
Dispute Settlement in Preferential Trade Agreements and the WTO: A Network Analysis of Idleness and Choice of Forum

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Abstract

It is generally presumed that World Trade Organization (WTO) members display a preference for dispute settlement under WTO rules over those provided for in preferential trade agreements (PTAs). This assumption is driven by observations relating to the large number of PTAs, the low number of PTA cases and the large number of WTO cases, including between PTA partners. These observations are challenged by adopting a methodology that has so far seen relatively limited use in the study of international law network analysis. This article finds, first, the network of connections among WTO members formed by PTAs is far less dense than appears to have been assumed. Second, while almost half of all WTO members have participated in WTO proceedings at least once, the vast majority of bilateral relations among WTO members have never been subject to WTO dispute settlement. This puts the perceived idleness of PTA dispute settlement into perspective. Lastly, the share of WTO cases that could have been settled under PTA procedures is far lower than commonly believed. This low share shows that there is no widespread predilection for the WTO, as commonly argued, but, more often than not, a genuine absence of choice. Ultimately, as the PTA network is unable to act as a substitute, WTO dispute settlement continues to hold a central place in the rules-based global trading system.

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1 Introduction

It is commonly held that the dispute settlement mechanisms (DSMs) of preferential trade agreements (PTAs) are underutilized,¹ especially in comparison to World Trade Organization (WTO) dispute settlement. Moreover, it has been argued that where disagreement arises between parties to a PTA, there is a preference to settle the dispute under WTO rules instead of relying on the DSM provided for in the PTA. The WTO is, according to scholarship on the subject, for political and institutional reasons, the preferred forum. Generally, three simple observations are relied upon to reach these conclusions: There are many PTAs, few PTA disputes and many WTO disputes. All three observations, while technically correct, do not hold up to closer scrutiny, particularly when considered in context. This article seeks to contribute to the academic debate by challenging the incomplete understanding of these observations.

The first observation relates to the number of PTAs currently in force. This number has increased dramatically since the WTO came into existence in 1995. The cumulative number of agreements was relatively low in 1995, with 47 PTAs in force.² However, it has increased more than six-fold since then. According to the WTO database on regional trade agreements, there are currently 302 PTAs in force.³ Since 2010, this growth has somewhat slowed down, particularly in recent years. Nevertheless, the total number of PTAs in force, while still growing, is generally considered to be large.⁴ Furthermore, whereas the majority of pre-1995 PTAs relied exclusively on diplomatic dispute settlement, the vast majority of recent agreements provides for some sort of adjudication.⁵

The second observation concerns the number of inter-state disputes filed under PTAs. This number is low, especially when compared to activity in the WTO. As will be explained below, it is difficult to paint an accurate picture of the total number of inter-state disputes initiated under PTAs. However, most experts on the subject would agree that the total number of inter-state cases filed under PTAs is a fraction of those filed in the WTO.⁶

The third observation is that WTO members file a large number of cases in the WTO. The number of requests for consultations (RfCs) has reached close to 600 disputes.

¹ This article uses the term PTA to refer to a trade agreement with two or more parties (apart from the WTO Agreement) that liberalizes the exchange of goods and services between its members.

² WTO, Regional Trade Agreements Database, available at <http://rtais.wto.org/UI/PublicMaintainRTAHome.aspx> (last visited 3 February 2021).

³ *Ibid.* This database relies on members self-reporting their PTAs. There is no doubt that a number of PTAs have not been reported. However, the database nevertheless covers a significant share of all PTAs in force.

⁴ See, e.g., WTO, *World Trade Report 2011: The WTO and Preferential Trade Agreements: From Co-Existence to Coherence* (2011), at 3.

⁵ Chase *et al.*, 'Mapping of Dispute Settlement Mechanisms in Regional Trade Agreements – Innovative or Variations on a Theme?', WTO Staff Working Paper ERSD-2013-07 (14 June 2013), at 14, available at <https://ssrn.com/abstract=2279720>.

⁶ Porges, 'Dispute Settlement', in J.-P. Chauffour and J.-C. Maur (eds), *Preferential Trade Agreement Policies for Development* (2011) 467, at 494–495.

According to WTO statistic, '51 WTO Members have initiated at least one dispute, and 60 Members have been a respondent in at least one dispute'.⁷ In total, 74 different WTO members have acted as either complainant or respondent in at least one dispute.⁸ With a total membership of 164, this means that more than 45% of WTO members have actively participated in WTO dispute settlement proceedings at least once.⁹ Moreover, it has not gone unnoticed that many of these disputes are filed between PTA partners.¹⁰

More generally, the relationship between the increasing number of PTAs and the WTO has often been characterized from the perspective of conflict. The proliferation of legal rules and the accompanying fear of fragmentation were not left ignored in the trade regime.¹¹ With respect to dispute settlement, forum shopping became the buzzword of the day. Scholars set out to explore mechanisms for coordination between the DSMs of PTAs and the WTO.¹² When widespread conflicts failed to materialize and countries exhibited an apparent preference for WTO dispute settlement (purportedly evidenced by the many WTO disputes, including between parties to the many PTAs, and the few PTA disputes), the discussion shifted towards exploring the reasons for this preference.¹³ When one takes the underutilization of PTA DSMs and a preference for WTO dispute settlement as given, the logical explanation lies in the respective DSMs' features, with the WTO's system being superior. This article takes a step back from the discussion and questions the underlying assumptions that PTA DSMs are underutilized and that states, in fact, *choose* to bring their disputes to the WTO instead of to a PTA DSM.

The empirical analysis in this article reveals a picture that somewhat contradicts previous findings on the subject.¹⁴ To do so, Section 2 explores the network of PTAs.

⁷ WTO, 'Dispute Settlement Activity – Some Figures', available at www.wto.org/english/tratop_e/dispu_e/dispustats_e.htm (last visited 3 February 2021); the quote was taken from the website on 1 December 2019, the cut-off date for this article.

⁸ WTO, 'Disputes by Member', available at www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm (last visited 3 February 2020); the website is continuously updated, this article used data as displayed on the website on 1 December 2019, the cut-off date for this article.

⁹ When one includes the instances where members participated as third parties, the total number of members that have participated in dispute settlement in one way or another reaches 109, more than 66% of all WTO Members. See WTO, *supra* note 7.

¹⁰ WTO, *supra* note 4, at 177.

¹¹ J. Bhagwati, *Termites in the Trading System: How Preferential Agreements Undermine Free Trade* (2008).

¹² See generally Henckels, 'Overcoming Jurisdictional Isolationism at the WTO–FTA Nexus: A Potential Approach for the WTO', 19(3) *European Journal of International Law (EJIL)* (2008) 571; Kwak and Marceau, 'Overlaps and Conflicts of Jurisdiction between the World Trade Organization and Regional Trade Agreements', in L. Bartels and F. Ortino (eds), *Regional Trade Agreements and the WTO Legal System* (2006) 465; de Mestral, 'Dispute Settlement Under the WTO and RTAs: An Uneasy Relationship', 16(4) *Journal of International Economic Law (JIEL)* (2013) 777.

¹³ See, for example, Chase, *supra* note 5, at 46–49; Vidigal, 'Why Is There So Little Litigation under Free Trade Agreements? Retaliation and Adjudication in International Dispute Settlement', 20(4) *JIEL* (2017) 927.

¹⁴ The cut-off date for the data in this article is 1 December 2019. WTO disputes up to DS592 are covered. The year 2020 saw a hike in PTA notifications to the WTO. Most of these PTAs are agreements between the UK and third states with which the EU maintains a PTA relationship. As the data in this article was gathered before the official Brexit, the UK is treated as an EU member. The quantitative analysis in this article would only change nominally if the UK were treated separately.

Section 3 describes the network of WTO disputes. Subsequently, both networks are combined. This is done to determine the total number of instances in which two PTA partners initiated a WTO dispute and whether or not the WTO dispute was covered by the respective PTA's substantive and jurisdictional scope. The aim is to obtain an accurate understanding of how many WTO disputes could have been settled under PTAs. Lastly, Section 4 provides details on the number of known inter-state PTA disputes to estimate the overall use of PTA DSMs. Moreover, a preliminary estimate of how many of these disputes could have alternatively been brought to the WTO is provided. The hypotheses this article advances are that PTA DSMs are not significantly more idle than WTO dispute settlement, that the preference for WTO dispute settlement among PTA partners may have been overemphasized and that WTO dispute settlement continues to be central as the PTA network is far from being able to act as a substitute.

2 The PTA Network

This section analyses the network of PTAs that are currently in force. The system of PTAs, just as any other system, can be studied from at least three different perspectives: with a focus on its individual components (for example, states or other stakeholders that participate in the negotiation and use of PTAs), with a focus on the nature of interactions (for example, the contents of a particular PTA) or with a focus on patterns of connections between different components, which can be represented as a network.¹⁵ So far, traditional legal methodology has mostly focused on the first two perspectives. While increasingly popular in other sciences since the late 1990s, network analysis is a relatively recent means to further one's understanding of international law. Recent studies in international law have, for example, focused on case law citation networks.¹⁶ Moreover, attempts have been made to map, for example, the relationships between investment arbitrators.¹⁷ Apart from the work by Pauwelyn and Alschner,¹⁸ albeit not with a focus on dispute settlement, networks of trade agreements remain underexplored.

