Friendship and Trade Agreements

Kenneth Stiller, University of Bayreuth & EUI
Karolina Milewicz, University of Bayreuth
Duncan Snidal, Nuffield College, Oxford

This version: 31 August 2025

Draft

Despite the proliferation of Preferential Trade Agreements (PTAs) with increasingly sophisticated dispute settlement mechanisms (DSM), very few trade disputes are directly resolved through these formal procedures under PTAs. The goal of this paper is to establish these causal interconnections and explore the underlying mechanisms that lead to these results as a step toward a broader view of the role of trade institutions encompassing both formal and informal dispute resolution.

Our argument is that PTAs go beyond their ostensible purpose of expanding trade relations among states, and even beyond their deepening of those relations in related nontrade areas, to changing the *legal and social relations* among states. These social relations among PTA members are reflected in their joint management of disagreements. Joint management allows PTA partners to address issues as they emerge and before they become full blown disputes whether under the PTA or by being escalated to the WTO or even open trade disputes. Key to this joint management is the "friendship" that emerges among state representatives that allow them to address disputes as a common threat needing resolution rather than as purely distributive issues driven by separate self-interests.[1] Thus, to understand the full impact of PTAs we need to go beyond their formal legal properties to examine how they operate as social institutions.[2]

In the theory section of the paper, we lay out a model of friendship and of trade disputes that traces the relation of institutional design to the handling of disputes in the PTA and, in turn, whether those disputes are resolved or escalate. As is often the case with legal systems, however, trade dispute mechanisms are most effective when they are least used. Effective dispute mechanisms create the "shadow of the law" that leads participants to settle their differences, typically relying instead on informal arrangements such as consultation and private negotiations as means of joint management to make sure that the trading system operates efficiently (Ostrom 1990). Moreover, many WTO disputes are primarily about clarifying "interpretation of vague provisions" (Maggi and Staiger 2011) and therefore are closer to the managerial understanding of international organizations (Chayes and Chayes 1995) than to the enforcement understanding (Downs et. al. 1995). In this way, enforcement of trade arrangements moves beyond the narrow confines of formal dispute settlement to a broader sense of institutional partnership and joint management, which is strongly enhanced by the emergence of friendship among the parties.

[1] While this bears a resemblance to the distinction between integrative versus distributive bargaining in economic negotiations (Walton and McKersie, 1965; see also Lax and Sebenius, 1986), bargaining is focused centrally on individual self-interest whereas social relations and friendship go to broader motivations.
[2] The move towards social relations also relates to the literature on the 'de-FTAization' of trade governance.

Importantly, explaining the pattern of (formal disputes) requires an understanding of the principles of cooperation that govern (the use of DS institutions in) PTAs. The surprisingly small number of disputes beyond informal consultations – even though increasing in recent years - could reflect attempts to avoid open confrontations in the form of inter-state disputes. Giving private actors and supervisory interstate bodies access to DS usually results in a large number of formal disputes being initiated.[3] This might indicate that states seeking to avoid escalation between themselves cause the small number of inter-state disputes, rather than the absence of contentious issues. Hence, friendliness and the desire to avoid confrontation might play a crucial role in dispute settlement.

Although preliminary, our understanding of the relation of dispute settlement in PTAs and WTOs provides a broader perspective on how the institutions that govern dispute settlement in international trade matter. The intricacies of institutional design may matter not as much as the desire of states to show restraint and the informal institutions through which they do so.

1. PTAs and Dispute Settlement

PTAs are a widespread element of international trade governance. Indeed, more trade volume is, at least technically, covered by PTA than by WTO rules (Heydon 2011, p.238) – despite the general absence of PTAs among the largest markets. Every member of the WTO has concluded at least one such agreement, which usually goes beyond multilateral rules in scope and depth, thus enhancing trade relations among the parties.

PTAs create a *legal and social* environment that helps states better manage international trade relations−including their disagreements. PTAs are incomplete contracts since even the most comprehensive agreement cannot anticipate the myriads of possibilities that might occur. This is especially true for agreements that go beyond pure trade consideration to consider nontrade issues such as the environment or human rights where matters are less well defined. To deal with this problem, PTAs typically include DSM provisions on what to do when diverging interpretations of the treaty text, or other disagreements not foreseen during negotiations arise. More importantly, PTAs also provide a broader institutional and social setting in which to resolve these issues.

While DSM provisions are typically treated as legal arrangements, in practice they vary widely and range from informal consultations to formalized, permanent institutional arrangements. These all serve the same purpose but operate very differently, as we detail in the model on trade disputes below. In particular, whereas more formalized arrangements draw on the legal text and procedures created by the agreement, informal arrangements depend much more on the social environment (which is also created through the PTA arrangement). PTAs are often well-suited for informal dispute resolution insofar as they are constructed among like-minded states with similar goals and perspectives and because they typically involve smaller numbers of actors.

Despite deeper and enhanced trade relationships within PTAs – which often require a more intricate management of relations and, thus, should present a greater risk of disagreements and confrontations – dispute settlement mechanisms under PTAs are rarely invoked (Nakagawa

[3] Tallberg, J., & McCall Smith, J. (2014). Dispute settlement in world politics: States, supranational prosecutors, and compliance. European Journal of International Relations, 20(1), 118-144.

2007; Porges 2011). This is surprising as the risk of disagreement should increase with the scope and depth of the agreement. This, however, seems not to be the case. On the contrary, the absence of dispute resolution in the context of deep trade ties and increasingly institutionalized and sophisticated dispute settlement mechanisms remains a puzzle.

2. Social Relations and Friendship

To understand this pattern, we conceptualize social relations as a continuum ranging from transactionalism (no friendship) through instrumental friendship to (true) friendship. Whereas the development of a purely transactional partnership into instrumental friendship is often facilitated by greater institutionalization and legalization, the transition from instrumental friendship to a deeper "friendship" depends on processes of socialization which often take place within institutionalized settings. These three points on the continuum are depicted in Figure 2 and we discuss them and the movement between them below.

Friendship is a complicated concept with multiple meanings and connotations. Whereas instrumental friendship is about material and other gains (cf. Cicero), friendship can come with material benefits but does not seek them. In Aristotelian terms, friendship is not about mutual benefit or even shared enjoyment but is a virtue that entails concern for each other's well-being, shared values, and common goals. Friendship is valuable in facilitating the exchange and interpretation of information, for encouraging open and frank discussions, for understanding others and their goal and for reducing suspicion and increasing trust.

Friendship is conventionally applied to interpersonal relations, so we need to be careful in stretching the concept to cover relations between collective entities such as states. For now, we remain agnostic on whether ascribing friendship to states (Wendt 1992, Berenskötter and van Hoef 2017) is useful or is extreme concept-stretching. We manage this by focusing on how institutional context enables interactions among individuals who represent states in managing trade disputes. We also differentiate interactions among top officials – who often do not have time or circumstances to build interpersonal relations – from interactions among lower-level officials who (given the right institutional setting) may be able to build and utilize something close to friendship.

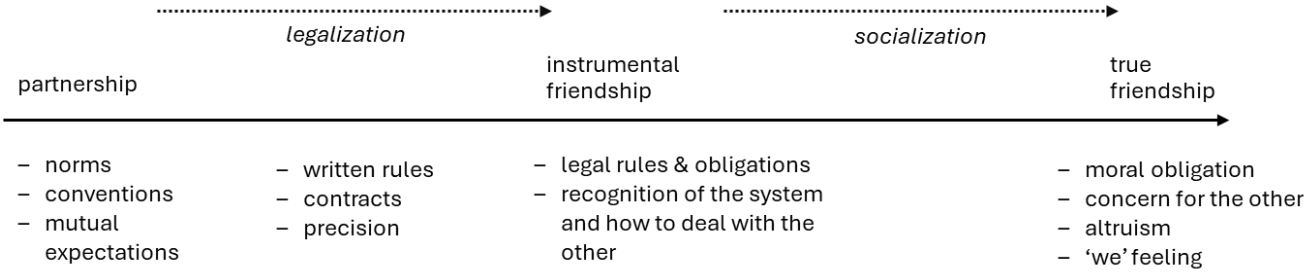

Figure 2. Model of Social Relations.

Finally, although our immediate case involves trade disputes and so is closely tied to economic and material considerations, we stress that our argument applies to interrelations among states more generally. To illustrate how the argument below might apply to a different issue area, consider how relations among members of the NATO alliance differ from relations within traditional alliances. Historically, alliances have been more like marriages of convenience

expected to last little longer than the immediate reasons for their formation. Thus, the United States allied with the Soviet Union to defeat the Nazis, but there was no common basis for continuing the relation once Hitler was defeated. The presumption underlying NATO is much deeper and has deepened over time. Members agreed through a formal legal arrangement that they would contribute to their common defense and, if any individual member were attacked, then all members would unquestionably come to its defense. If there were no doubt about this guarantee – as there would not be within the United States if California or another US state were attacked – then NATO would fall into the friendship category. Because there was some doubt about this in NATO's early years, however, the US positioned "tripwire" troops in West Germany to ensure that the US would be ensnarled in any major Cold War conflict with the Soviets. The common reaction to the 9/11 attacks where the Europeans stood by the US in the absence of a direct threat to themselves, and the common reaction to the Ukraine crisis, suggested that the NATO commitment is stronger than a legal treaty agreement, which can always be ripped up. As it currently stands, however, NATO is probably still more a case of instrumental friendship – although far enough along the spectrum of friendship that it provides a fairly strong guarantee to its members. Doubts about this guarantee were heightened with Donald Trump's view that the NATO guarantee is contingent on whether states have "paid their contribution," which would move the relationship back to transactional cooperation.[4]

2.1. Transactional Cooperation

Even enemies sometimes cooperate with one another out of necessity as, for example, Germany and Russia continue to do despite Western sanctions during the Ukraine war. Conflicts or outright hostilities fundamentally change the extent to which states cooperate – but do not necessarily mark the end of any relationship. Usually, this entails a reduction to severely more limited and well-defined transactions, such as regular prisoner exchanges. States that are not enemies but have minimal social bonds between them also exchange benefits through transactions. In such relationships, participants accept certain basic rules and principles – sovereignty, property rights –to facilitate their transactions, but nothing more. Transactional relations can be as thin as pure mutual acceptance of the other's existence but can also involve some mutual expectations between the actors.

