PREFERENTIAL TRADE AGREEMENTS: CRISIS OR OPPORTUNITY TO THE WTO?

ACORDOS PREFERENCIAIS DE COMÉRCIO: CRISE OU OPORTUNIDADE PARA A OMC?

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Resumo: O objetivo deste artigo, com base na análise dos principais pontos de conflito entre APC e a OMC, foi definir se a proliferação dos APC representava uma crise ou uma oportunidade para a OMC. Para responder a essa pergunta, na primeira seção, este artigo analisou os sintomas que indicam que a proliferação dos ACP é uma crise normativa e institucional da OMC. Na perspectiva normativa, a regra do consenso, a estrutura ultrapassada das disciplinas da OMC e a complexificação das regras de origem indicam uma crise da OMC. Além disso, a supervisão defeituosa do mecanismo de transparência, um Secretariado pouco atuante e conflitos de competência são questões relevantes na área institucional. Esta pesquisa nos permitiu concluir que o crescimento dos ACP é origem e consequência de uma crise na OMC. Na segunda seção, este artigo buscou propor alternativas para aproveitar o novo cenário do comércio internacional e aprimorar o sistema multilateral de comércio. Como possíveis soluções, identificamos o fortalecimento da supervisão feita pela OMC dos países com ACP, com um Secretariado com mais prerrogativas, e a multilateralização dos benefícios percebidos pelas partes a ACP, seja ela de facto ou através de uma massa crítica de Membros.

Palavras-chave: Acordos Preferenciais de Comércio; Acordos Regionais de Comércio; WTO; Sistema Multilateral de Comércio.

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Abstract:: The aim of this article, based on the analysis of the main issues of relationship between the PTA and the WTO, was to define whether the proliferation of PTA represented a crisis or an opportunity for the WTO. To answer this question, in the first section, this article has analyzed the symptoms indicating that the proliferation of the PTA is a normative and an institutional crisis of the WTO. In the normative perspective, the consensus rule, the outdated framework of WTO disciplines and the complexification of rules of origin indicate a crisis for the WTO. Moreover, the defective supervision of the transparency mechanism, a weak Secretariat and conflicts of jurisdiction are relevant issues on the institutional area. This research allowed us to conclude that the growth of the PTA is both the source and the consequence of a WTO crisis. In the second section, this article has tried to think of reasonable alternatives to take advantage of the new scenario of international trade to improve the multilateral trading system. As possible solutions, we identify the strengthening of the supervision made by the WTO of the PTA countries, with a more powerful Secretariat, and the multilateralization of the benefits perceived by the PTA parties, whether *de facto* or via a critical mass of Members.
Keywords: Preferential Trade Agreements; Regional Trade Agreements; WTO; Multilateral Trading System.

INTRODUCTION

The proliferation of preferential trade agreements (PTA)[3] and the complexification of global value chains (GVC)[4] have significantly changed the scenario of international trade in recent decades. The creation of an increasing number of preferential tariffs for goods, as well as preferential access to services, combined with dense regulation of instruments for bilateral or regional trade, raise concerns about the power and stability of the multilateral trading system.

This deadlock between multilateralism and regionalism of which the World Trade Organization (WTO) is particularly a victim (FABRI, 2001, p. 943) is an old debate. Back in 1963, Kenneth Dam, in one of the first comments on regional agreements ever made, addressed the subject of their proliferation (DAM, 1963, p. 615). In 2004, the authors of the WTO Sutherland report warned about the risk that these PTA could become a justification for non-WTO compliant behavior, in which case preferential treatment would become a prize for governments whose goals are not aligned to those of the WTO (SUTHERLAND, 2004, p. 79).