This article, thus, adopts an approach that may be somewhat foreign to many international lawyers. Moreover, just as any other methodology, network analysis has its limitations. However, with respect to the questions this article seeks to answer, the approach appears particularly suited. Insights delivered through network analysis can include, for example, observations as to the network's density. Determining the total number of PTAs is a relatively straightforward task. However, this reveals little about

¹⁵ M. Newman, *Networks: An Introduction* (2010), at 1–2.

¹⁶ Alschner and Charlotin, 'The Growing Complexity of the International Court of Justice's Self-Citation Network', 29(1) *EJIL* (2018) 83.

¹⁷ Puig, 'Social Capital in the Arbitration Market', 25(2) *EJIL* (2014) 387.

¹⁸ Pauwelyn and Alschner, 'Forget about the WTO: The Network of Relations between PTAs and Double PTAs', in A. Dür and M. Elsig (eds), *Trade Cooperation: The Purpose, Design and Effects of Preferential Trade Agreements* (2015).

the actual number of connections formed through the network of PTAs. Moreover, a network representation can provide valuable insights as to the structure of the relationships formed through PTAs; for example, if preferential trade liberalization continues to be a primarily regional endeavour or if a significant portion of PTAs are of a cross-regional character.

It has been widely observed that the PTA network is rapidly expanding. The total number of PTAs in force and notified to the WTO has reached 302. As not all PTAs are notified to the WTO, especially those between non-members, the true number is likely to be somewhat higher. Figure 1, below, shows WTO data on the growth of the network over time. The level of new PTAs peaked in 2009, and since then a certain slowdown in the addition of new PTAs can be observed. This slowdown more or less coincides with the 2008 financial crisis.

The following two sub-sections, first, briefly set out the methodology employed to create the network of PTAs. Subsequently, the characteristics of the network of PTAs will be discussed in some detail.

A *The Dataset and Methodology*

To analyse the network of PTAs, this article largely relies on the WTO Database on Regional Trade Agreements (RTAs).¹⁹ All agreements notified to the WTO are taken as the starting point. A limited number of agreements are excluded.²⁰ The membership of PTAs was confirmed by reference to outside sources. Furthermore, the European Union and its members (including the UK), all of which are individual WTO members, are counted as one. Consequently, the network covers 136 nodes (WTO members) instead of the actual membership of 164.

The network as displayed below only covers WTO members and excludes a large number of connections between WTO members and non-members as well as those exclusively between non-members. As this article analyses the use (or lack thereof) of PTA DSMs in comparison to the WTO, the inclusion of non-WTO members would significantly distort the results. In total, approximately one quarter of PTA connections are not between WTO members.²¹ This confirms earlier findings that 'WTO membership has little influence on a country's participation in regional PTAs'.²²

¹⁹ WTO, *supra* note 2.

²⁰ These exclusions concern the Global System of Trade Preferences among Developing Countries, 13 April 1988, 1534 UNTS 119 and the Protocol Relating to Trade Negotiations Among Developing Countries, 9 December 1971, 858 UNTS 176, as both are framework agreements with a large and diverse membership under which developing countries exclusively exchange tariff concessions; the South Pacific Regional Trade and Economic Cooperation Agreement, 14 July 1980, 1240 UNTS 65, which grants unilateral preferences by Australia and New Zealand to a number of developing states; and the EU–Overseas Countries and Territories (OCT) Agreement (in its most recent iteration, Council Decision 2013/755/EU of 25 November 2013 OJ 2013 L344/1) as none of the non-EU members are WTO members. These four agreements cannot usefully be compared to the remaining set of PTAs due to their nature.

²¹ Only considering PTAs that are notified to the WTO in the first place.

²² Pauwelyn and Alschner, *supra* note 18, at 506.

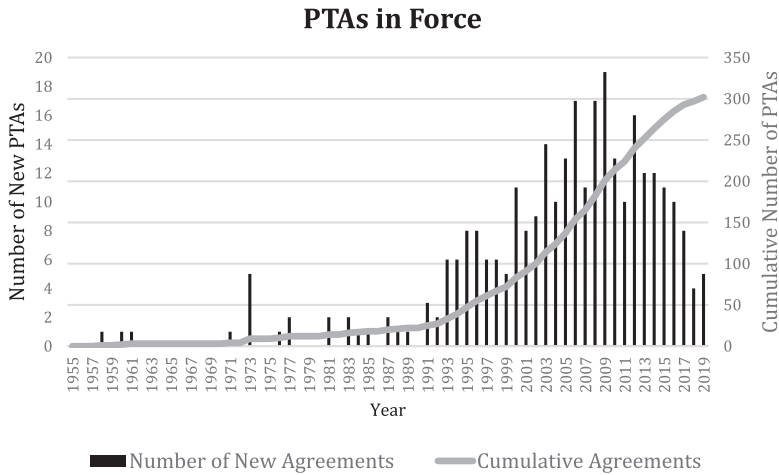


Figure 1: Number of PTAs currently in force, 1955–2019

Source: WTO, *Regional Trade Agreements Database*, available at <http://rtais.wto.org/UI/PublicMaintainRTAHome.aspx> (last visited 3 February 2021)

This article relies on a simple binary classification of DSMs in PTAs, distinguishing between PTAs that provide exclusively for diplomatic dispute settlement and those that provide for some form of adjudication. Thus, each PTA's DSM has been individually assessed. Where overlapping connections exist,²³ and the different PTAs between the same members provide for different types of DSMs (diplomatic versus adjudicatory), the network will display the connection as being covered by an adjudicatory DSM. This classification is admittedly significantly more simplistic than previous scholarship on the topic. A wealth of literature focuses on DSM design in PTAs. Chase *et al.*, for example, use a tripartite classification of DSMs and provide a detailed analysis of the workings of 226 different DSMs contained in PTAs.²⁴ Other notable works in this area include Jo and Namgung's analysis of PTAs and the sophisticated dataset developed by Allee and Elsig.²⁵

As explained in the Introduction, one of the objectives of this article is to determine the number of WTO cases that could have been settled by recourse to adjudication under PTAs. Where no adjudicatory DSM exists in a particular PTA, the point is moot. The unidimensional and limited approach adopted here thus provides sufficient insights. Factors such as the availability of different remedies or the existence of an appeals mechanism are ultimately irrelevant when answering the question if a case

²³ The widespread phenomenon of overlapping PTAs has been analysed in Pauwelyn and Alschner, *supra* note 18.

²⁴ Chase *et al.*, *supra* note 5.

²⁵ Jo and Namgung, 'Dispute Settlement Mechanisms in Preferential Trade Agreements: Democracy, Boilerplates, and the Multilateral Trade Regime', 56(6) *Journal of Conflict Resolution* (2012) 1041; Allee and Elsig, 'Why Do Some International Institutions Contain Strong Dispute Settlement Provisions? New Evidence from Preferential Trade Agreements', 11 *Review of International Organizations* (2016) 89.

could theoretically have been settled under a PTA but would rather be pertinent to the inquiry why the complainant went to one forum or the other.²⁶

B The Characteristics of the PTA Network

Figure 2 shows the PTA network among WTO members. Black edges signify the existence of a PTA that provides for adjudication. Connections in red arise from PTAs that exclusively provide for diplomatic dispute settlement. The size of each node/WTO member depends on its total number of connections. There are 1,042 different connections between WTO members.

As can be discerned, the vast majority of PTA DSMs provide for some sort of adjudication (883 black connections, approximately 85%). This is in line with earlier studies on the subject, which found that an increasingly large percentage of PTAs provides for adjudicatory dispute settlement.²⁷ The EU is, by far, the best-connected WTO member (60 connections). Other well-connected members include Chile (37 connections), Singapore (35 connections), Egypt (33 connections), as well as the four members of the European Free Trade Association (EFTA) (ranging between 31 and 33 connections).

Two WTO members have no connection to any other member. According to WTO data, Mauritania and Angola are not a party to any PTA (11 o'clock in Figure 2). Mongolia recently joined the network by concluding a free trade agreement (FTA) with Japan that entered into force in June 2016 but, so far, has no other connections.²⁸ When only considering the subset of PTAs that provide for adjudication (black connections), a further eight states are outside the network.²⁹ Overall, Figure 2 shows that almost all WTO members are connected through a PTA to at least one other member, and many of these PTAs provide for adjudication.