For these sorts of relations, we often talk in international politics about states as partners, as in "trading partners." No matter what these relations are concerned with, they all entail what Keohane (1986) described as specific reciprocity based on a direct and immediate exchange of benefits. According to Hopf (1998, 188) "[s]ocial bonds enhance trust, openness and therein reduce uncertainty between states. These characteristics, therefore, mark a state of partnership, but not friendship." Transactional partnership is typically much thinner than many other relationships where the language of partnership is invoked – including business partners, bridge partners, tennis partners, and sexual or intimate partners.

Interestingly, in the context of trade, when the General Agreement on Trade and Tariffs was being drafted, the United States insisted that participating states be referred to as "contracting

[4] Speaking at a campaign rally in South Carolina in February 2024, Trump described a conversation with a fellow head of state at an unspecified NATO meeting: "One of the presidents of a big country stood up and said, 'Well, sir, if we don't pay and we're attacked by Russia, will you protect us?'" … "I said, 'You didn't pay. You're delinquent.' He said, 'Yes, let's say that happened.' No, I would not protect you. In fact, I would encourage them to do whatever the hell they want." *Washington Post* 10 Feb 2024.

parties" rather than as members. While there were legal arguments for this, the primary reason was the symbolic one of emphasizing the limited nature of the underlying obligations by emphasizing the transactional rather than organizational aspects. The United States sought not be entangled, as friendships sometimes do.

2.2. Institutionalized Cooperation and Instrumental Friendship

Pure transactionalism is the standard assumption of cooperation theory where institutions are thin and cooperation is enforced only by direct incentives, such as those offered by repeated interactions. Because this does not provide a very solid footing for cooperation – especially when interactions are infrequent, or information is poor – states have incentives to create institutions that strengthen the basis for cooperation. But even when created primarily to facilitate transactional cooperation, institutionalized cooperation can entail and build stronger social relations. Legalization is one important form of this but other forms of institutionalization such as joint delegation to international organizations have a similar impact.

Institutionalized cooperation can lead to instrumental friendship, which corresponds with the Aristotelian friendship of utility and is a key concept for international politics and diplomacy. In Figure 2, it is positioned between transactionalism and friendship. It emerges when joint and on-going participation in institutions leads to a sense of belonging to a common group which facilitates cooperation not because of a concern for others' welfare but because it demarcates who is supposed to cooperate and enables strategies that support cooperation. It also provides a setting in which parties can share information, get to know each other (and their preferences), and monitor their behavior against agreed standards. Finally, institutionalized cooperation promotes *diffuse reciprocity* based on broad cross-issue and long-term exchange of benefits that goes beyond immediate payoffs. As such it can lead to a recognition of the values of the institutions themselves, the development of trust among actors and ultimately a sense of community. This moves things rightwards along the continuum in Figure 2.

2.3. Socialization from instrumental friendship to true friendship

Socialization is necessary for instrumental friendship to develop into a true friendship. Aristotle differentiates between friendships of utility, pleasure and virtue. Whilst the former two are motivated by self-interest, true friendship is only "the friendship of good people similar in virtue" (1999: II.6). Oelsner and Koschut invoke the term normative friendship to clarify Aristotle's notion of virtue; they argue that "normative friends genuinely trust each other because their relationship is not based on instrumental rational thought process and utility-based cost-benefit calculations but is manifested as an emotional and moral disposition" (2014: 14-5). Mutual trust, reciprocity and honesty are necessary elements of friendship, but insufficient in themselves. Only normative or virtuous friendship, based on overcoming self-interests, deserve the name. This requires that actors change their value and belief systems in ways that allow them to form new identities. Put differently, actors need to internalize the norms and of their community in ways that lead to a change of their own interests and identities.

Institutions, including those created for instrumental purposes, may play a central role in facilitating these socialization processes. Relational ties motivated by interests can develop over time into communities with shared values, identities, and trust (Adler and Barnett 1998). However, institutional settings can be propitious to the development of friendship – but only as a necessary and not a sufficient condition. They are necessary because actors need to interact

to develop friendship. But they are not sufficient because actors do not necessarily become friends through interaction – they may stay neutral or even become enemies. Indeed, sometimes institutions are designed to prevent the forming of friendship. For example, institutional rules for rotating policemen are implemented to prevent them from becoming too cozy with their populations. The same logic explains why states rotate the stationing of diplomats between different countries so that they do not "go native" and become too friendly to any particular foreign country.

Building upon up these considerations on friendship in IR, altruism or 'selflessness' could be used as the decisive distinguishing element between the two. However, that is often hard to distinguish empirically.[5] States apparently acting opposite to their interest is indeed irrational - unless such behaviour serves some other, long-term interests. But even purely transactional states can be expected to show strategic restraint in the event of disagreements in trade policy in order to maintain cooperation in the long-term. Restraint can also be a result of states' awareness of the reciprocal nature of their trade partnerships. In complex and deeply integrated trade, (mutual) minor violations seem inevitable. Cooperation might not be sustained if such issues were escalated, and instrumental friendship supported through institutions can make this a realistic possibility. Friendship can be seen as going beyond this. The occasional request for formal discussions under PTAs might be considered a signal of dissatisfaction with the trading partner's attitude rather than the initiation of a dispute intended to be pursued. Indeed, states are concerned to maintain a friendly tone and maintaining the relationship among the parties becomes more important than are specific outcomes. As a Chilean negotiator put it, *"we don't even call them disputes, we call them disagreements."*[6]

2.4. The Level of Analysis and the Role of Actors

When building an argument on the social effect of PTAs around the concept of friendship, we should be clear about the actors we refer to. Most importantly, we distinguish between states and individuals as actors (see also Table 1). The predominant (and our) view is that PTAs are the formal expression of enhanced social relations among *state actors* on trade matters. But we do not assume socialization at the level of states, so remain agnostic as to whether true friendship among states themselves is possible. Instead, we emphasize that relations among individuals – i.e. bureaucrats and negotiators- are different from and potentially deeper than those among states and can substitute for state friendship itself (see Nair 2020).

Inter-individual and inter-state processes both involve formal and informal – that is, social – relations that affect interactions among individuals or states. The same holds true for inter-state relations on a more abstract level. However, we argue that socialization only happens among individuals and not states. The absence of socialization processes among states in turn implies that only instrumental friendship can be build up among states, but not true friendship.[7] For the

[5] This is also reflected in numerous debates in neuroscience and psychology over the empirical nature of altruism as well as the usefulness of its being contrasted to self-interest.
[6] Interview with Felipe Tagle Ramirez, SUBREI Chile, 28.10.2020.
[7] If national interest refers not just to what state leaders think it is but instead refers to deeply held views among the broad population, then we could get true friendship among states whose populations believe they are "one" with members of another state. This is an important aspect of nation-building where people of different regions or circumstances come to see themselves as "one" and why, in the NATO example above, California is different than Germany from the US perspective. It is also what the EU-building process has aspired to (but not yet achieved). This approach locates socialization processes at the individual level but argues that friendship can be aggregated from individuals to the state. When we focus on negotiators below, we treat them as using their

most part, friendship is theoretically unsound in the realm of IR, and altruism as the crucial component of friendship is incompatible with the purpose of states to further the interest of its citizens. By logic, states cannot be altruistic and hence (truly) friends (Keller, 2009: 67; Sloterdijk, 2009: 9).

The distinction between social relations among individuals and states is visualized in Table 1 below, where X indicates the possibility of each type of social relation.

	Individuals	*States*	*Required for*
Asocial Relations	X	X	Transactionalism
Social Relations	X	X	Instrumental Friendship
Socialisation	X		Friendship

Table 1: Social Relations among States versus Individuals

3. PTAs and Trade Disputes

The general design of dispute settlement is fairly uniform across PTAs. The central focus of dispute settlement usually rests on the formal institutions and procedures, which broadly follow a three-tiered sequence: if triggered, (i) formal consultations are followed by (ii) mediation, and, if not resolved, (iii) arbitration. *Consultations* provide a framework for the parties to deal with disagreements in a loosely formalized way in the shadow of a potential escalation of the conflict. *Mediation*, sometimes also referred to as good offices or conciliation, involves bringing in a third party to assist PTA parties to reach agreement. This potentially costly step indicates that parties were not able to resolve the initial disagreement among themselves. *Arbitration* is formalized but only partially legalized, meaning that it usually takes the form of an ad hoc panel with three or five members making decisions that are usually - but not always - binding on the parties. The lengthy examination by specialists and subsequent ruling on the issue, however, carries significant weight.

While the formal dispute settlement mechanism is an essential part of virtually all PTAs, their limited use indicates that these formal institutions are not the central element to dealing and resolving disagreements. Rather than adjudicating every alleged breach, the aim of dispute settlements mechanisms is to structure the underlying trade relations among the parties and enable (further) cooperation. Parties' actual behaviour and use of DS institutions should therefore be evaluated in this light. In other words, the objective of dispute settlement systems is to maintain the mutual perception of fair and fruitful relations, even when contract violations are registered.

Even the WTO dispute settlement understanding, which has witnessed a proliferation of disputes, operates under this principle. In joining the WTO, states forfeit their right to unilaterally veto any dispute proceedings and, thus, the imposition of sanctions if a member state was found in breach of trade rules. Yet, the principal aim of dispute settlement in the

individual-level friendship to guide state action and allow for the possibility that this enhances friendship among states.

WTO remains achieving compliance with trade rules - rather than the punishment of parties that breach trade laws or retaliation. In doing so, the mechanism prevents disputes from spilling over into wider conflicts and escalating into trade wars (Schwartz and Sykes 2002, p. 200).