Nowadays, the WTO is confronted - more than ever, since the PTA are responsible for 80% of global trade today - with Members who seek preferential treatment when they join the PTA, while those who are not

3 We adopt in this article the term "Preferential Trade Agreement" because it encompasses a larger range than the term "Regional Trade Agreement". These are agreements concluded between two or more parties can, providing that they are appropriately notified to the WTO under the Article XXIV of GATT 1994, create more beneficial trade conditions (preferential), such as the relativization of the most-favored nation principle. Such agreements also provide means for Members to achieving consensus in specific agenda they are interested in that could not be achieved otherwise (via the regular WTO framework. Cf. MATSUSHITA, M. et. al., *The World Trade Organization:* law, practice and policy, 3rd ed., Oxford University Press, 2015, Chapter 17, p. 507 ss.; VAN DEN BOSSCHE, Peter. *The law and policy of the World Trade Organization: text, cases and materials.* Cambridge University Press, 2008.

4 Global value chains (GVCs) refer to international production sharing, a phenomenon where production is broken into activities and tasks carried out in different countries. In GVCs, the operations are spread across national borders (instead of being confined to the same location), with the design originated from one place, components coming from other, and assembling realized in a different country with outsourced worked force. They have become increasingly complex with globalization and represent an important challenge to international trade. and the products made are much more complex than a pin. Cf. HUMPREY, John; Schmitt, Hubert, Governance in Global Value Chains, In: *IDS Bulletin,* Volume 32, Issue 3, Wiley Library, July 2001.

part of these agreements claim that such arrangements have a negative impact. Indeed, these agreements are discriminatory by nature, since they escape most-favored-nation treatment (TNPF) from Article I of the GATT. However, providing that they fulfill certain conditions laid down by Article XXIV of the GATT and by Article V of the GATS, they can be compatible with WTO law.

This is explained by the logic of trade liberalization within the framework of the GATT 1947. This was part of the continuation of a process of increasing economic integration between the contracting parties who saw in the PTA an opportunity to expand world trade (BOLLYKY, MAVROIDIS, 2017). If the PTA are part of the logic of trade opening of the GATT 1947 and are, theoretically, in conformity with the rules of the WTO through article XXIV of the GATT, how can these agreements represent a threat to the WTO? Are they not compatible with the latter?

The difficulty does not arise exactly from plurilateral initiatives to achieve objectives that are not sufficiently addressed by the WTO. But the PTA are proliferating on such a scale that it has become a systemic problem for the WTO (CARREAU, JULLIARD, 2004). The problem arises when Members use this option to circumvent the provisions of WTO law, thereby creating significant trade distortions. The scale is the question, which actually denies the goal of non-discrimination.

There are several reasons for the growth of regionalism in trade - the creation of free trade areas and the emergence of preferential agreements - and the consequent weakening of the WTO. However, these reasons can be summed up by two main issues: a generalized crisis of the multilateral model, which has occurred in many other institutions (DUBIN, RUNAVOT, 2013); and the difficulty of the GATT and of the whole WTO system to adapt, in a normative and institutional way, to the needs of economic actors and to integrate the new fields which are gaining more and more importance in the international trade.

If this regionalist trend has been going on in the recent decades and if the current scenario indicates a much broader crisis, with the block of the Appellate Body, currently with a single judge, and mega-agreements which bring together major volumes of trade including several provisions problematic to the WTO, it is possible to conclude that the phenomenon of regionalism will remain. However, if the PTA are an in-

evitable reality, how to preserve the importance of the role of the WTO in times of spaghetti bowl[5]? Finally, do the PTA represent a crisis or an opportunity to the multilateral trading system?

This article will focus on answering this question. At first, we must identify and understand the specific issues that arise from the articulation between the PTA and the WTO which result in a crisis for the multilateral trade system, at the normative and institutional levels. Once the elements that characterize this threat have been identified, considering the major importance of preserving the WTO as a multilateral institution, we will discuss possible solutions to make the PTA explosion an opportunity to reform and modernize the WTO.

Section 1 studies the PTA-related symptoms that characterize the crisis in the multilateral trading system, in the normative (A) and institutional (B) perspectives.