The network representation further shows the extent to which regionalism continues to constitute a driving force in the conclusion of PTAs. Several regional integration communities are clearly discernible in Figure 2. However, it should also be acknowledged that a significant number of PTAs are of a cross-regional character. Other simple network measures include its diameter and average path length. With respect to the network's diameter, this measure shows the maximum number of steps

²⁶ Such factors are discussed at the beginning and end of Section 3.B. For literature that seeks to uncover why complainants use one forum versus another, see, for example, Busch, 'Overlapping Institutions, Forum Shopping, and Dispute Settlement in International Trade', 61 *International Organization* (2007) 735; Leal-Arcas, 'Comparative Analysis of NAFTA's Chapter 20 and the WTO's Dispute Settlement Understanding', 8(3) *Transnational Dispute Management* (2011) 1. For literature that discusses the WTO's features compared to PTA DSMs, see, for example, Porges, *supra* note 6; Kolsky Lewis and van den Bossche, 'What To Do When Disagreement Strikes?: The Complexity of Dispute Settlement under Trade Agreements', in S. Frankel and M. Kolsky Lewis (eds), *Trade Agreements at the Crossroads* (2014) 9; Vidigal, *supra* note 13.

²⁷ See, for example, Chase *et al.*, *supra* note 5, at 14.

²⁸ Agreement between Japan and Mongolia for an economic partnership, 10 February 2015, United Nations, New York, available at tinyurl.com/23q3m344 (last visited 3 February 2021).

²⁹ These additional members are Afghanistan, Bangladesh, Macao, Maldives, Nepal, Sri Lanka, Venezuela and Yemen.

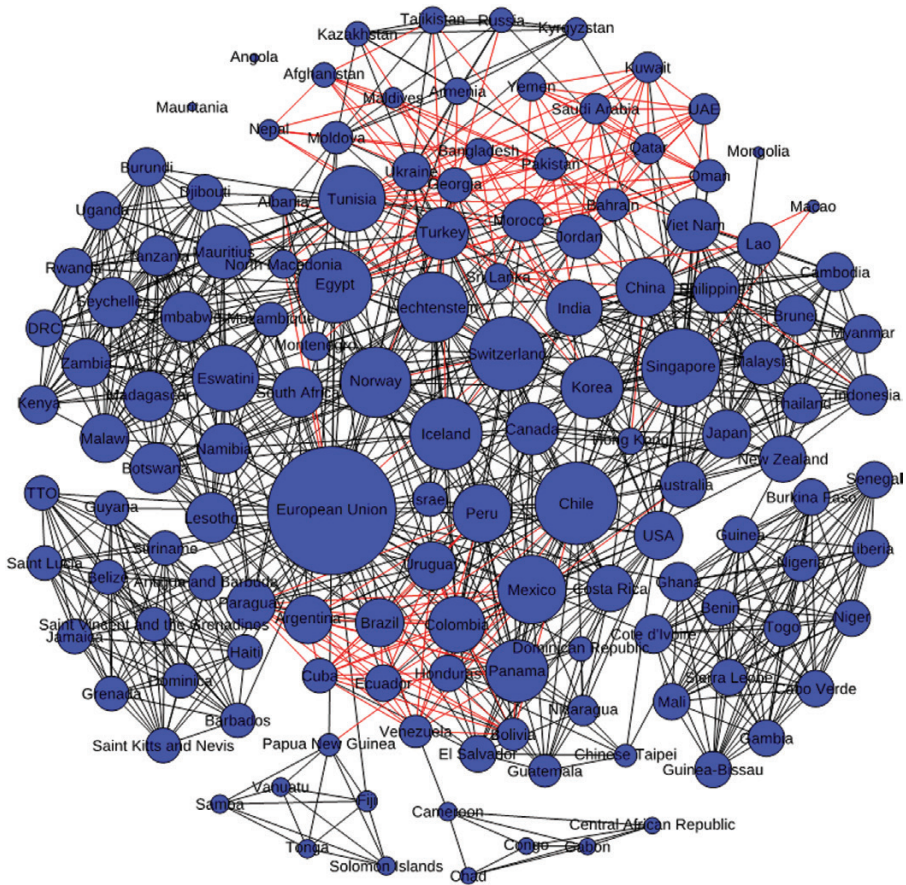


Figure 2: *The network of PTAs among WTO members*

needed to connect any member to any other member. For the PTA network among WTO members, this number is five steps, indicating that the network constitutes, similar to many others found in the social sciences or nature, a small-world network. On average, it takes approximately 2.6 steps to connect any WTO member with any other member.

The average number of PTA connections for any WTO member is approximately 15. This average can be achieved, for example, through membership in a single PTA with 16 parties or 15 bilateral PTAs. Eswatini, for example, only has six PTAs in force but is one of the best-connected WTO members with 29 total connections, due to its participation in a number of non-overlapping regional integration communities. The European Union's 60 connections are formed by 42 PTAs, indicating a large share of bilateral agreements. A more detailed assessment of these dynamics could help to reveal if and how economically powerful WTO members are increasing their bargaining power by displaying a preference for bilateral PTA negotiations.

One of the most important measures for the questions this article seeks to answer relates to the density of the network of PTAs. As has previously been observed, 'little

is known about how tightly or loosely knit the PTA network is'.³⁰ As almost all WTO members are parties to a significant number of PTAs, one is quickly led to believe that the network is relatively dense. The density of a network is determined by dividing the total number of existing connections by the total number of possible connections. As stated above, the PTA network displays 1,042 connections between 136 WTO members. The total number of possible connections between these 136 members is 9,180. Thus, a mere 11.35% of all possible connections among WTO members are covered by a PTA. Excluding PTAs that exclusively provide for diplomatic dispute settlement, the network's density decreases to 9.62%. In short, less than 10% of the bilateral relations among WTO members are covered by a PTA that provides for and adjudicatory DSM.

Generally, it is difficult to provide an abstract characterization of whether or not a particular network should be considered dense or sparse. The formal definition of dense and sparse networks is relatively useless in the case of many real-world networks, including that of PTAs.³¹ It may, however, be useful to draw a comparison to other treaty networks. The network of bilateral investment treaties and other treaties with investment provisions covers approximately 33% of all possible bilateral relations.³² The tax treaty network consists of approximately 3,200 treaties, almost all of which are of a bilateral nature.³³ Its density is, thus, estimated at roughly 16%.³⁴ The density of both networks is significantly higher than that of the PTA network.

Another factor that may be relevant in this context is the ease with which one can gain 'access' to the respective network. As a consequence of the absence of widespread anti-abuse or denial-of-benefits clauses in tax and investment agreements, companies can set up their investments and corporate tax structure in a way that allows access to treaty benefits. This often requires little more than the creation of a shell company in a particular jurisdiction.³⁵ With respect to the trade in goods, corporate restructuring is

³⁰ Pauwelyn and Alschner, *supra* note 18, at 504.

³¹ Networks are dense when their density stays constant as the number of nodes in the network approaches infinity and sparse when their density approaches zero as the number of nodes approaches infinity. See M. Newman, *Networks: An Introduction* (2010), at 134. Considering the finite number of states, this abstract definition provides little guidance.

³² For data on investment treaties, see United Nations Conference on Trade and Development (UNCTAD), International Investment Agreements Navigator, available at <https://investmentpolicy.unctad.org/international-investment-agreements> (last visited 3 February 2021). Relying on data up to 1 December 2019, there are approximately 6,500 connections between states arising from all international investment agreements (IIAs) that are currently in force. One should note that not all of these agreements provide for investor–state dispute settlement and some, such as the Energy Charter Treaty, 17 December 1994, 2080 UNTS 95, only have sectoral coverage. The density is calculated under the assumption that there are 200 states that can conclude IIAs.

³³ The total number of double taxation conventions in force is reported to lie somewhere between 3,000 and 3,500 treaties. This article takes an estimate that is (somewhat conservatively) closer to the lower reported number.

³⁴ Assuming that there are 200 jurisdictions that can conclude tax treaties.

³⁵ ICSID, *Aguas del Tunari S.A. v. Republic of Bolivia – Decision on Jurisdiction*, 21 October 2005, ICSID Case No. ARB/02/3, para. 330; Sinclair, 'ICSID's Nationality Requirements', 23(1) *ICSID Review* (2008) 57, at 88; Damgaard, Elkjaer and Johannesen, 'The Rise of Phantom Investments: Empty Corporate Shells in Tax Havens Undermine Tax Collection in Advanced, Emerging Market, and Developing Economies', 56(3) *Finance & Development* (2019) 11.

far less convenient. Detailed and complicated rules of origin contained in PTAs would often require moving entire production facilities to gain access to the preferential tariff rates of PTAs. Such factors may ultimately exacerbate the perception that the PTA network is relatively sparse compared to other treaty networks.

One of the consequences of this sparsity is that there are sound reasons to believe that the PTA network will continue to grow in the future, albeit at a slower pace, as the trend already indicates in recent years.³⁶ The ‘updating’ of old agreements takes up resources and new agreements are increasingly more ambitious, leading to longer, more contentious and protracted negotiations. Ultimately, the conclusion of new PTAs is driven by a multitude of factors, prominently among these features the continued ability of the WTO to serve as the primary forum for trade liberalization.

3 WTO Disputes and their Justiciability under PTAs

Having introduced the network of PTAs above, Section 3.A focuses on the network of WTO disputes. Section 3.B combines the two networks and analyses the number of WTO disputes that could have alternatively been initiated under a PTA.