This is reflected in parties' behavior with respect to disputes. The relative restraint WTO member states show in their conduct with the WTO DSM can be empirically observed. Some 120 WTO disputes have eventually been settled between the parties on their own, either by finding mutually agreeable solutions or by withdrawing the dispute. Another 99 disputes have been at the consultation stage for more than 20 years, without further action being taken. Furthermore, states adopt countermeasures in merely a quarter of cases when authorised to retaliate (G. C. Shaffer and Meléndez-Ortiz 2010, p. 82.) – and even when retaliatory measures are imposed, they typically are significantly below the authorized level (Vidigal 2017, p. 21).

Although the goal of dispute settlement remains the same, the prospect of escalation and potential losses of retaliation are much more severe under PTAs. PTAs are usually agreements between states with – extant or prospective - deeper economic ties, which indicates the importance of the relationships they govern. At the same time, the perception of unjust prosecution and dispute proceedings may more easily contaminate other trade-related or even political relationships among parties. Unlike in the WTO, PTAs do not delineate trade policy as clearly from parties' broader political relationship. The possibly adverse consequences of retaliation and tit-for-tat like responses are therefore more serious. This is particularly worrisome since minor breaches of treaty violations are almost inevitable in complex and intricate trade relations, providing states with ample opportunity to escalate disputes should they choose to do so. Facing the prospect of perpetual breaches of the agreement, states must decide whether to raise every perceived breach and whether in the long-term the formal escalation of a trade dispute and its repercussions is preferable to inaction or dealing with the issue in informal procedures.

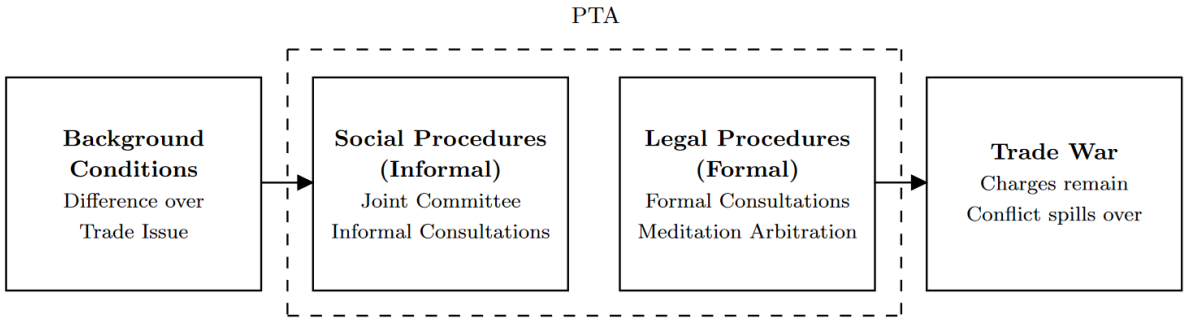

Figure 2: Schematic Dispute Resolution involving PTAs

It is in this context that informal procedures attain a central role in dispute resolution under PTAs – before any formal proceedings are initiated. Figure 2 schematically visualizes the full sequence of dispute settlement under PTAs. If a potential breach of the agreement is perceived by one of the parties, this will usually first be raised in informal consultations among technical officials and bureaucrats or in the PTA's joint committee. If they are interested in constructively managing their trade relations and maintaining mutual perceptions of fair conduct, the parties will often be able to resolve the issue, or at least de-escalate the

disagreement, at this stage. The processes are shaped by informal proceedings as well as anticipation of what will happen if PTA dispute settlement fails at that stage.

Flexibility in enforcement itself can help reconcile objectives and thus sustain cooperation even in dispute settlement procedures (Pelc and Urpelainen 2015). In fact, several plurilateral PTAs have adopted or are adopting additional arbitration protocols, such as CEFTA, the Agadir Agreement or the D8. Interestingly, this is also observed for regional IOs with regional courts: for example, Comesa (in 2018), the EAC (in 2012) and SIECA (in 2003) all adopted new rules on arbitration. Their member states seem to prefer the softer legalization of arbitral procedures with their lower costs and higher flexibility; conversely, the effectiveness of arbitration is enhanced insofar as the shadow of courts induces states to settle through arbitration. Thus the more formal institutions of PTAs are themselves often an expression of and embedded in the overall trade relations among parties.

Only when both informal and formal procedures are insufficient to resolve a dispute will it escalate beyond the institutional and social framework. If the PTA fails to accommodate such disagreements, a trade war involving chains of retaliatory actions may result. In this case, the deep divergences in parties' perception of how economic ties should be managed within the trade issue at hand spills over to the parties' general economic and political relations. Oftentimes, it then becomes a sensitive political matter that must be dealt with at the highest levels. Examples of such cases are the decade-old Airbus/Boeing dispute, softwood lumber in North America, or steel and aluminum tariffs imposed by the US.[8]

The difference between social and legal procedures, particularly between informal and formal consultations, may seem very minor, but is central for how PTAs govern and manage trade relationships. This also explains why states are reluctant to initiate formal disputes. Even if both informal and formal consultations involve the same people sitting in the same room talking about the same issues, the formalization of consultations signifies an escalation of the issue, including the likely need to consult with home officials not in the room. Facing the prospects of such – or further – escalation, trade representatives are concerned to maintain a friendly tone on behalf of their states. Informal or social processes therefore are central to PTAs.

3.1. Social Relations and PTAs

While the focus on DSMs typically leads to an emphasis on the formal mechanisms and institutional design of dispute settlement, the PTA setting provides for informal dispute settlement before proceeding to formal dispute.

Informal consultations are a crucial step *before* any more formal procedures are initiated. What happens in this process is reminiscent of Stewart Macauley's analysis that businesses rarely use formal legal means to enforce contracts. Instead, Macauley (1963: 10-11) observes that:

> "Disputes are frequently settled without reference to the contract or potential or actual legal sanctions. There is a hesitancy to speak of legal rights or to threaten to sue in these negotiations. Even when the parties have a detailed and carefully planned agreement which indicates what is to happen if, say, the seller fails to

[8] Note that PTAs are not necessary for a trade war and trade wars sometimes result from other disputes between the parties, as when military conflict is accompanied by various cut-offs of trade.

> deliver on time, often they will never refer to the agreement but will negotiate a solution when the problem arises apparently as if there had never been any original contract."[9]

For Macauley incomplete contracts are typically not resolved by formal dispute mechanisms but by common understandings and commitments among the parties. Their incentives to do so rest in the value of maintaining their ongoing interactions – both economic and social –and not letting secondary differences or misunderstandings get in the way of their mutually beneficial arrangement.

In terms of our friendship model, this corresponds to instrumental friendship built around specific reciprocity, though situated in the context of developing diffuse reciprocity. The institutions operate in the background.

A similar process occurs in the context of PTAs. In complex and deeply integrated trade relations, disagreements and minor violations are inevitable; cooperation might not be sustained if such problems are escalated. To maintain ongoing cooperation, member representatives informally discuss potential disputes as they arise, which helps address disagreements early on. These discussions are facilitated by the mutual recognition that discussions take place within the PTA, which simultaneously emphasizes both the linkage among covered trade issues and members' common commitment to pursue open trade. Informal consultations and discussions, which often take place on a technical level, are crucial elements in resolving disagreements under PTAs. They are sometimes supported by the existence of working groups; joint commissions or committees within a PTA (Dür, Gastinger 2021). Such joint bodies are usually organized on a technical or ministerial level and establish regular meetings among representatives of the parties. These meetings can either be general in character or address specific issues of the agreement. For instance, joint bodies can be tasked with reviewing agreed rules of origin, empowering them to respond to supply chain and other issues that may have arisen *after* the conclusion of an agreement. Finally, these consultations are facilitated by the "epistemic community" of trade lawyers and economists who know one another and interact frequently, share common values and perspectives, and have a common interest in the success of the PTA.

In terms of our friendship model, this situation begins to approach "true" friendship among the practitioners (the individual level). Relying on interpersonal friendship among negotiators using informal procedures has many advantages. They allow for ongoing "filling in" of the agreement, for the adjustment of details, and for resolving smaller problems before they become larger ones. Informal procedures also entail lower costs than more formalized procedures because they can be resolved within the PTA and do not create opportunities for outside parties to intervene in ways that might escalate issues. Finally, informality helps keep information private as disputes and dispute resolutions happen behind closed doors not visible to third parties; this "joint management" approach puts PTA parties in an advantaged position even beyond their direct trade relationship. For instance, the WTO non-discrimination principle can be violated since interested third parties are unaware of settlements under PTAs.

[9]Macauley's (1963:19). point is not that contracts are irrelevant but that focusing on their legalized aspects is insufficient and that "To understand the functions of contract the whole system of conducting exchanges must be explored fully."

Because of these advantages, virtually all PTAs call for informal consultation whether or not they include formal DSM procedures. For the many PTAs without formalized DSMs, informal resolution is the best available alternative. Indeed, even if the agreement doesn't explicitly contain them, we might expect representatives to adopt informal procedures to further the purposes of the PTA. In addition, formal DSM procedures make informal processes more effective. Violators of agreement are more likely to settle up in an informal process if the alternative is being compelled to make changes through a more costly legal procedure or a referral of settlement to the WTO; they may also be able to negotiate a better outcome (as may their disputants) through negotiation in an informal process than if the formal rules applied.

If informal arrangements are successful, disputants resolve their differences and "settle". This success will likely strengthen the use of informal consultations and joint management – and the role of trade negotiators – in addressing future trade disputes. But if informal arrangements are not successful in achieving resolution, then the dispute will move to the formal DSM under the PTA or will be referred to the WTO.

3.2. The same yet different: Informal and formal procedures

The informal and formal procedures serve the same purpose of resolving trade issues and preventing dispute escalation, but they do so in distinct ways. The prospect of subsequent formal legal procedures, moreover, alters the role of informal social relations. Beyond the flexibility of informal means to resolve disputes, these two differ in terms of the personnel in charge, their guiding mechanisms, and the relationships they give rise to.