Regarding the normative crisis experienced by the WTO as a result – or the cause – of the proliferation of the PTA (A), the principle of the single undertaking will be analyzed, which makes negotiations within the meaning of the WTO more difficult (A.1); the inadequacy of the disciplines covered by the GATT (A.2), which justify the recourse of Members to preferential agreements to address the areas not covered by WTO; and the difficulty presented by rules of origin as a new challenge arising from the complexification of global value chains (A.3).

As for the crisis from the institutional point of view of the WTO (B), attention is drawn to the insufficient supervision currently carried out by the WTO vis-à-vis the PTA. First, it is important to understand the limitations and inconsistencies of GATT Articles XXIV and GATS V (B.1), and then discuss the weak operation of the Transparency Mechanism (B.2) and, finally, also addressing the subject of the conflict of jurisdiction between the dispute settlement mechanisms provided by the PTAs and the Dispute Settlement Body (DSB) of the WTO (B.3).

Having understood the concerns caused by the PTA countries, the symptoms of a crisis in the WTO, section 2 will be dedicated to reflecting

5 Essentially, these different types of agreements create smaller trade regimes that link countries in different ways. Jagdish Bhagwati compares the plethora of trade relations to a bowl of spaghetti (BHAGWATI, J.; KRUEGER, A., The Dangerous Drift to Commercial Trade Agreements, In: *United States trade policy: craze for free trade agreements*, Washington, DC: AEI Press, 1995.

on the possible alternatives to transform this systematic crisis into an opportunity for reform of the WTO. The possibilities of strengthening the Transparency Mechanism (A) and multilateralization (B), de facto (B.1) or disbursed (B.2) will be analyzed.

SECTION 1: THE PTA AS A DOUBLE CRISIS IN THE WTO

In this first section, the problematic links between the PTA and the WTO will be analyzed, starting from the study of the symptoms which configure a crisis from the normative point of view (A) and from the institutional point of view (B).

A) Symptoms of a normative crisis

Symptoms which indicate that the proliferation of the PTA reveals a normative crisis in the WTO are (A.1) the difficulty of reaching a decision; (A.2) the insufficient disciplines covered by the WTO, and (A.3) the challenge presented by the definition of rules of origin with the increasing complexity of GVCs.

A.1) The difficulty of making a decision: the principle of the single undertaking and decision-making process by consensus

Let us imagine a Parliament which works according to two rules. The first requires that everything should be decided unanimously. The second requires that each issue should be resolved as a whole, in one agreement. This Parliament will never approve anything. According to Gary Houfbauer (HOUFBAUER, BHAGWATI, 2007), that's exactly what the WTO is right now. All Members have to agree on almost everything.

This illustration of the principle of the single undertaking and the consensus rule, set forth by Article IX: 1 of the GATT[6], helps to understand the difficulty experienced by Members before making a decision. These two requirements aim to achieve more legitimate and effective

6 "The WTO will continue the practice of decision-making by consensus followed under the GATT 1947".

decisions, but with diverse and divergent interests among countries, negotiations are a particularly complex task (CARREAU, JULLIARD, 2004, para. 185). Difficulties in achieving universalism or multilateral relations, such as differences in power, culture and needs, are the sources of regionalism (MARCEAU, REIMAN, 2001, p. 299).

WTO Members use preferential agreements for various economic and political reasons. Regionalism therefore allows states sharing the same concerns to align. In a smaller regional forum, consensus can be more easily reached. In addition, this allows countries that are more motivated to negotiate to do so faster than through the WTO (HOEKMAN, KOSTECKI, 1995, p. 216), where it would be necessary to "convince everyone else". Beyond the greater ease of reaching an agreement, the reasons also include research to amplify its markets and increase the level of integration, especially between neighbour countries or in the same region (COTTIER, FOLTEA, 2006, p. 45).

Recourse to regional or bilateral agreements is not only done to escape the rule of consensus, but also in order to be able to deal with subjects not covered by the WTO.