A *The Network of WTO Disputes*

To date, WTO members have initiated 592 disputes in the WTO. A total of 74 WTO members (45%) have acted as either complainant or respondent in at least one dispute.³⁷ While this number is far from covering the entire WTO membership, it indicates that a significant share of members – almost half – participated, at least once, in WTO dispute settlement proceedings. Generally, more new cases were filed in the early years of the WTO (Figure 3: 55% in the first 10 years, the remaining 45% in the 15 years from 2005 to 2019). This does not mean that the WTO DSM is now less busy in terms of its overall workload as an increasing share of cases progresses to the panel stage and beyond.³⁸

The decrease in new WTO cases is accompanied by the growth in total PTAs (with the largest share of new PTAs entering into force in the two five-year periods of 2004–2009 and 2010–2014). This leaves room for speculation that the two phenomena are linked. PTAs could either provide for an alternative forum to settle trade disputes or lead to a decrease in overall disputes between the parties. Arguments in favour of the latter hypothesis have been advanced by Mavroidis and Sapir as well as Li and Qui. Adopting different methodologies, they appear to have found data in support of the existence of a correlation between PTA membership and the

³⁶ See Figure 1.

³⁷ WTO, *supra* note 8.

³⁸ Pauwelyn and Zhang, ‘Busier than Ever? A Data-Driven Assessment and Forecast of WTO Caseload’, 21(3) *JIEL* (2018) 461, at 468–469.

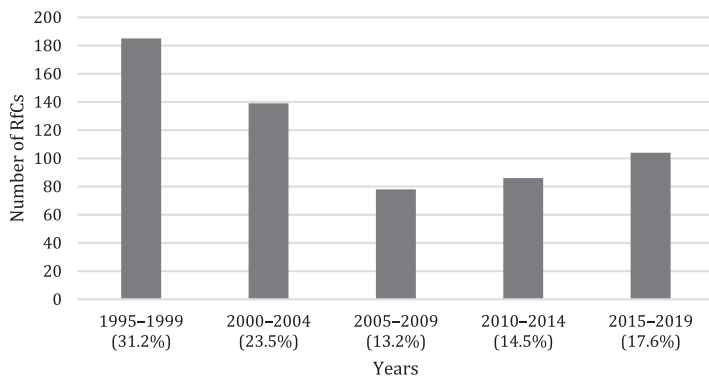


Figure 3: The number of newly filed WTO disputes.

absence of new disputes in either forum, the WTO or the PTA DSM.³⁹ Consequently, it could be argued that the more PTAs exist, the less disputes arise, including new WTO disputes.

Further insights can be gained by adopting a network approach towards WTO dispute settlement proceedings. Figure 4 shows the network of WTO disputes. To create the network, all WTO RfCs have been relied upon. The current total of 592 RfCs gives rise to 633 bilateral disputing constellations. The excess in bilateral disputes over the number of RfCs is explained by that fact that, in a limited number of instances, one RfCs is directed at multiple defendants or one RfCs is filed by multiple complainants together.

For the sake of visualization, in those cases where a then EU member was named as defendant, the case is attributed to the EU.⁴⁰ Consequently, the number of bilateral disputes is reduced to 620. As a result of this methodology, the total number of WTO members participating in dispute settlement proceedings is reduced from 74, the actual number of WTO disputants, to 62, excluding certain EU members. Figure 4, hence, displays 62 nodes.

The network in Figure 4 is a directed network with the edge pointing from the complainant to the defendant. The edge size indicates the number of disputes between the two members. The node size is indicative of the total number of disputes. Lastly, green edges show that the bilateral dispute relation led to the adoption of at least one panel

³⁹ Mavroidis and Sapir, 'Dial PTAs for Peace: The Influence of Preferential Trade Agreements on Litigation between Trading Partners', 49(3) *Journal of World Trade (JWT)* (2015) 351; Li and Qiu, 'Beyond Trade Creation: Free Trade Agreements and Trade Disputes', ERIA Discussion Paper Series, ERIA-DP-2015-28 (March 2015), available at www.eria.org/ERIA-DP-2015-28.pdf.

⁴⁰ The question of exclusive, joint and separate liability for WTO violations of the EU and its members is not fully settled from an international law perspective. Within the WTO it is generally accepted that the EU acts as defendant even where a violation could be attributed to one of its members. See the discussion in Beyer, 'Direct Taxes and the GATS: Substantive and Procedural Defences for Non-Compliant Income Tax Measures', 52(3) *JWT* (2018) 351, at 362-363; Leinarte, 'The Principle of Independent Responsibility of the European Union and its Member States in the International Economic Context', 21(1) *JIEL* (2018) 171.

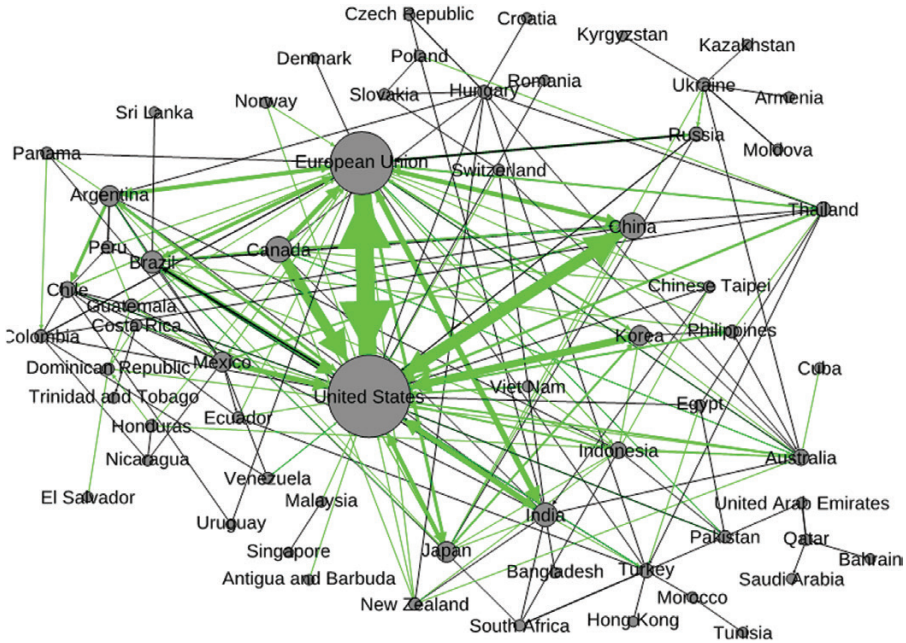


Figure 4: *The network of WTO disputes*

report. Black edges between members exist where one or more RfCs were filed between the two members but, so far, no panel report has ever been adopted between the two. The 620 bilateral disputes create 221 directed edges.

If one treats the network of WTO disputes as an undirected network, meaning one ignores which of the two WTO members acted as complainant or respondent, the network consists of 176 undirected edges. Consequently, there are 45 instances in which a WTO member was first named as a defendant by another member and in a later (potentially unrelated) dispute that other member sued back the earlier complainant. This allows for the formulation of at least two, potentially conflicting, hypotheses that could be further tested. First, the relatively large share of unidirectional disputing relations could indicate that WTO members do not have to be overly concerned about the ‘glasshouse effect’ (‘you sue me, I’ll sue you back’), as most WTO members do not commence proceedings against another member for the sole reason of having been named as a defendant by that member. Alternatively (or complementary), WTO members are very much aware of their own ‘glasshouse’ and are, thus, restrained in the first place from commencing proceedings against members that are likely to sue them back, thereby having created the large number of unidirectional dispute relations over the years.

The large number of disputes and the large share of WTO members participating in these disputes indicates that dispute settlement under WTO rules is a popular choice to settle trade disputes. It has, however, been noted that the majority of disputes are filed between the same frequent users. For example, the bilateral relationship between

the European Union and the United States accounts for a total of 70 disputes, China–United States covers 39 disputes, Canada–United States accounts for 28 disputes and Korea–United States amounts to 20 disputes. The top 15 bilateral relations in terms of number of disputes (8.5% of all existing bilateral dispute relations) account for approximately half of all WTO disputes. This can be contrasted with the other end of the spectrum, where 96 of the bilateral dispute relations (54.5%) cover only one case each (15.5% of all cases).

The network analysis of dispute relations not only confirms that few WTO members account for a large share of disputes, as already observed by others,⁴¹ but also adds further context. It allows one to more accurately understand the very limited extent to which WTO members participate in judicial dispute settlement. Not only do few members account for the majority of disputes. All disputes so far arose between an extremely limited number of WTO members. This is despite the fact that 45% of WTO members have participated in dispute settlement proceedings at least once. The vast majority of bilateral relations among WTO members has never been subject to WTO proceedings. The density of the disputes network is below 2%.⁴² A different way of looking at this number would be to state that 98% of all bilateral relations among WTO members have never been subject to judicial dispute settlement. Only focusing on green edges (89 out of 176 edges, 50.6%) reveals that less than 1% of all potential dispute relations among WTO members are covered by at least one panel report.