	Social Procedures	**Legal Procedures**
Processes	Consultations	Arbitration, Adjudication
Formality	Informal	Formal
Level	Bureaucracy	Low Politics
Mechanism	Diffuse Reciprocity	Formal Rules
Relationship	Instrumental Friendship	Transactionalism

Figure 3: Differences between Social and Legal Procedures in PTA Dispute Settlement

Informal processes occur among trade experts, lawyers and bureaucrats of the parties who are in continuous exchange with each other. Working side by side in working groups or joint committee meetings, these exchanges can give rise to social relations among these practitioners. In other words, true friendships may emerge among practitioners – thus creating a common interest in avoiding disputes and their escalation as noted above in the Chilean negotiator's reluctance to *"even call them disputes, we call them disagreements*."

Building dispute resolution on interpersonal friendship among negotiators using informal procedures has many advantages. This allows for ongoing "filling in" of the agreement, for necessary adjustments of details, and for resolving smaller problems before they become larger ones. Informal procedures also lower costs compared to more formalized procedures because they can be resolved within the PTA. They also avoid politicizing the dispute among the parties or create opportunities for outside parties to intervene, both of which could increase the risk of

escalation. Finally, informality helps keep information private as disputes and dispute resolutions happen behind closed doors not visible to third parties; this "joint management" approach puts PTA parties in an advantaged position even beyond their direct trade relationship. For instance, the WTO's principle of non-discrimination can be violated as interested third parties are not aware of settlements under PTAs.[10]

A similar atmosphere guides states' behavior in the joint committees that manage and are instrumental in the implementation of PTAs. For example, as we show below with respect to the UK-Andean Countries-PTA joint committee, parties can raise concerns about deficits in filling in rule of origin certificates even as they offer mutual assistance to deal with the problem. Concerns about potential amendments to relevant laws can be combined with promises to keep the other parties updated on any plans to change laws that would have meaningful impact on main export goods.[11] Similarly, excerpts from a typical dialogue - on the Northern Ireland protocol – reveal that 'the UK explained the new legislation that has been introduced in Parliament, to address any practical problems in the implementation of the Agreement.' [...] 'The Andean Countries thanked the UK for the information.' [...] 'The UK directed the Andean Countries to GOV.UK for the latest information.'[12] In short, informality allows negotiators to deal with evolving intricacies that are beyond the specification and precision of the agreements or even the legalistic resolution of them.

Related to this common interest among practitioners is the *diffuse reciprocity* these processes entail, which also reflects the role of cultural norms in negotiations (Nair 2019). Negotiators seek to prevent formal disputes not for their trading partner's sake but for the sake of the general spirit of cooperation within the process and to maintain their interpersonal relations. One of the few interstate disputes brought to the court of the Eurasian Union stresses shows the advantages of restraint. The dispute involved 14 rounds of consultations,[13] which usually suffice to resolve any disagreements.[14] The prospect of such a lengthy formal process underlies states' preference for dealing with disagreements informally. Even though informality was unsuccessful in this case, formal disputes remain only as a measure of last resort.

The scope of parties' social relations extending beyond the limited issue at hand underlines the point that PTAs and their substantive rules are embedded in broader social relations that guide the use of formal rules. For instance, several states might have a common PTA but negotiate collective agreements with outsiders. The social dynamics between negotiators generated within the PTA change their collective negotiations: they work together and quite literally sit on the same side of the negotiating table. As one Mercosur negotiator described the contrast between internal coordination and external negotiations in joint negotiations: 'what we have within Mercosur is a negotiation, as much as with third states - as friends, but these are negotiations.'

[10] Interview with Felipe Tagle Ramirez, SUBREI Chile, 28.10.2020.
[11] https://www.gov.uk/government/publications/uk-andean-countries-committee-documents/21-to-22-july-2022-joint-minutes-of-the-first-uk-andean-trade-committee
[12] https://www.gov.uk/government/publications/uk-andean-countries-committee-documents/21-to-22-july-2022-joint-minutes-of-the-first-uk-andean-trade-committee
[13] For details on the dispute between Russia and Belarus, see: https://legalacts.ru/doc/reshenie-suda-evraziiskogo-ekonomicheskogo-soiuza-ot-21022017-ob-ustanovlenii/.
[14] Interview with Anastasiia Ruzavina, Russian Delegation to the WTO, 26.05.2021.

However, there are differences between informal and more formal negotiation. Internal coordination in Mercosur happens continuously, during or between rounds, via instant messengers, or informally '*during breakfast or with a beer in your hand'*. Importantly and beyond substantive interests, their success depends on some sense of a common interest or even solidarity, particularly when small states operate under capacity constraints. Small states, such as Liechtenstein in EFTA, that cannot send delegates to all negotiation groups rely on being informed by their fellow members, who - in turn - must respect the absent member's right to approve or reject negotiated outcomes. T this requires some level of trust and solidarity among practitioners.

These relations and experiences of practitioners also spill over and affect their conduct when it comes to trade rules between their own states. As they increasingly recognize the prospect of a common goal even in bilateral relations, negotiators will be more inclined to deal with disagreements amicably. In consequence, they should seek resolution on the technical level and avoid an escalation to political actors. The result is an instrumental friendship also between states, based on the principle of diffuse reciprocity, which goes well beyond pure transactionalism. Disagreements are dealt with in accordance with these principles.

4. Expectations

The role of social relations in international trade and the instrumental friendship that arises from PTAs should be reflected in states' conduct with respect to their trading partners – and how states use the formal institutions that are available to them. Broadly speaking, we expect states to show a level of restraint in their actions that cannot be explained by substantive or institutional factors alone. Thus, we assume that

Assumption: *States are instrumentally friendly in bilateral or plurilateral trade relations depending on social interactions within the institution.*

Following our theory, this assumption entails other important theoretical implications.

Implication 1*: States do not initiate formal bilateral inter-state disputes when disagreements arise.*

Disputes seen as unwarranted by trading partners can provoke reciprocal actions that might even escalate into wider trade conflicts (Alter 2003, p.789). In the worst case, the joint management necessary to effectively implement PTAs may come to a halt and endanger cooperation at large. Consistent with both rational choice theory and prospect theory (Mercer 2005), this should then lead states to exercise restraint as any award they may win in arbitration will generally be dwarfed by the potential adverse consequences of such escalation. In short, before initiating a dispute, states will carefully consider alternative ways of handling the problem.

Implication 2: *Private actors or international bodies initiate formal disputes when disagreements arise if authorized to do so.*

But other actors may not be similarly constrained. Two of the most consequential differences between dispute settlement for international trade versus dispute settlement for international investment lies in the differential access of various stakeholders to dispute initiation and, consequently, the role played by states. Whereas corporations usually have direct access as

complainants to the dispute settlement mechanism in investment issues, trade disputes commonly are dealt with between states. This is not to say that nonstate stakeholders play no role in international trade disputes – quite on the contrary, as they are directly affected by trading restrictions and their adverse consequences before anyone else. Importantly, trade stakeholders cannot take direct action but have to raise complaints indirectly through their home government, which in turn can address such issues in the framework of the PTA.

States thus function as gatekeepers when it comes to formal trade dispute settlement – gatekeepers that are interested in diffuse reciprocity and amicable relations. This can put states in an awkward position, facing a trade-off between representing domestic interests and being disruptive to international cooperation. Their incentives are different for other actors. As just noted, individuals and corporations are not specifically interested in the general tone of inter-state relations. By contrast, supernational surveillance authorities are charged with being impartial and guardians of treaties, and tasked with enforcing them (Tallberg and Smith 2014). Therefore, when these other actors have direct access to formal dispute settlement and are authorized to initiate disputes, they will initiate a larger number of formal disputes.

Implication 3: More formal disputes are initiated under plurilateral PTAs - despite deeper and closer relations among parties than in bilateral PTAs.

How states deal with potential disputes also depends on what type of treaty these disagreements emerge from. In general, plurilateral PTAs should witness a significantly larger number of disputes than bilateral ones. The mechanism is twofold. First, plurilateral PTAs, particularly those attached to regional international organizations often are much more comprehensive in scope and create much deeper trade relations. These broader and deeper trade relations affect a myriad of non-trade issues increasing the potential for disagreements. Second, the presence of third parties throughout the process can reduce the risk of a subsequent spiral of escalation. As opposed to the bilateral case, states do not carry out their disputes in private. The presence of a third party can reduce the risk of unwarranted retaliation by providing an assessment of the justification of their fellow members' actions. The presence of third parties is known to change the behavior of institutions (Honig et al. 2023). Both bureaucrats (Anderson et al. 2019) and political leaders (Carlson and Seim 2020), for instance, alter their behavior if decisions are disclosed to the public. Third parties, particularly if unconcerned by the substantive issue at hand, can serve as brake to spirals of escalation, overseeing *how* disputants interact and take a stance against unjustified or overproportionate measures.

Implication 4: *States adjust institutions to the shadow of the law.*

Even in deeply integrated trading blocs and plurilateral PTAs where states can resort to adjudication, less formal approaches to dispute resolution can play a meaningful role in preventing disagreements from escalating. As states become aware of the importance of informal dispute resolution and social relations, they adjust the menu of institutions available to them. Informal resolution becomes more effective and is less disruptive to cooperation. While no such adjustment is necessary in the case of bilateral PTAs where informal consultations are antecedent to any formal proceedings, this is not the case for highly legalized arrangements. Particularly in regional international organizations that initially established a regional court – possibly as a symbol of successful regional integration precisely because of judicial and legal powers – states may only subsequently supplement formal institutions with less formal processes. Alternatively, parties may open up dispute settlement proceedings to

non-state actors to prevent straining their broader relations while allowing meaningful substantive disagreements to be settled.