A.2) The inadequacy of the disciplines covered by the GATT

Material WTO law is based on a legacy of GATT 1947, restricted to promoting negative integration and prohibiting tariff barriers, principles which today are largely anachronistic in relation to Members' interests and their trade objectives. In the absence of progress from the WTO, countries are turning to preferential bilateral and regional trade agreements to deepen their integration into regulatory matters already covered by the WTO, or to go beyond these topics. As argues Ruiz Fabri (2001), it is not the PTA that is causing a crisis for the WTO; the real crisis being the fact that it is a "young organization with an old-fashioned behavior"[7].

When the PTA allow deepening integration in an area covered by the WTO, we are in front of a "WTO-plus" agreement. When the goal is to extend integration to a new segment, this is an "OMC-extra" agreement. Among the WTO-plus, some examples of subjects concerned are services, agriculture, intellectual property, state-owned enterprises,

7 Original in French : « *jeune mais héritière de modes de comportements passés et dépassés* ".

among others. OMC-extra, on its turn, embeds more specific disciplines, such as competition, environment, human rights, energy, labor law, corruption, etc. A study by Henrik Horn, Petros Mavroidis and André Sapir (2010, p. 1565) identified these problems as being the most frequent in trade agreements.

Still in the WTO-extra field, the traditional WTO framework does not allow to include consumer preferences and quality requirements. Businesses and consumers relied on the standards of private or non-profit organizations and third-party certifications to enforce their preferences. The resulting cacophony of private rules and standards has increased compliance costs and poses a challenge to the effectiveness of international regulatory oversight (BOLLYKY, MAVROIDIS, 2017, p. 3).

It is a political choice of not including the characteristics and stages of production of a certain product[8]. The WTO has a very orthodox perception of the similarity of the product and its competitive relationship, which is concerned only with similar or directly competitive and substitutable finished products. In this case, the WTO refuses to include production methods and procedures (PMP) in the definition of similarity as a method that allows us to consider that the products are different.

The WTO guarantees non-discriminatory market access, not a right of market access. However, as Howse et Regan (2000) stress, in order to assess the non-discrimination of Article III of the GATT, the WTO impose on Members the obligation of guaranteeing market access for foreign products. It is a mistake because what is prohibited is discrimination: if access becomes compulsory, then the State is no longer sovereign in this domain.

This problem arises when a country approves a law that restricts the commercialization of a certain product due to its production process (harmful to health or the environment for example) and is obliged by the WTO to open access to foreign products which do not comply with these rules[9]. The PTA are very often concerned about

8 This political choice, although described as negative in this article, was considered, by Bhupinder Chimni, as a decision which takes into account the needs of developing countries. S. SCHIMNI BS., "Third world approaches to international law: a manifesto", In: *International Community Law Review*, v. 8, 2006.

9 In the US-Tuna case, the Appellate Body defined that establishing limitations on PMPs falls within the definition of discriminatory quantitative restrictions in Article XI.

these PMPs and thus WTO-extra, in particular on climate and social issues. They include chapters of sustainable trade and development, in which they aim to express respect for the agreement articulating these standards with free trade.

Therefore, as explained by Sorel (2007, p. 59), the origin of the multilateral crisis is not the growing number of PTA countries, "but the structural weaknesses of the WTO which encourage countries to resort to preferential agreements, whether or not they are regional, only to aggravate in return the crisis of multilateralism"[10].

To further discuss the difficulty of the WTO to reinvent itself and follow the changes that affect trade, the next subsection will analyze the consequences of the complexification of the rules of origin resulting from GVC.

A.3) The challenge posed by global value chains: the complexity of rules of origin

Alongside the proliferation of the PTA, one of the main innovations in international trade in recent decades is the emergence of global value chains, which correspond to ⅔ of global trade.