This number highlights a seemingly obvious, yet often ignored fact. Greater supply in dispute settlement procedures does not necessarily create greater demand. When the WTO came into existence in 1995, compulsory dispute settlement among all its members equally came about. Yet, in the 25 years of the WTO's existence, only 2% of bilateral relations have been subject to dispute settlement. China, by all conventional measures a frequent user of WTO dispute settlement, has so far initiated proceedings in 21 cases. However, all of these disputes were exclusively directed at two members, the European Union and the United States. In light of the sparse WTO disputes network it is, thus, somewhat surprising that the limited use of adjudication under PTAs receives so much attention. One wonders why the existence of more adjudicatory DSMs in PTAs should, without any other intervening factors, suddenly lead to an increase in the number of disputes. It rather appears that most states favour strong dispute settlement in the hope of never having to use it.

The density of the WTO disputes network further allows for a useful comparison to analyse if PTA DSMs are underused in comparison to the WTO. Davey, for example, argues that 'RTA dispute settlement seems to be used much less frequently than WTO dispute settlement'.⁴³ When comparing the total number of WTO and PTA disputes, this statement appears to be correct. However, this article argues that this type of

⁴¹ Davey, 'The WTO and Rules-Based Dispute Settlement: Historical Evolution, Operational Success, and Future Challenges', 17(3) *JIEL* (2014) 679, at 687–688.

⁴² The 176 existing connections are divided by 9,180 potential connections.

⁴³ Davey, 'Dispute Settlement in the WTO and RTAs: A Comment', in L. Bartels and F. Ortino (eds), *Regional Trade Agreements and the WTO Legal System* (2006) 343, at 349.

comparison is misleading or, at least, insufficient. Instead, one should equally consider the level of *potential* dispute activity in the WTO. In other words, to usefully compare the level of adjudication under PTAs to that of the WTO, one cannot simply disregard the fact that the network of adjudicatory PTAs has a density below 10% whereas the WTO DSU covers 100% of the WTO's members. Arguably, for PTA DSMs to reach a level of overall dispute settlement activity that is comparable to the existing WTO level, it would be sufficient if 1% of the 883 existing bilateral PTA relations that provide for adjudication had led to the adoption of a report. Hence, merely nine different member pairings relying on a PTA DSM to issue a report would indicate a comparatively equal level of dispute settlement activity between the WTO and PTAs.⁴⁴

The following section will provide more detail on the relationship between existing WTO disputes and the PTA network. In particular, the next section analyses how many past WTO disputes are covered by the substantive and jurisdictional scope of any PTA applicable between the disputing parties. This is done to uncover the number of instances in which a PTA could have served as a forum for dispute settlement in lieu of the WTO.

B Choice of Forum: How Many WTO Disputes Could Have Been Settled under PTAs?

As stated, it is generally argued that 'WTO members have *overwhelmingly chosen* to bring their disputes – even against RTA partners – under the WTO dispute settlement procedures rather than under any applicable RTA procedures'.⁴⁵ The reasons presented to support the existence of such a preference often relate to the superiority of the WTO. Factors associated with the perceived preference for WTO dispute settlement include the members familiarity with the institution,⁴⁶ the long line of established case law,⁴⁷ 'the desire to be able to mobilize greater pressure against illegal denial of market access by suspending MFN [most-favoured nation] tariffs and other WTO obligations (particularly where the PTA's margin of preference is low)',⁴⁸ access to neutral panellists,⁴⁹ the possibility to create alliances of co-complainants,⁵⁰ unblockable dispute settlement⁵¹ and the existence of an experienced secretariat.⁵²

One of the gaps this article seeks to highlight in existing scholarship is that past writings on the subject appear to have neglected to systematically consider actual disputes, seek to determine if the dispute could actually have been raised under a PTA

⁴⁴ Admittedly, this approach ignores the fact that trade flows are one of the drivers of the conclusion of PTAs and the existence of disputes. Hence, it may be that the existing PTA relations are exactly those that give rise to a large number of disputes. In support of this hypothesis, see the data in Section 3.B.

⁴⁵ Kolsky Lewis and van den Bossche, *supra* note 26, at 15 (emphasis added).

⁴⁶ Porges, *supra* note 6, at 492.

⁴⁷ Kolsky Lewis and van den Bossche, *supra* note 26, at 15.

⁴⁸ Porges, *supra* note 6, at 492.

⁴⁹ Davey, *supra* note 43, at 355; Porges, *supra* note 6, at 492.

⁵⁰ Porges, *supra* note 6, at 492.

⁵¹ Vidigal, *supra* note 13, at 932–933; Porges, *supra* note 6, at 492.

⁵² Kolsky Lewis and van den Bossche, *supra* note 26, at 15.

(or in case of a PTA dispute, under WTO rules) and then aim to uncover why the complainant chose one forum over the other.⁵³ A preference for the WTO implies the existence of choice. Where a PTA's substantive or procedural rules do not cover a particular disagreement between trading partners, one cannot, in any meaningful way, argue that states *choose* WTO dispute settlement over PTAs.⁵⁴ Hence, to determine if there is an overwhelming preference for WTO dispute settlement, it is necessary to ascertain how many disputes could have been raised in the alternative forum. Only if a large share of WTO disputes could, indeed, have been litigated under PTA procedures (and vice versa) would it be accurate to claim that there is 'complete dominance of WTO litigation over FTA litigation'.⁵⁵

To answer the question how many WTO cases could have been settled under a PTA, this article combines the PTA network with the undirected WTO disputes network.⁵⁶ Figure 5 displays the results in somewhat simplified form. The existence of an edge indicates that at least one dispute arose between the members. Node and edge size are indicative of the total level of activity, as in Figure 4. Black edges indicate the absence of a PTA between the two WTO members. Blue edges indicate a PTA that entered into force after the last RfC was filed between both members and, hence, did not exist at the time the last dispute arose. Red and green edges indicate that a PTA existed at the time when *at least one* of the disputes was filed between the members. In the case of red edges, the PTA does not provide for adjudication. In the case of green edges, it does. Red and green edges do not mean that all disputes between the two members would have been covered by the PTA relation. For example, the Korea–United States edge is green. In total, 20 disputes were filed between the two WTO members. The majority of these disputes, 15, were filed before the PTA entered into force in March 2012.

A total of 89 out of 176 edges are black. This means that almost exactly half of all past bilateral disputing relations are now covered by a PTA (87 edges, 49.4%). These covered connections account in total for 243 out of 620 disputes. There is no means to accurately predict future dispute settlement demand apart from broad generalized claims concerning overall disputes or perhaps those brought by large economies against major trading partners. However, if one takes past disputes as an approximation of future disputes, 39% of those disputes would now be covered by a PTA. As detailed in Section 2.B, the PTA network covers 11.34% of bilateral relations among WTO members. Thus, the relatively sparse PTA network covers almost half of all disputing relations and 39% of past cases.

The phenomenon that the relatively sparse PTA network covers almost half of all disputing relations is intuitively explained by the fact that the emergence of disputes and trade agreements is strongly driven by existing trade flows. Put differently,

⁵³ A notable exception is Vidigal, *supra* note 13, in which the author works with a dataset of WTO disputes covering the years 2007 to 2016.

⁵⁴ Kolsky Lewis and van den Bossche, *supra* note 26, at 15.

⁵⁵ Vidigal, *supra* note 13, at 942.

⁵⁶ To properly assess past cases, the PTA network here also includes all agreements notified to the WTO that are no longer in force.

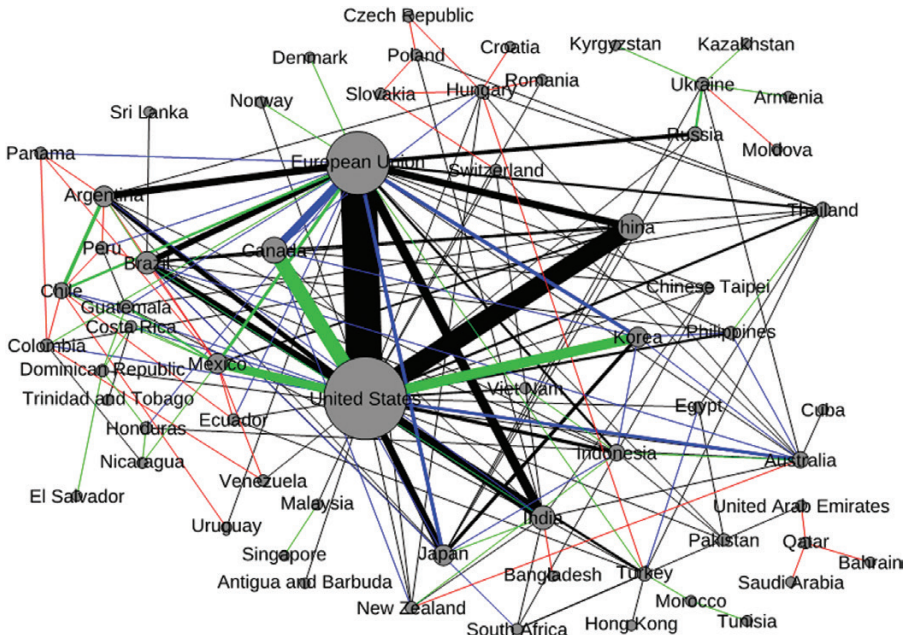


Figure 5: WTO disputes that are covered by a PTA relationship

major trading partners are not only more likely to disagree over the legality of trade restrictive measures but are also more likely to negotiate and conclude PTAs. That such a large share of past cases, 39%, arose between WTO members that are now PTA partners is further explained by the power law distribution of WTO cases, hinted to above in Section 3.A. As stated, the bilateral relations of very few members account for a large share of past cases. At least some of these major disputing relations are (now) covered by a PTA.