5. Empirical Observations & Case Studies

We evaluate our empirical expectations against general trends and a small number of in-depth cases. To do so, we collected original data on disputes under both bilateral and plurilateral PTAs. General patterns of dispute initiation are displayed in Figure 4.[15] Identifying disputes, particularly those at the margin between formal and informal dispute settlement, is not straightforward. Figure 4 shows the cumulative number of formal disputes by the type of party involved.[16] State-to-state dispute settlement, such as those taking place in the WTO, only account for a fraction of all PTA disputes, and has been stagnating while the number of disputes initiated by regional IOs (RIOs) or private actors such as corporations or individuals is growing substantively. On a global scale, state-to-state dispute settlement has been outmatched by states losing their gatekeeper function and authorizing other actors to initiate disputes – thus presumably bringing disputes closer to actors that are directly affected by treaty breaches or whose very purpose is ensuring compliance with treaties.

Analyzing state-to-state dispute settlement in greater details reveals stark trends. Most importantly, the numbers differ dramatically for bilateral and plurilateral PTAs. While disputes under plurilateral PTAs are not uncommon, those under bilateral PTAs are almost negligible – we count 15 distinct cases. In other words, state-to-state disputes are almost exclusively confined to regional trade agreements; there are only isolated cases under bilateral agreements. A majority of state-to-state disputes have occurred under NAFTA or its bilateral predecessor agreements (51%), followed by the Central American Integration System, MERCOSUR, ECOWAS, and the Andean Community.

The enhanced trade relations associated with modern PTAs and the simultaneous lack of formal disputes under these agreements, especially in settings where disputes can only be initiated by states as is usually the case for bilateral PTAs, further suggest that states may treat disagreements differently if they arise within the context of an institutionalized bilateral or plurilateral trade relationship. The implication is that underlying relations alter states' behavior beyond the institutional design of PTAs – such as through arbitration or joint committees which are relevant to both bilateral and plurilateral PTAs.

[15] Note that in order to prevent distortion, the Figure does not display the numerous cases of infringement procedures of the Andean Community or any cases within the EU. As of summer 2024, the EU Commission had issued just more than 24,000 decisions in infringement procedures. It is noteworthy that while about 2500 of these cases had been brought to the ECJ, the ECJ has only ever heard nine inter-state cases, six of which were decided by the court. See http://www.statewatch.org/media/documents/news/2019/nov/eu-meijers-cttee-opinion-interstate-procedures-the-rule-of-law.pdf.

[16] Note that "type of party" generally refers to the complainant. However, there is a very small proportion where the defendant is a non-state party. In order to isolate state-to-state disputes, these are assigned to the corresponding category of the defendant.

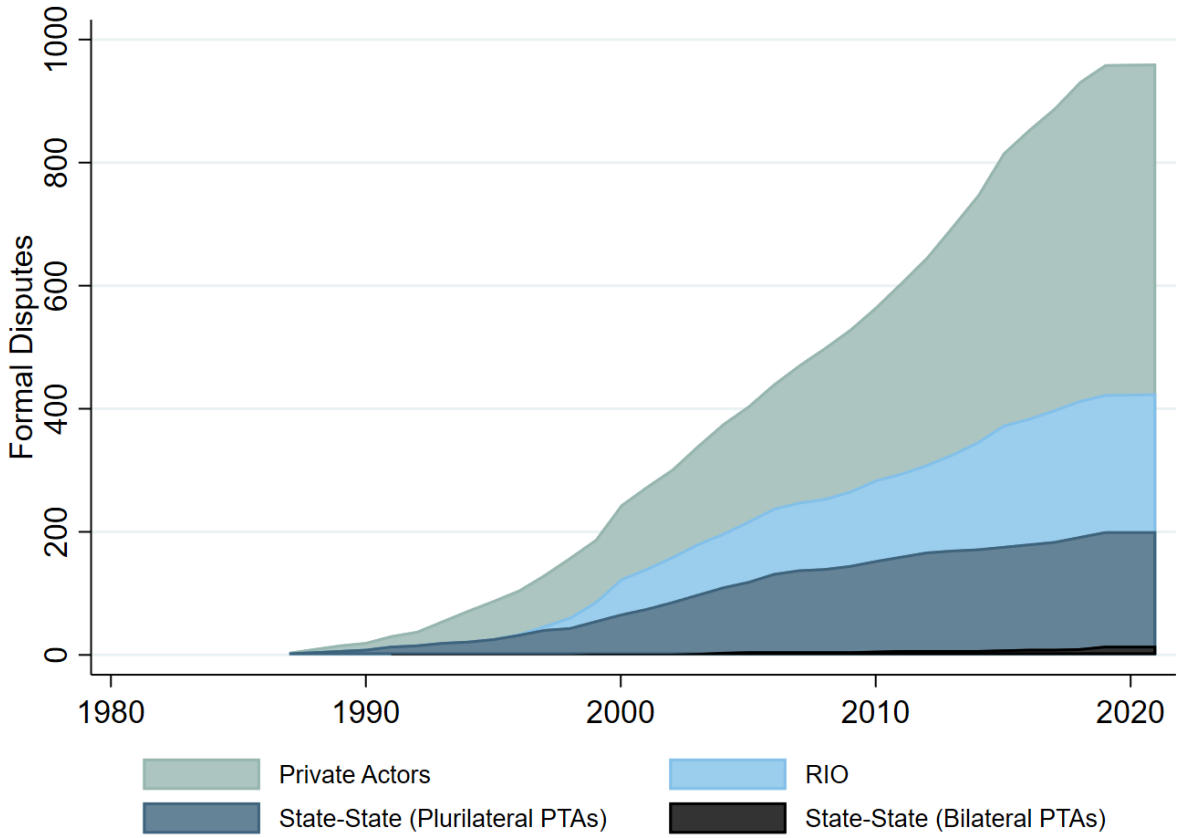

Figure 4: Formal Dispute Settlement under PTAs by Type of Actor over time.[17]

The escalatory potential of bilateral disputes and the precedence of informal resolution over institutional design is reflected in a series of disagreements between Colombia and Chile. Colombia brought a dispute over Chile's reclassification of sugar to the WTO in 2001[18], and three years later requested arbitration proceedings under a bilateral agreement with Chile. Once Chile did not comply with the arbitration panel ruling in favor of Colombia, the Columbian government decreed unilaterally suspended benefits.[19] In turn, Chile retaliated by initiating new dispute proceedings under the bilateral agreement against the previous decision. The conflict was ultimately resolved through negotiations and the conclusion of an additional protocol to the agreement in 2006 which added new substantive and institutional provisions. Importantly, the protocol explicitly states that the parties consider both bilateral disputes to be terminated and that Colombia agrees not to pursue the WTO dispute any further.[20] It further entailed a joint commitment to negotiate a comprehensive bilateral PTA, which was concluded three years later – and hasn't seen any formal disputes yet.

The anecdote illustrates that social relations matter - but also that formal proceedings only reveal parts of the story as negotiations, consultations especially if unfolding in informal

[17] Own data. Note that the figure is omitting four inter-state disputes in EFTA in the early 60s. Strikingly, these are indeed the only interstate disputes to have occurred under EFTA.
[18] https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds230_e.htm
[19] Decreto 3146, 27 September 2004. https://www.suin-juriscol.gov.co/viewDocument.asp?id=1780941
[20] Article 8, Seventh Protocol to ACE 24.
http://www2.aladi.org/biblioteca/publicaciones/aladi/acuerdos/ace/es/ace24/ACE_024_007.pdf

settings, and social relations can easily be overlooked. In particular, our data cannot exhaustively describe the extent and relevance of consultations as part of dispute settlement proceedings as data are either unavailable or are not systematically recorded by states themselves[21]. To address this problem, we analyze a small number of cases studies that allow for in-depth views of partial aspects of our proposed theory.

5.1. When States Choose Restraint over Escalation: Consultations in Mercosur

Institutions such as joint committees play an important role in dealing with issues that arise among parties, including, but not limited to, disagreements and potential disputes (Gastinger & Dür 2021; Dür & Gastinger 2023). For example, disagreements under EU PTAs are discussed and often resolved in joint committees, which are intended to reflect the complementary character of joint bodies and adjudication (Melillo 2019). Importantly, dealing with contentious issues through implementation is one of the central tasks - even if not explicitly so - of these committees.

While useful as an alternative forum, joint committees and informal consultations may not fully resolve all disagreements. Diffuse reciprocity also makes states show restraint in *how* they use these channels. Even when disagreements cannot be resolved informally but persist, in order to preserve informal relations states may decide not to escalate beyond consultations by initiating formal disputes. States therefore have to decide to what extent they seek to use these institutions – and how disruptive for their trade relations the consequences of any further steps could be.

To illustrate this, we leverage the case of Mercosur, which is a rather rare example of a trading bloc that publicises information on (informal) consultations and their respective outcomes. Mercosur records on consultations allows us to identify cases and the way states chose to deal with them.

Mercosur members have access to a three-tiered dispute resolution system. The first *diplomatic* stage entails negotiations and consultations.[22] These take place on a technical level within the framework of Mercosur's Market Commission, which is a technical body tasked with maintaining the functioning of the common market. In terms of hierarchy, it is situated below the Common Market Group, which is comprised of ministerial representatives and therefore political in character.[23] The second *political* stage entails an escalation to precisely that group, handing the case over to ministerial representatives. Despite Mercosur's careful distinction of these two stages, 'there isn't really a difference in practice'[24] beyond the switch from technical to political negotiators. Third, the *judicial* stage entails an ad hoc arbitration tribunal – and, additionally since 2004, the standing Mercosur tribunal of revisions.