GVC bring us to a very important question: how do we know where the product comes from? This is a relevant question because production has spread enormously through GVC, with the same product being able to bring together suppliers and manufacturers from various countries. To determine the course of a product, it is necessary to determine its rules of origin.

The rules of origin constitute the set of conditions that a product must satisfy in order to obtain preferential tariff treatment, as a way of avoiding that third-party products can benefit from the same treatment. They can be defined by (a) value added requirements (at least a certain percentage of the final value must be originated in the countries party to the agreement), or through (b) the change in tariff classification.

Despite almost 20 years of negotiations in the Doha Round under the aegis of the WTO, no multilateral agreement has been concluded

10 Original in French : "*mais les faiblesses structurelles de l'OMC qui encouragent les pays à recourir aux accords de préférence, qu'elles soient ou ne soient pas régionales, quittent à aggraver en retour la crise du multilatéralisme*".

to harmonize non-preferential rules of origin (CONCONI, 2018). The WTO rules of origin only establish general rules which must guide the rules of origin defined by each country, and some guidelines for the establishment of preferential rules such as transparency, judicial review and rules of non-retroactivity.

Thus, there is a huge variety of rules of origin in PTA, with different criteria for determining the origin of each product. This suggests a debate about their legality with respect to WTO provisions, that is, if they do not cause discrimination. Research shows that rules of origin can violate Article XXIV para. 5 (b) to the extent that they significantly increase protection for PTA countries (CONCONI, 2018), which leads to the construction of real barriers to trade (THORTENSEN et. al., 2014).

To avoid these consequences, rules of origin must remain "neutral" (MATTHIES, 1992), being limited to simply identifying the products qualified for the coverage of the tariff preference. If the rules of origin become too restrictive, they risk creating real discrimination against third countries, therefore being non-compliant with WTO rules. An example of an excessively restrictive rule of origin is that of the United States-Canada and NAFTA agreements.[11].

Despite the Agreement on Rules of Origin, the rules of PTA countries are more restrictive towards imports from third countries than those previously in force. Allowing excessively restrictive rules of origin to be adopted would amount to authorizing protectionism.

Rivas (2006, p. 152) argues that Article XXIV, in particular paragraphs 4, 5 (b) can clarify the governance of these rules. Thus, the neutrality of rules of origin, and therefore its conformity with Article XXIV support the objective of minimizing the adverse effects for third countries (BURFISHER, 2004).

Identified the symptoms for which the PTA represent a normative crisis for the WTO, the next subsection will focus on the symptoms of an institutional crisis.

11 When the United States-Canada agreement was still in force, ketchup made in the United States or Canada from tomato sauce imported from third countries, such as Chile, was considered to be the origin of the agreement and could therefore benefit from the tariff preferences. When the NAFTA rules of origin replaced those of the United States-Canada agreement, only ketchup made from tomato sauce of NAFTA origin could receive preferential treatment. As a result, Chile lost its position as a major exporter of tomato sauce to the United States, taken by Mexico. V. NAFTA, Annex 401.

B) Symptoms of an institutional crisis

One of the functions of the WTO is the management of agreements. If its institutional framework is deficient and, consequently, its management is not effective, we face an institutional crisis. To check this hypothesis, it is necessary to analyze (B.1) the defective nature of the control defined by articles XXIV of GATT and V of GATS (B.2), to understand what are the concerns which weaken the supervision of the Transparency Mechanism, and (B .3) to study the jurisdictional conflict between dispute settlement mechanisms present in the PTA and the Dispute Settlement Body of the WTO.

B.1) The defective control of Articles XXIV of GATT and V of GATS

The multilateral trading system exempt, within an exceptional framework and through Article XXIV of the GATT 1994, preferential agreements of most-favored-nation treatment of Article I. To be able to claim this exception, these agreements must respect three criteria, laid down by article XXIV: (a) cover most trade exchanges between its parties, (b) stablish the absence or the elimination of any discrimination; (c) and prohibit new discriminatory measures towards third countries.