These findings can also be considered from the perspective of the continued functioning of the WTO's DSM. Froese argued that strong adjudicatory DSMs in PTAs are meant to serve as a security 'against the possibility of multilateral failure'.⁵⁷ The relatively large percentage of past cases that are now covered by a PTA relationship might indicate that the PTA network could, at least to a certain extent, serve as an alternative to WTO dispute settlement, *if needed*.⁵⁸ However, there are equally arguments that would suggest the invalidity of this hypothesis. For example, as will be detailed below, a large share of PTAs fail to replicate existing WTO disciplines or exempt them from dispute settlement. The relatively low number of WTO cases that could have been settled under adjudicatory PTA procedures appears to

⁵⁷ Froese, 'Regional Trade Agreements and the Paradox of Dispute Settlement', 11 *Manchester Journal of International Economic Law* (2014) 367, at 368.

⁵⁸ Pauwelyn, 'WTO Dispute Settlement Post 2019: What to Expect?', 22(3) *JIEL* (2019) 297, at 320.

indicate that PTA DSMs would struggle to serve as a proper substitute for WTO dispute settlement.

Taking into account the date of entry into force of the PTA as well as the date of filing of the RfC in each dispute, approximately 23% of cases (143 out of 620) were brought by a WTO member against a (then) PTA partner (indicated in simplified form by red and green edges in Figure 5). Cases brought between PTA partners where the agreement contains an adjudicatory DSM are covered by green edges. In total there are 33 such green edges. Again, accounting for the time of entry into force of the PTA and the date of filing of the RfC, 104 WTO disputes are covered. Thus, out of the 143 WTO cases brought between PTA partners, in 39 instances the PTA did not provide for adjudication. A different way of looking at this data is that in approximately 17% of WTO cases, members brought a case to the WTO despite the existence of a PTA between the disputing parties that provides for adjudicatory dispute settlement. This relatively high number is likely to be one of the drivers of the perceived preference for WTO dispute settlement over PTA DSMs.

In an additional step, the 104 cases where an adjudicatory PTA existed at the time between the parties were examined in conjunction with the applicable PTA. This was done for two reasons: First of all, many obligations found in the WTO are not covered by PTAs. Prusa, for example, considered a dataset of 76 PTAs and analysed the trade remedy rules in these agreements. He found that a sizeable share of the agreements do not provide for rules on anti-dumping, countervailing duties and global safeguards,⁵⁹ all of which are covered by the WTO. A large share of WTO disputes deal exactly with issues relating to trade remedies.⁶⁰ Secondly, even where the PTA imposes these substantive obligations, they may be exempted from adjudication. Chase *et al.* provide a detailed analysis of 226 PTAs. They found that 65% of PTAs which provide for dispute settlement by an ad hoc panel exclude at least one subject matter covered by the agreement from dispute settlement.⁶¹

The fact that certain WTO disciplines are not replicated in PTAs or are exempted from dispute settlement under PTAs could allow one to hypothesize that this reflects an inherent preference for WTO dispute settlement. A potential counterargument would be that, for example, trade remedies rules, among the most litigated in the WTO, are often excluded from PTAs as states do not wish to expend negotiating capital on a sensitive subject when the WTO delivers more or less satisfactory results. Ultimately, the substantive disciplines of PTAs are driven by a host of factors. Dispute settlement may not be the first thing on the mind of trade negotiators and policy makers.

It is not always entirely straightforward to determine if a WTO case could have been brought under a PTA. Depending on how the substantive or procedural obligations

⁵⁹ Prusa, 'Trade Remedy Provisions', in J.-P. Chauffour and J.-C. Maur (eds), *Preferential Trade Agreement Policies for Development* (2011) 179, at 185.

⁶⁰ Pauwelyn and Zhang, *supra* note 38, at 461: '45% of cases filed between 2012–16 are trade remedy disputes'.

⁶¹ Chase *et al.*, *supra* note 5, at 20.

in the PTA are interpreted, a case may or may not be covered.⁶² Moreover, there are cases where only part of the WTO claims could have been brought under the PTA or where the claims would have to be reframed significantly to fall within the scope of the PTA.⁶³

The majority of cases are, however, relatively clear-cut. For many of the 104 cases analysed here, the PTA either explicitly imposes similar obligations to those relied upon in the WTO proceedings, does not contain any obligations or clearly exempts these from dispute settlement. If one adopts a broad reading of PTA obligations, in those cases where uncertainties as to the PTA's scope exist, there are 46 instances in which the WTO case could have been litigated under the applicable PTA procedures. If one excludes those instances where the PTA's language may raise serious doubts as to the justiciability of the case under PTA procedures, there are 38 remaining WTO cases. Thus, out of 143 WTO cases that have been brought between PTA parties, only 38 could have relatively clearly been litigated under the PTA in question.

The World Trade Report 2011 is correct in noting that 'WTO members that are partners in a PTA continue to have frequent recourse to the WTO dispute settlement system to resolve trade disputes'.⁶⁴ After all, there are 143 instances where this is the case. The common observation that PTA partners overwhelmingly *choose* to bring cases to the WTO instead of relying on PTA procedures,⁶⁵ however, appears not to hold in practice. Where a PTA does not provide for adjudication, does not impose substantive obligations similar to those found under the WTO covered agreements or exempts these obligations from adjudication, there is no choice that would indicate a preference for the WTO. One should note that these three limitations are the only ones considered here. Thus, the argument here does not relate to *why* a particular forum was chosen but the data rather indicates that there often was no choice in the first place.

The data collected here also helps to provide further insights on some of the possible explanations for why members may choose WTO dispute settlement over PTAs.

⁶² See, for example, WTO, *United States – Safeguard Measures on PV Products – Request for Consultations*, 14 May 2018, WT/DS545/1; WTO, *United States – Safeguard Measure on Washers – Request for Consultations*, 14 May 2018, WT/DS546/1; Free Trade Agreement Between the United States of America and the Republic of Korea, 30 June 2007, available at <https://ustr.gov/trade-agreements/free-trade-agreements/korus-fta/final-text> (last visited 3 February 2021), art. 10.5 (hereinafter 'KORUS'), addresses global safeguards. The agreement stipulates that no 'additional rights or obligations' beyond those contained in the WTO Agreement are conferred by the PTA. It is unclear whether this language covers substantive or procedural rights or both. Another example is the Treaty on a Free Trade Area between members of the Commonwealth of Independent States, 18 October 2011, available at <http://rtais.wto.org/UI/PublicShowRTAIDCard.aspx?rtaid=762&lang=1&redirect=1> (last visited 3 February 2021), art. 19.3, which obliges parties to use WTO dispute settlement when WTO obligations are at stake. However, similarly strong language is used in conferring the right to rely on the PTA's procedures.

⁶³ For example, the *Mexico-Additional Duties – Request for Consultations*, 16 July 2018, WT/DS560/1, alleged a most-favoured nation (MFN) clause violation under WTO rules. The North American Free Trade Agreement, 17 December 1992, 32 ILM 289 (hereinafter 'NAFTA'), the applicable PTA does not contain an MFN clause. However, the applied customs duties were potentially in excess of bound rates under NAFTA.

⁶⁴ WTO, *supra* note 4, at 176.

⁶⁵ Kolsky Lewis and van den Bossche, *supra* note 26, at 15.

As stated earlier, the possibility of creating alliances of co-complainants is referenced as one of the reasons countries choose WTO dispute settlement.⁶⁶ However, states do not appear to systematically resort to WTO procedures instead of relying on PTA proceedings for this reason.⁶⁷ At least the numbers here appear to be too low to speak of a general trend. Out of the cases that could have been settled under PTA procedures,⁶⁸ there are only six disputes in which a complainant relied on WTO proceedings to litigate a case with a coalition of co-complainants that could not have been built in PTA proceedings. In these particular instances the explanation may still hold. However, it is difficult to draw more general conclusions.

The argument that states prefer the WTO due to its established line of case law is somewhat more difficult to assess. First of all, the WTO's case law, while proper to the institution, is not 'owned' by it. Marceau, Izaguerri and Lanovoy noted that other courts and tribunals, including those established under PTAs, rely on WTO jurisprudence to clarify substantive obligations under the respective agreement.⁶⁹ There is, thus, no reason to assume that the WTO's existing case law makes the WTO the better forum as such. The 46 instances where a WTO case could potentially have been litigated under a PTA led to the adoption of a report on the merits in 18 disputes. Some of these instances are run-of-the-mill General Agreement on Tariffs and Trade (GATT) non-discrimination cases where established jurisprudence may have influenced the decision to bring the dispute to the WTO.⁷⁰ However, a number of these cases dealt with, as of then, entirely unexplored legal issues such as the disputes in *Thailand – Cigarettes (Philippines)*,⁷¹ *United States – Tuna II (Mexico)*,⁷² *United States – COOL*⁷³ and *Australia – Tobacco Plain Packaging*.⁷⁴ When it comes to case law, the choice may, thus, not necessarily be influenced by existing law but potentially by the complainants decision to establish a new precedent in a particular forum.⁷⁵

At best, the data appears unclear on some of the explanations why the WTO is the superior forum. What is considered a *plausible* general explanation (for example, the possibility to form a coalition of co-complainants) does not serve to explain a sufficiently large number of cases to speak of a broad trend. For a number of individual cases the previously advanced explanations appear to hold in practice. However, it may be difficult to extrapolate general explanations from relatively few, at times isolated, instances.