Despite the dispute settlement mechanism's legal character, members typically address disagreements in the diplomatic and political stages of dispute settlement that precede adjudication. In fact, despite hundreds of consultations, only 12 arbitration awards have been issued throughout Mercosur's history, the last one in 2006, whereas only six verdicts in four

[21] Several interviews with officials revealed that consultations tend not to be recorded while institutional memory can be short.
[22] Note that while Mercosur refers to this stage as diplomatic, this is mainly to delineate it from the political subsequent political stage. The diplomatic stage essentially takes place on the level of technical experts.
[23] Section III, Ouro Preto Protocol, 17 December 1994.
[24] Interview with Mercosur TPR official, April 2021.

distinct cases have been issued by the revision tribunal, and none since 2012. So the use of formal adjudication is rare and perhaps disappearing.

We draw on data originating from Common Market Commission protocols to identify all consultations that were brought up in official meetings. The data range from 1996 until 2023 and reveal insightful links between diplomatic dispute settlement, i.e. on technical levels conducted by non-political experts, and legal dispute settlement through formal arbitration and adjudication (Figure 5). Most of the 496 consultations took place during the early years of Mercosur; after a rapid decline in numbers over the early 2000s, the number of consultations has been small since 2008. Interestingly, this coincided with the establishment of the standing revision tribunal and drying up of arbitration proceedings. Thus, informal dispute settlement has not simply shifted to adjudication but declined overall.

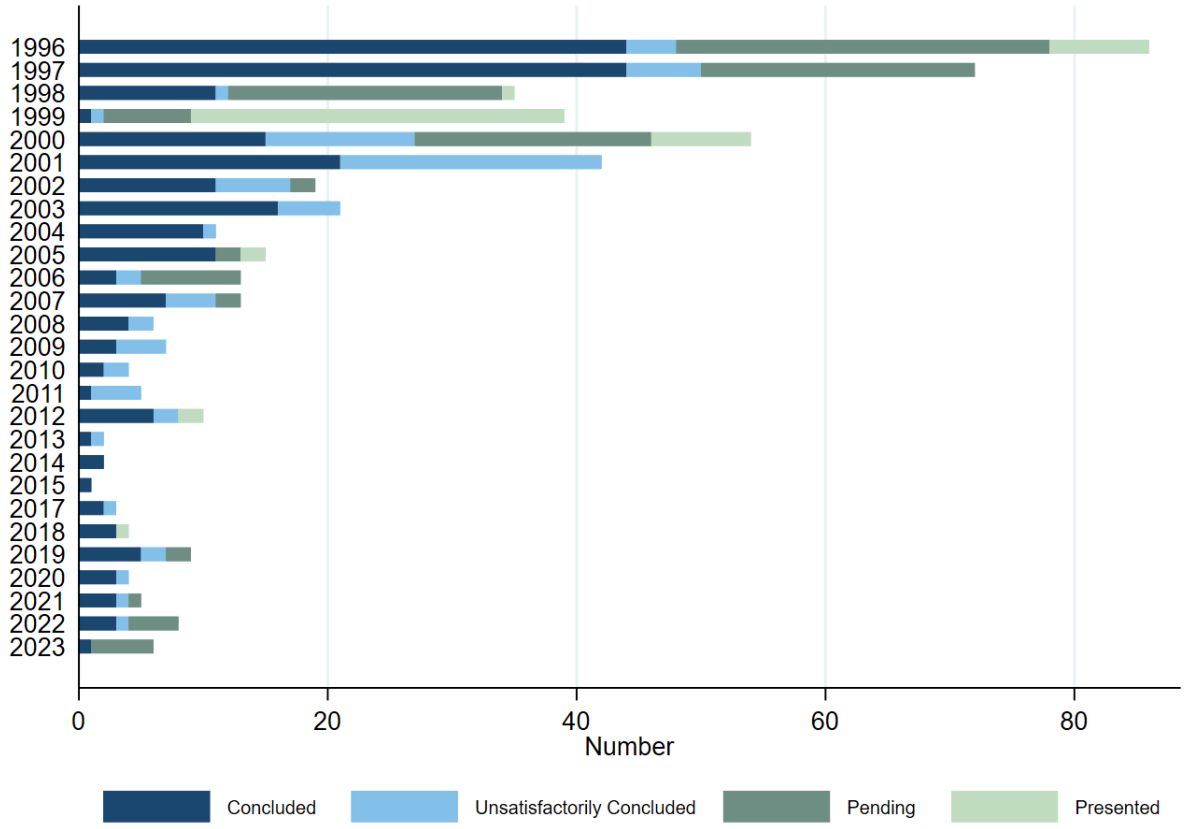

Figure 5: Number and Status of Mercosur Consultations.[25]

Importantly, this protocol data shows not only the frequency of disputes but also their outcomes. Just below half (47%) of all consultations are considered concluded, whereas another 17% are explicitly concluded in an unsatisfactory fashion – suggesting that the parties did not resolve the issue. A further 25% are pending – mostly for more than 20 years – and can thus be understood to have been abandoned without any solution, dealt with bilaterally or became irrelevant. Finally, 11% have been presented without any direct response or further action in the Commission.

[25] Source: Mercosur Common Market Commission. https://documentos.mercosur.int/public/consultaccm.

Perhaps the most striking thing in the data is the large number of inconclusive or specifically unsatisfactory consultations that were not escalated and brought to arbitration. This suggests that it is not the lack of substantive disagreements or institutional fora which led to the rather small number of inter-state disputes under PTAs but rather how states deal with such issues. Friends can learn to live with their joint problems without fighting and so accept the lack of resolution and even (limited) adverse outcomes.

An illustrative example of rather lengthy consultations reveals how contentious points are resolved without escalating the issue to another forum or formalizing the disagreement. It shows how lengthy, interrupted discussions and occasional developments may – or may not – result in solutions in the long-term. Raising Argentine import restrictions on beef, in June 2014 Brazil presented its case to the commission including a request to the Argentine officials:[26]

> *The Argentine authorities are requested to confirm the current suspension of imports of beef and live cattle from Brazil. If the answer is affirmative, the authorities are requested to provide, as soon as possible, the scientific support used for the measure*.[27]

The very next day, the Argentine representatives respond that a reclassification of risk-assessment is ongoing with respect to mad cow disease, while the existing criteria remain in place for countries with recent cases, which included Brazil.[28] Briefly, after Brazil issued a technical note supporting its case there was seven months of inaction. Then Brazil issued another technical note – including underlined and bold text – calling upon Argentina to follow the guidelines of the world organisation of animal health.[29] Almost exactly two years later, Argentina declared the completion of the reclassification and that the market would be opened as soon as the necessary certifications have been issued. Brazil, however, did not respond to a proposed date for the necessary visits.[30] Without further statements or notes, the case was marked as concluded five months later. Despite lengthy pauses and inaction, technical experts did not escalate the case but worked towards a solution. In several other cases of similar duration, however, no solution was found – implying that states recognised the other member's goodwill and effort and chose to live with limited treaty breaches.

Technical experts deal with such issues and violations of PTAs on an almost daily basis and repeatedly see each other at monthly committee meetings. Unlike some political representatives, experts seem to understand that certain violations are an inevitable part of implementing a deep PTA. This understanding and their effort to administer the agreement as smoothly as possible is what makes them accept such lengthy procedures and adverse outcomes. Even victory in adjudication can be futile and adverse for their future cooperation.

The Mercosur case indicates that it's about the approach states choose – not about the existence of contentious issues. Since Mercosur jointly negotiates some of its third-party agreements, negotiators and officials represent a collective interest in those negotiations and their joint experiences there are likely to shape their interactions in 'internal' matters. As one negotiator put it, '*what we have within Mercosur is a negotiation, as much as with third states - as friends,*

[26] Consultation 1/14: Export of beef and live cattle. https://documentos.mercosur.int/public/consultaccm/134
[27] Meeting of the Mercosur Market Commission, Act 2/14, Annex X, dated 25 June 2014.
[28] Meeting of the Mercosur Market Commission, Act 2/14, Annex XI, dated 26 June 2014.
[29] Meeting of the Mercosur Market Commission, Act 2/14, Technical Note, 21 May 2015.
[30] Meeting of the Mercosur Market Commission, Act 2/14, Technical Note, 24 May 2017.

but these are negotiations.' This is also reflected when it comes to interpersonal relationships, at least on the diplomatic level. 'Internal coordination in Mercosur happens continuously, during or between rounds, via instant messengers, or informally '*during breakfast or with a beer in your hand*.'

This logic of instrumental friendships and their corresponding restraint is by no means restricted to Mercosur. A fluent transition between discussions, concerns and issues over multiple years is also evident in the relations governed by EU trade agreements (Melillo 2019, p.104-5). Going beyond this, the UK-Cariforum EPA proactively considers the possibility of administrative errors and includes what essentially is a joint declaration to address and resolve such errors through consultations:[31]

4.3 Supranational Surveillance, Corporations and States: Access to Dispute Settlement in the Andean Community and EFTA

Institutional reforms illustrate that it is indeed not the absence of substantive disagreements that suppress the number of formal disputes but differences in how various stakeholders choose to deal with them. Importantly, political considerations and diffuse reciprocity are much more consequential for states than for IO bodies or corporations.

