**	**Judges**	**Standing**	**Remedy**	**Level of Legalism**	
1957	EC	Yes-automatic	Binding	standing tribunal	States, treaty organs, and individuals	Direct effect	**very high**	
1960	EFTA 1960	Yes, but only by majoriy vote of Council	Not binding (Council "may" vote to recommend)	Ad hoc	States only	Sanctions (only by vote of Council)	**low**	
1973	EC-Switzerland	No	None	None		None	**None**	
1973	EC-Iceland	No	None	None		None	**None**	
1992	EFTA-Israel	Yes-automatic	Binding	Ad hoc	States only	None	**Medium**	
2003	EC-Chile	Yes, automatic after consultations fail	Yes, binding. Coverage excludes Competition issues	Ad hoc - roster	States only	Suspension of benefits	**Medium**	
2004	EFTA-Chile	Yes	Yes, binding	AD-hoc, not blockable	states	suspensions of concessions	**medium**	
2005	US-Australia	Yes	No	Ad-hoc, roster	States	Suspension of benefits, or monetary damages	**low**	Bindingness: almost all US PTAs state that implementation of panel finding shall 'normally conform with the recommendations of panel". This is deemed non-binding
2006	EFTA-Korea	Yes	Yes, binding	AD-hoc, not blockable	states	suspension of benefits	**medium**	

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