⁶⁶ Porges, *supra* note 6, at 492.

⁶⁷ Ignoring the possibility of supportive third-party interventions or statements in the meetings of the dispute settlement body.

⁶⁸ Here, the wider set of 46 WTO disputes that could have been litigated under a PTA is relied on.

⁶⁹ Marceau, Izaguerri and Lanovoy, 'The WTO's Influence on Other Dispute Settlement Mechanisms: A Lighthouse in the Storm of Fragmentation', 47 *JWT* (2013) 481.

⁷⁰ See General Agreement on Tariffs and Trade, 30 October 1947, 61 Stat. A-11, 55 UNTS 194 (hereinafter 'GATT').

⁷¹ WTO, *Thailand – Cigarettes (Philippines) – Panel Request*, 29 September 2008, WT/DS371/3.

⁷² WTO, *United States – Tuna II (Mexico) – Panel Request*, 9 March 2009, WT/DS381/4.

⁷³ WTO, *United States – COOL – Report of the Appellate Body*, 29 June 2012, WT/DS384/AB/R, WT/DS386/AB/R.

⁷⁴ WTO, *Australia – Tobacco Plain Packaging (Indonesia) – Panel Request*, 3 March 2014, WT/DS467/15.

⁷⁵ Busch, *supra* note 26.

4 Inter-State Disputes under PTAs

The previous sections detailed the network of PTAs and sought to determine how many WTO disputes could have been brought under PTA procedures. This section seeks to estimate how many inter-state PTA disputes exist. The aim is to uncover if the ‘virtual idleness of inter-state dispute settlement mechanisms’ in PTAs can in fact be confirmed.⁷⁶

Before doing so, a few words of caution are in order. First, a number of PTA DSMs provide for standing by individuals or PTA authorities. A sizeable share of disputes are brought by individuals or PTA authorities such as the EFTA Surveillance Authority or the European Union Commission against the parties to the agreement. There are strong reasons to assume that at least some inter-state cases are thereby crowded out. Second, in the WTO, in 230 out of 574 cases (40%) was a panel report adopted.⁷⁷ Although many PTA DSMs provide for consultation as a pre-requisite for adjudication,⁷⁸ these consultations are not always publicly known in the same manner as they are in the WTO. Where consultations take place behind closed doors and the case is settled or otherwise abandoned, it is relatively difficult to uncover the existence of a trade dispute. There is no reason to assume that PTA cases are settled or abandoned less often than WTO cases.⁷⁹ Third, as noted by Porges, ‘[f]or PTAs with diplomatic or political dispute settlement, the true level of dispute activity is unknown and perhaps unknowable’.⁸⁰ McDougall raised similar concerns by finding ‘that there is incomplete information about the actual number of disputes brought before RTA DSMs’.⁸¹ In particular, he notes confidentiality and language issues that may impede the widespread dissemination of reports.⁸²

The difficulties in uncovering the existence of PTA disputes also arose in the course of this research. For some disputes, reports are available. For others, only secondary sources served as evidence of the existence of such disputes. Especially Africa, with its many regional integration communities, appears to create particular hurdles. Little is known about the jurisprudence of African (trade) courts.⁸³ However, if one were to assume that there are far more disputes under PTAs than those that are known, this limitation would not negate the argument advanced in this article. If anything, more

⁷⁶ Vidigal, *supra* note 13, at 928.

⁷⁷ WTO, *supra* note 7, ‘Table 1: Total number of dispute settlement reports’ covers disputes up to 2018 (or did so on 1 December 2019, this article’s data cut-off date). At least some of the more recently filed disputes will likely result in the adoption of panel reports.

⁷⁸ Chase *et al.*, *supra* note 5, at 24.

⁷⁹ For example, under NAFTA three inter-state reports were adopted. However, a further 12 cases were initiated and abandoned or settled.

⁸⁰ Porges, *supra* note 6, at 491 (emphasis omitted).

⁸¹ McDougall, ‘Regional Trade Agreement Dispute Settlement Mechanisms: Modes, Challenges and Options for Effective Dispute Resolution’, RTA Exchange – Issue Paper (April 2018), available at <https://bit.ly/2Yna8HT>.

⁸² *Ibid.*

⁸³ Gathii, ‘The Under-Appreciated Jurisprudence of Africa’s Regional Trade Judiciaries’, 12 *Oregon Review of International Law* (2010) 245.

active PTA dispute settlement would underline the point that PTAs are not far more idle than WTO dispute settlement. As actual PTA disputes remain somewhat uncharted territory, apart from a limited number of well-publicized cases, the below seeks to provide an indication as to the level of activity.

Bearing these limitations in mind, there are a number of known PTA cases.⁸⁴ Under the Southern Common Market (hereinafter 'Mercosur'), 10 cases have been initiated under the Brasília Protocol between 1993 and 2004.⁸⁵ Two more trade cases were initiated under the Olivos Protocol leading to seven awards between 2005 and 2008.⁸⁶ Moreover, in 2012 a non-trade dispute was initiated.⁸⁷ Under the Dominican Republic–Central America Free Trade Agreement (CAFTA-DR) at least five disputes have been initiated so far.⁸⁸ Under the Peru–United States Trade Promotion Agreement as well as the Mexico–El Salvador–Honduras–Guatemala (Triángulo del Norte) FTA at least one dispute each was initiated.⁸⁹ In the Andean Community, which is very active with respect to cases brought by individuals and the Andean Community Secretariat, one inter-state dispute was adjudicated between Venezuela and Colombia.⁹⁰ Moreover, there are four known cases that arose under various economic complementation agreements of the Latin American Integration Association.⁹¹

There have been three North-Atlantic Free Trade Agreement (NAFTA) cases that culminated in panel reports.⁹² A further 12 cases were initiated but have not (yet) led to a panel report.⁹³ Under the Korea–United States FTA (hereinafter 'KORUS'), two

⁸⁴ For much of the known cases, this article relies on the data collected and continuously updated by Porges Trade Law PLLC, 'Regional Trade Agreement Dispute Settlement', available at www.porgeslaw.com/rta-disputes (last visited 3 February 2021).

⁸⁵ Protocol of Brasília for the Solution of Controversies, 17 December 1991, (1991) 36 ILM 691.

⁸⁶ Olivos Protocol for the Settlement of Disputes in MERCOSUR, 18 February 2002, 2251 UNTS 243.

⁸⁷ For awards of the Tribunal Permanente de Revisión del Mercosur, see 'Protocolo de Olivos para la solución de controversias en el MERCOSUR, Tribunal permanente de revisión', MERCOSUR, available at www.mercosur.int/quienes-somos/solucion-controversias/laudos/ (last visited 3 February 2021).

⁸⁸ Porges Trade Law PLLC, *supra* note 84. See also Central America-Dominican Republic-United States Free Trade Agreement, 5 August 2004, Organisation of American States, available at http://www.sice.oas.org/Trade/CAFTA/CAFTADR_e/CAFTADRin_e.asp (last visited 3 February 2021) (hereinafter 'CAFTA-DR').

⁸⁹ Porges Trade Law PLLC, *supra* note 84. See also Peru–United States Trade Promotion Agreement, 12 April 2006, Organisation of American States, available at http://www.sice.oas.org/Trade/PER_USA/PER_USA_e/Index_e.asp (last visited 3 February 2021); Mexico–El Salvador–Honduras–Guatemala Free Trade Agreement, 29 June 2000, Organisation of American States, available at <http://www.sice.oas.org/Trade/mexnorte/indice.asp> (last visited 3 February 2021) (hereinafter 'Triángulo del Norte FTA').

⁹⁰ Tribunal de Justicia de la Comunidad Andina, Proceso 4-AI-96, Acción de Incumplimiento Interpuesta por la Republica de Venezuela contra la Republica de Colombia, 14 Gaceta Oficial 308, 28 November 1997, available at www.tribunalandino.org.ec/decisiones/AI/04-AI-1996.pdf.

⁹¹ Porges Trade Law PLLC, *supra* note 84.

⁹² NAFTA, *Tariffs Applied by Canada to Certain U.S.-Origin Agricultural Products – Final Report*, 2 December 1996, Doc. CDA-95-2008-01; NAFTA, *U.S. Safeguard Action Taken on Broom-Corn Brooms from Mexico – Final Report*, 30 January 1998, Doc. USA-97-2008-01; NAFTA, *Cross-Border Trucking Services – Final Report*, 6 February 2001, Doc. USA-MEX-98-2008-01.