The Andean Community provides an insightful case with respect to the incentives and roles of different actors in dispute settlement. Its Andean Tribunal is one of the most authoritative and active transnational courts and was in part modelled on the European Court of Justice (Alter et al. 2012). The Court initially focussed on preliminary rulings on cases that we ultimately dealt with in national courts; in substantive terms it focussed on intellectual property rights. Few infringement procedures were brought to the tribunal in its early years. Indeed, before the revival of the Community's integration process following the end of the Cold War, only member states and the Community's Secretariat – named the Junta at the time – were authorised to initiate infringement procedures. This changed with the coming into force of the 1998 Trujillo Protocol – amending the underlying treaty of the Community – and the 1999 Protocol of Cochabamba, which reformed the tribunal. While non-state actors, such as corporations and individuals, previously were able to initiate specific actions such as anti-dumping and safeguards investigated by the Secretariat, in the wake of the reform these private actors gained authorization to initiate infringement procedures against member states. This reform was prompted by the realisation that private actors were not bringing infringement cases to national courts and, if they did, national courts often failed to refer them to the Andean Tribunal (Alter and Helfer 2017, p.43). After the reform, both states and non-state actors are to raise the issue directly with the Secretariat, which then investigates the case and issues an administrative ruling. Only in the event of persistent non-compliance or the Secretariat's failure to act within time limits may the Secretariat or other actor, respectively, refer the case to the tribunal.[32]

[31] UK-CARIFORUM EPA, Article 21.
[32] Articles 23-25, Protocol of Cochabamba Amending the Treaty Creating the Court of Justice of the Cartagena Agreement. https://www.wipo.int/wipolex/en/text/224429

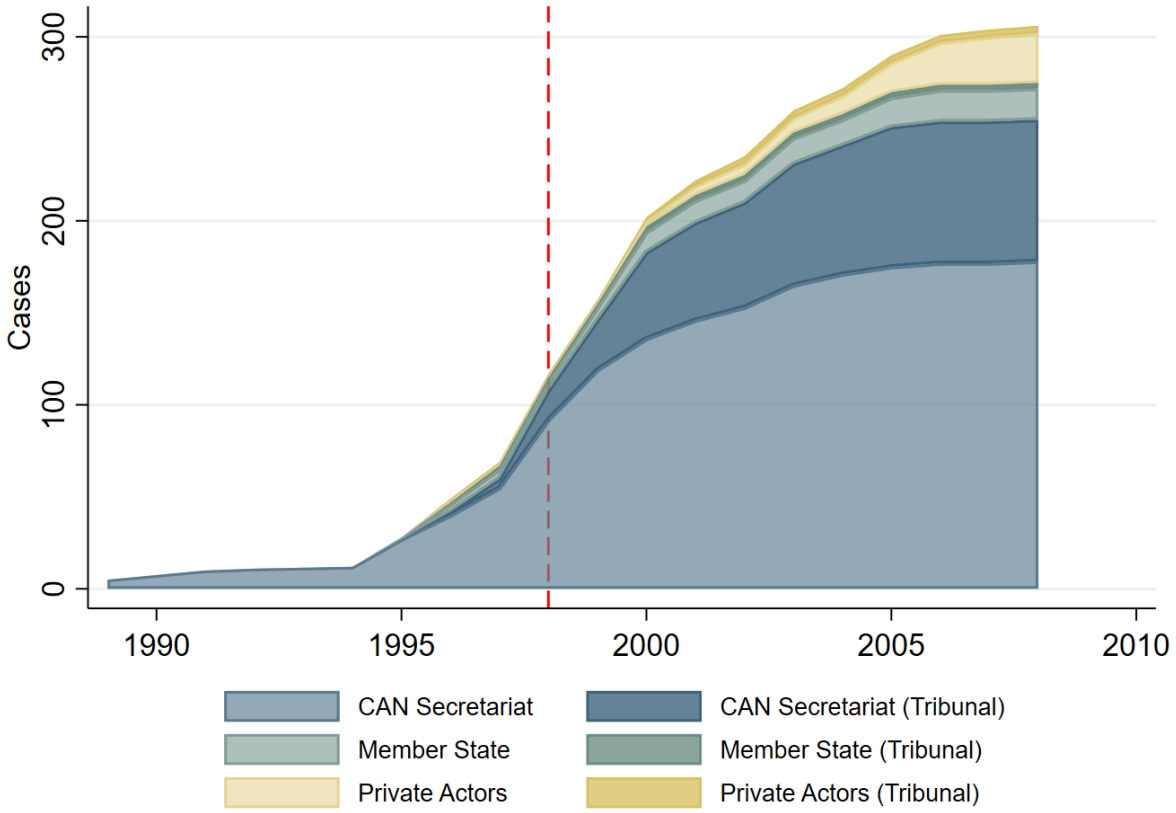

Figure 6: Infringement procedures brought forward to the Secretariat and adjudicated disputes by type of initiator. *The vertical line marks coming into effect of the Cochabamba and Trujillo Protocols, which reformed the tribunal.*

To assess the impact of the reform of the Community's dispute settlement procedures, we use data from *Integrated database of trade disputes for Latin America and the Caribbean* assembled by the UN Economic Commission for Latin America and the Caribbean.[33] The number of cases raised with the Secretariat and brought to the Tribunal by initiating party is displayed in Figure 6. The figure distinguishes infringement procedures investigated and ruled on by the Secretariat, on the one hand, and those brought to the tribunal, on the other hand. Before the reform of the Tribunal – indicated by the vertical dashed line – the bulk of issues were raised by the Secretariat itself, with only single cases on antidumping and safeguards being initiated by private actors. Importantly, only eight infringement procedures were brought to the Tribunal, five by the Secretariat itself. This changed substantially following the reform. First, the number of infringement procedures brought to the Tribunal grew significantly. Second, the cases brought to the tribunal are almost exclusively initiated by the Secretariat, with less than 5 cases each initiated by states and private actors. Third, although they tend not to address the Tribunal, private actors do initiate a sizable number of infringement procedures and have become a relevant group of actors when it comes to infringement procedures.

Only one case was brought to the tribunal by a private actor *before* the reform. Interestingly, this was an attempt by a Colombian company to bypass states as gatekeepers, and national courts as the competent authority, to take action against the Colombian state. The Tribunal refused to hear the case, arguing that it did not have jurisdiction as private actors don't have

[33] https://hub.unido.org/category/legal-and-regulatory-framework-un-eclac

any right to address the Tribunal.[34] While ultimately futile, this case is likely to have contributed to the reform of the Tribunal.

In fact, post-reform the number of infringement procedures initiated by private actors exceeded those triggered by member states.[35] When states do invoke the mechanism, they mainly do so for investigations of safeguard and barriers to trade violations rather than to initiate infringement procedures. While virtually all cases heard by the tribunal had been initiated by the Secretariat, this is not the case for those procedures that end with a decision issued by the Secretariat. Since 1998, the latter have been primarily submitted by the Secretariat (77%) and private actors (16%), less so by states (7%). Only considering the ratio between proceedings initiated by the Secretariat and those initiated by states reveals a virtually unchanged distribution between the pre- and post-reform periods.[36] In the post-reform period, however, private actors initiated roughly 2.5-times as many infringement procedures as states. This indicates that states have shown more restraint in initiating infringement procedures since the institutional reform – despite a growing number of cases overall and the rise of adjudication.

The levelling off towards the end of the period can be attributed to the repercussion of increasing turmoil among member states on Tribunal activity. Following Venezuela's withdrawal in 2006, Community institutions faced funding cuts. Increasing polarization among members further curbed support for integration and 'big' political questions took precedence over legal proceedings (Alter and Helfer 2017, p.82). In consequence, although the Tribunal continues adjudicating cases on technical issues such as intellectual property, political sensitivities became increasingly relevant in times of crisis and limited the scope and number of cases brought to the tribunal (Alter and Helfer 2017, p.196)

5.2. When Social Relations Span Over Institutional Boundaries: Three-Tiered Dispute Settlement in EFTA

EFTA provides another example of the same phenomenon under vastly different circumstances given the pro-business and depoliticized character of the organization. Dispute settlement under the original EFTA convention was organized in a hybrid fashion, combining elements of diplomatic and legal dispute settlement. If states failed to resolve the issue through collective efforts, the case could be referred to the EFTA Council, which would appoint an examining committee (Fahner 2021, p. 78). The Council would then determine whether the Convention had been violated by majority vote. Doubts about the procedure were raised early on as issues had previously resolved in routine meetings of the Council and these rather informal procedures had usually been deemed sufficient (Fahner 2021, p. 79). Movement to the formal proceedings were considered offensive to other members (Fahner 2021, p.92) or may even suggest 'coercion where none may be intended' (Figgures 1965, p.1085). Indeed, the dispute settlement process has only been invoked four times – between 1962 and 1966 – and even those complaints were

[34] Gaceta Oficial del Acuerdo de Cartagena, Year IV, No 24, 16 November 1987, p.1-2. https://www.tribunalandino.org.ec/decisiones/AI/01-AI-1987.pdf

[35] Unfortunately, the data series ends in 2008. However, our own data collected on court cases and partial continuations of the data indicate an acceleration of the trend of a growing share of non-state actors addressing the court and decline in interstate disputes. See: Salazar Costa, A. (2014). *Análisis De La Actividad Del Ecuador En El Sistema Andino De Solucion De Controversias* (Thesis), Annex A and B. https://repositorio.uisek.edu.ec/bitstream/123456789/903/1/Analisis%20de%20la%20Actividad%20del%20Ecuador%20en%20el%20Sistema%20Andino%20de%20Soluci%C3%B3n%20de%20Controversias%20%281%29.pdf

[36] Note that this indicates that the change does not merely reflect a 'relocation' of the role of complainants.

resolved during consultations with the help of ad hoc committees (Fukuda 1970, p.58). The last of these four cases led to the establishment of a formal examination committee. EFTA staff subsequently expressed disappointment over the non-legal character of the process as member representatives acted like negotiators rather than legal experts (Fahner 2021, p 89) – thus essentially rendering the process an extension of previous negotiations.

The revised EFTA – or Vaduz - Convention of 2001 added an arbitration mechanism to the dispute settlement process, but no intra-EFTA disputes have ever been initiated under that convention. A watershed moment for EFTA with repercussions on dispute settlement was its integration with the EU in the wake of the creation of the European Economic Area (EEA). With three out of four EFTA states joining a new architecture for dispute resolution was required. While EEA-related disputes among EU member states can be brought to the European Court of Justice, this is not the case for EFTA states as the court has no jurisdiction extending to them. As a result, the institutional response to this constellation entailed a twofold mechanism.