It is problematic to note that the WTO continues to treat regionalism or preferentialism according to the logic of GATT 1947, since Article XXIV has not changed for GATT 1994. Interestingly, negotiators were aware that this Article was insufficient to properly address the issue of PTA, and therefore expected that future negotiations of the Doha Round would clarify these disciplines, which was not the case.

With regards to the first requirement, to cover the majority of trade, set forth by Article XXIV: 8 (a), in order to comply with WTO law, the parties cannot "choose" different products and sectors. This is particularly important because, if the requirement to embark the essential of trade in goods and services is properly implemented, the breach of most-favored-nation treatment is delayed, thereby preserving the multilateral trading system (COTTIER, FOLTEA, 2006, p. 48).

To determine whether most of the trade has been considered, in the

area of services, Article V of the GATS explains the need for a quantitative and qualitative approach[12]. Also, a combined analysis, of quantitative and qualitative definition, is indicated by WTO case law for trade in goods[13].

In addition to this non-discrimination obligation and as a way of increasing free trade, GATT Article XXIV recognizes that customs unions and free trade areas between WTO members may be desirable (MARCEAU, REIMAN, 2001, p. 297). To this end, Article XXIV of GATT and Article V of GATS provide for the possibility that Members constituting a PTA may derogate from WTO obligations, as recognized by the Appellate Body in EC-Bananas III[14].

The Appellate Body Report in Turkey-Textiles[15] makes it clear that the formation of a PTA may justify measures inconsistent with GATT rules, but only after having demonstrated (a) the total compatibility of the PTA with GATT Article XXIV: 5 and 8 and only (b) if the formation of the agreement would have been prevented otherwise. The report also emphasizes the surveillance responsibility of WTO Members. In rendering this decision, the Appellate Body almost introduces a reverse consensus rule suggesting that, unless proven otherwise, PTA and their preferences are contrary to the multilateral WTO rules (MARCEAU, REIMAN, 2001, p. 297).

Despite this reasoning of the Appellate Body in Turkey-textiles, what seems clear is that, even if these articles set conditions for determining the compatibility of the PTA with WTO law, these conditions are not really subject to a strict control. With the consensus rule, in addition, Members are discouraged from helping in the task of oversight for fear of retaliation. This is the subject of the next subsection.

B.2) The poor supervision of the Transparency Mechanism

First, it is important to note that WTO Members do not need to authorize such agreements. WTO Members do not need to give a "green light"; at best, WTO Members can show a "red light" to a PTA

12 "This condition is understood in terms of number of sectors, volume of trade affected and modes of supply. In order to meet this condition, agreements should not provide for the a priori exclusion of any mode of supply".
13 Appellate Body Report, Turkey-Textiles, WT-DS34-AB-R, adopted November 19, 1999, para. 49.
14 Appellate Body Report, EC - Bananas III, WT / DS27 / AB / R, para. 191.
15 Appellate Body Report, Turkey-Textiles, Op. Cit.

(MARCEAU, REIMAN, 2001, p. 311). However, since WTO members make decisions by consensus, only one PTA has been formally recommended to change its elements[16].

In December 2006, the General Council of the WTO established a new transparency mechanism for these agreements, which is currently being implemented on a provisional basis. This mechanism provides for the rapid announcement and notification of any agreement to the WTO, as well as the notification of any subsequent change in the implementation or operation of an agreement.

This initiative strengthens the power of the Committee on Regional Trade Agreements, responsible for the administration and supervision of the PTA that will be notified, and the committee later informs the Secretariat. As for the latter, there is a real desire to contribute more directly to the challenge presented by these agreements, which is unlikely to be accepted by Members. According to the 2006 decision that created the Transparency Mechanism, the Secretariat can make a factual presentation of the agreement but cannot challenge them (WTO 2006, para. 10).

In addition to this strictly representative function of the Secretariat in the supervision of PTA, another concern is the lack of precision regarding the notification period and deadline for Members to notify their agreements. So far, the only guideline is that WTO Members must be taken into account in good faith to notify their agreements as soon as possible.