⁹³ Porges, *supra* note 6, at 495.

cases appear to have been initiated so far.⁹⁴ The EU has initiated three cases under three different PTAs against Ukraine, Korea and the Southern African Customs Union.⁹⁵ Lastly, at least two inter-state disputes relating to trade policy have been initiated before the Economic Court of the Commonwealth of Independent States.⁹⁶

In total, there are, thus, 46 known cases that have been initiated under 15 different PTAs. This total is, indeed, significantly lower than the number of WTO disputes. Moreover, this data confirms that ‘the vast majority of provisions in regional and bilateral trade agreements are never the subject of any dispute settlement proceedings, even where a right to invoke proceedings exists’.⁹⁷ However, the data presented in this article also appears to show that PTA dispute settlement is not necessarily much more idle than WTO dispute settlement. As stated in Section 3.A, the vast majority of bilateral WTO relations have never been subject to dispute settlement, a staggering 98%. Much like in the case of many WTO members, the mere fact that adjudicatory procedures exist in a PTA does not necessarily mean that they will be used. If one bears the limited network of adjudicatory PTAs in mind, the claim that PTA dispute settlement is idle compared to the WTO appears to be inaccurate at best, and at worst a mischaracterization of the current state of affairs. Moreover, while data limitations prevent a thorough assessment, it appears that 21 of these 46 cases could have been settled under WTO disciplines. This means that in a significant share of cases, PTA partners preferred PTA adjudication over WTO dispute settlement.

The examples of some PTA DSMs may be particularly insightful for the purposes of this article. These are the relatively widely commented upon cases of Mercosur and NAFTA. In the case of Mercosur, as stated above, 12 trade cases have been initiated and litigated in the years up to 2008. It is, thus, true that Mercosur dispute settlement has been mostly idle for the past decade.⁹⁸ However, in comparison, Mercosur members have only initiated three WTO cases against one another, with the most recent of these cases having been initiated in December 2006.

The *Argentina – Cotton* and *Argentina – Poultry Anti-Dumping Duties* WTO cases between Brazil and Argentina arguably provide evidence of a preference in favour of Mercosur dispute settlement over WTO proceedings.⁹⁹ In both cases, Brazil’s WTO challenge was initiated after the respective Mercosur proceedings. The third WTO

⁹⁴ Office of the United States Trade Representative (USTR), Press Release, ‘USTR Requests First-Ever Consultations Under the U.S.–Korea Free Trade Agreement (KORUS)’, 15 March 2019, available at <https://bit.ly/2Me24Xn>; Office of the USTR, Press Release, ‘USTR to Request First-Ever Environment Consultations Under the U.S.–Korea Free Trade Agreement (KORUS) in Effort to Combat Illegal Fishing’, 19 September 2019, available at <https://bit.ly/39roJIA>.

⁹⁵ European Commission, Disputes under Bilateral Trade Agreements, available at <https://bit.ly/2KZujZb> (last visited 3 February 2021).

⁹⁶ There has been one case between Tajikistan and Uzbekistan and one case between Belarus and Russia, see Dragneva, ‘The Case of the Economic Court of the CIS’, in R. Howse *et al.* (eds), *The Legitimacy of International Trade Courts and Tribunals* (2018) 286, at 296–297.

⁹⁷ WTO, *supra* note 4, at 130; See also Chase *et al.*, *supra* note 5, at 6: ‘The vast majority of RTA-DSMs have not been used at all, at least in the sense of formal disputes having been initiated in such fora’.

⁹⁸ Vidigal, *supra* note 13, at 930.

⁹⁹ WTO, *Argentina – Cotton – Request for Consultations*, 11 February 2000, WT/DS190/1; WTO, *Argentina – Poultry Anti-Dumping Duties – Request for Consultation*, 7 November 2001, WT/DS241/1.

case, *Brazil – Anti-Dumping Measures on Resins*, dealt with measures that are largely unregulated under Mercosur.¹⁰⁰ It only became clear after the Mercosur proceedings in *Argentina – Poultry Anti-Dumping Duties* that Mercosur does not impose specific obligations with respect to anti-dumping measures.¹⁰¹ It is, thus, relatively unsurprising that Argentina immediately chose the WTO route in the subsequent *Brazil – Anti-Dumping Measures on Resins* dispute. Lastly, many of the 12 Mercosur cases appear to invoke disciplines that can equally be found under the WTO covered agreements. The complainants, however, chose to rely on Mercosur procedures.

The case of NAFTA is slightly more complex. It is a generally held belief that NAFTA parties have an overwhelming preference for WTO proceedings.¹⁰² This belief seems to have some merit and mostly stems from the fact that, on the one hand, NAFTA parties have initiated 45 WTO cases and, on the other hand, only three reports have been adopted under NAFTA. What has generally gone unnoticed, however, is that only 14 out of these 45 WTO cases dealt with issues that could have been settled under NAFTA. The majority of the WTO cases between Mexico and the United States as well as Canada and the United States dealt with anti-dumping and countervailing duties for which NAFTA does not impose substantive obligations similar to those found in the WTO covered agreements. In only five of those cases was a WTO report adopted on the merits of the dispute. As noted above, at least 15 NAFTA cases were initiated, with three reports being adopted. Admittedly, many of these cases dealt with NAFTA specific obligations and could not have been brought to the WTO. However, overall, while there appears to be a preference for WTO proceedings, this dominance may not be as pronounced as often assumed. This is despite the fact that the United States rendered NAFTA Chapter 20 proceedings virtually useless after blocking the panel appointment process in a Mexican challenge of US sugar quotas around the turn of the millennium.¹⁰³

5 Conclusion

In conclusion, the network analysis of PTAs and WTO disputes reveals certain patterns of interaction that appear to have previously gone unnoticed. The common observations relied upon to justify the conclusions that PTA dispute settlement is largely idle compared to the WTO and that states display a preference for WTO proceedings do not hold up to closer scrutiny or, at a minimum, need to be properly qualified.

¹⁰⁰ WTO, *Brazil – Anti-Dumping Measures on Resins – Request for Consultations*, 26 December 2006, WT/DS355/1.

¹⁰¹ Mercosur, *Controversia entre la República Argentina y la República Federativa del Brasil sobre: Aplicación de Medidas Antidumping contra la Exportación de Carne de Pollos Enteros, Provenientes de Brazil, Resolución No 574/2000 del Ministerio de Economía de la República Argentina-Laudo del tribunal ad hoc*, 21 May 2001, paras. 131, 147–148.

¹⁰² See, for example, Davey, *supra* note 43, at 351.

¹⁰³ Pauwelyn, 'Adding Sweeteners to Softwood Lumber: The WTO–NAFTA "Spaghetti Bowl" Is Cooking', 9 *Journal of International Economic Law* (2006) 197, at 198.

First, the network of PTAs, while ever growing, continues to be far more limited than often assumed, with the connections formed by adjudicatory PTAs covering less than 10% of the WTO's membership. Second, while WTO members have filed an impressive number of cases since the organization came into existence in 1995, the network of WTO disputes is extremely limited. Few members account for the vast majority of disputes and more than 98% of bilateral relations among WTO members have never been subject to WTO dispute settlement proceedings. PTA parties continue to file a large share of WTO cases against one another, close to one quarter of all WTO disputes. The vast majority of these disputes, however, could not have been adjudicated under a PTA DSM. Lastly, the total number of PTA disputes is, indeed, low compared to the number of WTO disputes. Nevertheless, when considered from the perspective of the limited network of adjudicatory PTAs, PTA dispute settlement is not unusually idle, with at least 46 inter-state disputes being filed under 15 different agreements.

One significant insight drawn from the above analysis is that WTO dispute settlement continues to hold a central place in the rules-based global trading system. The lack of substantive disciplines in PTAs as well as their jurisdictional limitations lead to a situation in which the PTA network is unable to serve as a substitute for WTO dispute settlement in case of multilateral failure. Moreover, PTAs will continue to be unable to assume this position for many years to come. However, at the same time, the analysis presented in this article shows that there is no widespread preference for WTO proceedings over PTA dispute settlement. If this preference exists at all, it is far more limited than previously assumed. In total, only 38 out of more than 600 bilateral WTO disputes could have been settled by recourse to a PTA. Thus, statistically, the best explanation for why WTO members do not avail themselves of PTA procedures more often is quite simply that they could not have done so.

Moreover, it appears that a significant number of PTA cases could have been settled in WTO proceedings. General observation as to the superiority of WTO dispute settlement may have to be rethought. Further research could analyse the approximately 60 PTA and WTO cases that could have been brought in either forum. In a first step, one would have to determine what factors influenced the forum choice in each of these cases. In a second step, one could attempt to distil common themes. Importantly, such research should not assume the WTO's superiority and on that basis seek to explain forum choice in favour of the WTO by reference to its features. Previously advanced explanations continue to be *plausible* and may help to explain particular instances of choice of forum. Without further empirical analysis, however, it remains unclear if these are *valid* and can serve as general explanations.