First, the dispute settlement procedure between EFTA and EU member states is purely diplomatic – both in the cases of the EEA agreement and the series of Swiss-EU bilaterals. Indeed, this is partly due to the EU's concern that any arbitration mechanism not undermine the ECJ's authority (Ziegler 2007, p. 409). It is noteworthy that this interstate mechanism has never formally been used in the case of Switzerland and only twice in the case of the EEA agreement in 2001 and 2002. While the dispute mechanism was formally evoked, both cases were resolved through consultations. The absence of formal disputes despite a large body of common legislation can partly be traced back due to the informal nature of discussions and the presence of strong mechanism in both the EU and EFTA, following subsequent intra-EFTA institutional changes.

Second, the EFTA Court was established for the three EFTA-EEA members, where the newly founded EFTA Surveillance authority was tasked with identifying infringements by EFTA states. The court is very active and, by 2019, has heard more than 250 cases, with cases on non-compliance exclusively brought by the Surveillance Authority. Private actors can also address the court in response to decisions made by the authority. More importantly, member states can ask the court to hear interstate disputes. Although states can raise disputes directly with the court, this has not occurred so far. Instead, there seems to be an implicit consensus among EFTA member states to leave this task entirely to the Surveillance Authority (Fredriksen 2018, p. 170). As a result, the highly legalized proceedings within the EU (ECJ) and EFTA (EFTA Court) are the preferred fora for settling disagreements and, given the role of supranational bodies, allow member states to avoid the need to initiate inter-state disputes in the first place.

Despite multiple institutional changes and the resulting three-tiered dispute settlement proceedings available to EFTA member states, EFTA's amicable and consensus-oriented approach is reflected in highly distinct institutional settings and throughout institutional change. The result is an absence of inter-state disputes and delegation of infringement processes to the EFTA Surveillance Authority.

6. Conclusion

To follow.

Bibliography

Abadie, A., Diamond, A., & Hainmueller, J. (2015). Comparative politics and the synthetic control method. *American Journal of Political Science*, *59*(2), 495-510.

Adler, E. and Barnett, M. 1998. *Security Communities*. Cambridge University Press.

Alter, K. J. (2003). Resolving or exacerbating disputes? The WTO's new dispute resolution system. *International Affairs*, *79*(4), 783-800.

Alter, K. J., & Helfer, L. R. (2017). *Transplanting international courts: the law and politics of the Andean Tribunal of Justice*. Oxford University Press.

Alter, K. J., Helfer, L. R., & Saldias, O. (2012). Transplanting the European Court of Justice: the experience of the Andean Tribunal of Justice. *The American Journal of Comparative Law*, *60*(3), 629-664.

Anderson, S. E., Buntaine, M. T., Liu, M., & Zhang, B. (2019). Non-governmental monitoring of local governments increases compliance with central mandates: a national-scale field experiment in China. American Journal of Political Science, 63(3), 626-643.

Aristotle, *Nicomachean Ethics*, Translated by W. D. Ross.

Athey, S., & Imbens, G. W. (2022). Design-based analysis in difference-in-differences settings with staggered adoption. *Journal of Econometrics*, *226*(1), 62-79.

Berenskötter, F. & van Hoef, Y. (2017). Friendship and Foreign Policy, in C.G. Thies *The Oxford Encyclopaedia of Foreign Policy Analysis*, Article available at: http://dx.doi.org/10.1093/acrefore/9780190228637.013.429

Carlson, E., & Seim, B. (2020). Honor among chiefs: An experiment on monitoring and diversion among traditional leaders in Malawi. The Journal of Development Studies, 56(8), 1541-1557.

Correlates of War Project. 2017. *"State System Membership List, v2016."* Online, http://correlatesofwar.org

Davis, Christina. 2012. *Why Adjudicate? Enforcing Trade Rules in the WTO.* Princeton University Press.

De Bièvre, D. (2017). The origins of WTO dispute settlement. In Bourgeois/Bronckers (eds): *WTO dispute settlement mechanism: a health-check,* (pp. 13-26).

De Chaisemartin, C., & d'Haultfoeuille, X. (2020). Two-way fixed effects estimators with heterogeneous treatment effects. *American Economic Review*, *110*(9), 2964-2996.

De Chaisemartin, C., & d'Haultfoeuille, X. (2022). *Difference-in-differences estimators of intertemporal treatment effects* (No. w29873). National Bureau of Economic Research.

Dür, A., & Gastinger, M. (2023). Spinning a global web of EU external relations: how the EU establishes stronger joint bodies where they matter most. Journal of European Public Policy, 30(6), 1072-1091.

Dür, A., & Gastinger, M. (2021, January). Joint Bodies in Preferential Trade Agreements: Why Are Some Stronger Than Others?. In *Political Economy of International Organization (PEIO) First Seminar Series*

Elsig, M., & Eckhardt, J. (2015). The creation of the multilateral trade court: Design and experiential learning. *World Trade Review*, *14*(S1), S13-S32.

Fahner, J. H. (2021). Settling interstate trade disputes: lessons from the EFTA complaints procedure. *Journal of International Economic Law*, *24*(1), 77-97.

Figgures, F. E. (1965). Legal Aspects of the European Free Trade Association. *International & Comparative Law Quarterly*, *14*(4), 1079-1088.

Fredriksen, H.H. (2018). 'The EFTA Court' in Rob Howse et al. (eds), The Legitimacy of International Trade Courts and Tribunals (CUP), 138–82.

Fukuda, H. (1970). 'First Decade of EFTA's Realization', in Hugh Corbet and David Robertson (eds), Europe's Free Trade Area Agreement. E.F.T.A. and Economic Integration (Pergamon)

Gastinger, M., & Dür, A. (2021). Joint bodies in the European Union's international agreements: Delegating powers to the European Commission in EU external relations. European Union Politics, 22(4), 611-630.

Gomez-Mera, L., & Molinari, A. (2014). Overlapping institutions, learning, and dispute initiation in regional trade agreements: evidence from South America. *International Studies Quarterly*, *58*(2), 269-281.

Goodman-Bacon, A. (2021). Difference-in-differences with variation in treatment timing. *Journal of Econometrics*, *225*(2), 254-277.

Helfer, L. R., & Slaughter, A. M. (1997). Toward a Theory of Effective Supranational Adjudication. *Yale Law Journal*, *107*, 273.

Heydon, K. (2011). The OECD: lessons from investment and services. In The New Economic Diplomacy (pp. 231-248). Routledge.

Honig, D., Lall, R., & Parks, B. C. (2023). When does transparency improve institutional performance? Evidence from 20,000 projects in 183 countries. American Journal of Political Science, 67(4), 1096-1116.

Hope, D. (2016). Estimating the effect of the EMU on current account balances: A synthetic control approach. *European Journal of Political Economy*, *44*, 20-40.

Hope, D., & Limberg, J. (2022). The economic consequences of major tax cuts for the rich. *Socio-Economic Review*, *20*(2), 539-559.

Hopf, Ted. (1998). The Promise of Constructivism in International Relations Theory', *International Security*, 23, 1, 171-200.

Hudec, R. E., Kennedy, D. L., & Sgarbossa, M. (1993). A statistical profile of GATT dispute settlement cases: 1948-1989. *Minn. J. Global Trade*, *2*, 1.

Imai, K., & Kim, I. S. (2019). When should we use unit fixed effects regression models for causal inference with longitudinal data?. *American Journal of Political Science*, *63*(2), 467-490.

Imai, K., Kim, I., & Wang, E. (2023). Matching methods for causal inference with time-series cross-sectional data. *American Journal of Political Science*, *67*(3), 587-605.

ITC database of preferential trade agreements, accessed from Rules of Origin Facilitator and Market Access Map, International Trade Centre, https://findrulesoforigin.org/en/home/agreements/

King, G., & Nielsen, R. (2019). Why propensity scores should not be used for matching.

Political analysis, *27*(4), 435-454.

King, G., Lucas, C., & Nielsen, R. A. (2017). The balance-sample size frontier in matching methods for causal inference. *American Journal of Political Science*, *61*(2), 473-489.

Lax, D. & Sebenius, J. (1986*).* The Manager as Negotiator: Bargaining for Cooperation and Competitive Gain. New York: The Free Press.

Lechner, L., & Wüthrich, S. (2018). Seal the deal: Bargaining positions, institutional design, and the duration of preferential trade negotiations. *International Interactions*, *44*(5), 833-861.

Macauley, Stewart. 1963. "Non-Contractual Relations in Business." *American Sociological Review*, 28, 1:1-19. February.

Melillo, M. (2019). Informal dispute resolution in preferential trade agreements. Journal of World Trade, 53(1).

Mercer, J. (2005). Prospect theory and political science. Annu. Rev. Polit. Sci., 8(1), 1-21.

Nakagawa, J. (2007). No More Negotiated Deals?: Settlement of Trade and Investment Disputes in East Asia. Journal of International Economic Law, 10(4), 837-867.

Ostrom, Elinor. 1990. Governing the Commons. Cambridge: Cambridge University Press.

Pevehouse, Jon C.W., Timothy Nordstron, Roseanne W McManus, Anne Spencer Jamison, "Tracking Organizations in the World: The Correlates of War IGO Version 3.0 datasets", Journal of Peace Research.

Porges, A. (2011). Dispute Settlement. In*: J.P. Chauffour and J.C. Mour (Eds.), Preferential Trade Agreement Policies for Development: A Handbook*, 467-501.

Sekhon, J. S. (2009). Opiates for the matches: Matching methods for causal inference. *Annual Review of Political Science*, *12*, 487-508.

Sun, L., & Abraham, S. (2021). Estimating dynamic treatment effects in event studies with heterogeneous treatment effects. *Journal of Econometrics*, *225*(2), 175-199.

Walton, R.E. & McKersie, R. B. (1965). *A Behavioral Theory of Labor Negotiation: An Analysis of a Social Interaction System*. Ithaca: Cornell University Press.

Wendt, A. (1992). Anarchy is What States Make of It. *International Organization*.

Ziegler, A. R. (2007). Dispute Settlement in Bilateral Trade Agreements: the EFTA Experience. *Regional Trade Agreements and the WTO*, 407-418.