With the weak supervision of the PTA by the WTO, and the purely representative role of the Secretariat, even if in several meetings we note that these agreements do not comply with Articles XXIV of GATT and V of GATS, thus being WTO-less (which covers less trade integration and liberalization commitments than those achieved within the WTO), incompatible with WTO rules, are being notified without serious consequences.

One could argue that the ineffectiveness of the Transparency Mechanism is not a real issue, because there will always be the DSB. However, this alternative is not as simple. Most PTA have their own dispute settlement mechanisms, which results in many jurisdictional overlaps, topic of the next subsection.

16 Customs union between the Czech Republic and the Slovak Republic, Working Party Report, GATT document L-7501, October 4, 1994.

B.3) The jurisdictional conflict posed by the PTA dispute settlement mechanisms

Virtually all WTO Members are parties to free trade agreements. Therefore, the assumption that disputes related to these agreements are brought before the WTO DSB is not irrelevant. This does not however happen very often. Yet, these preferential agreements include the possibility of countervailing measures for violations, which often consist of a violation of the WTO law. Such measures should therefore be analyzed by the DSB.

However, a theoretical and practical issue arises when we are faced with an agreement that includes a provision related to WTO law - for example, TNPF. In this situation, there would be double violation: a violation of the PTA and a violation of WTO rules. Countries are then able to seize the dispute settlement mechanism provided in the agreements and the DSB. That might result in two different (and potentially contradictory) awards[17] (KWAK, MARCEAU, 2006, p. 467).

In most cases, the PTA let Members decide which mechanism to use. In fact, the growth of the PTA has weakened the power of the DSB, but also the jurisdictional solutions provided by PTA (CHASE et. al, 2016, p.610). Most of the solutions sought by Members therefore go rather through the diplomatic channel. Even if this is not a legal solution, it cannot be said that it does not work.

One of the problems with these PTA dispute settlement mechanisms is their high confidentiality, which poses a problem with regard to the access of less powerful countries to this system (CHASE et. al, 2016, p. 615). Within the DSB, these benefit considerably from the figure of the interested third party, which is not possible within the PTA. So, if Members want to seek a jurisdictional solution, it will likely be the DSB, because small states can use the assistance of the WTO Secretariat (DAVEY, 2006, p. 355). Another concern with the mechanisms presents in these agreements is the absence of any element of monitor-

17 This also raise concerns on forum shopping, a practice according to which claimant, in this case, WTO Members, will seek jurisdiction at the forum that presents most advantages to their case. S. BUSCH, M.L., "Overlapping institutions, forum shopping, and dispute settlement in international trade"; In: *International Organization*, v. 61, n. 4, p. 735-761, 2007.

ing the procedures possibly triggered by these mechanisms.

Some free trade agreements contain a conflict clause which gives priority, and sometimes exclusivity, to the FTA. The question that arises is whether the waiver or the introduction of an irrevocable choice clause can be invoked against WTO jurisdiction, at the risk of falling into *lis pendens*. Kwak and Marceau (2006, p. 481) explain that everything depends on the interpretation that the DSB will give to the concept of *lis pendens*, if it will consider the cases identical.

If given a choice, Members often prefer to initiate a WTO dispute, faster and more efficient forum. In practice, thanks to its speed, the WTO dispute settlement mechanism will be able to provide decisions - in the form of panel reports, appeal bodies or arbitration - much faster than many other systems and will provide for automatic sanctions, while other systems do not have such capabilities (DAVEY, 2006, p. 349).

This means that, in the context of a dispute between two WTO Members involving situations governed both by a PTA and by WTO agreements, either Member may take the mechanism WTO dispute settlement if it considers that one of its benefits under the WTO has been violated or compromised.

The problems highlighted above suggest that the PTA are often mobilized for political reasons. If Members pursue the PTA with so many non-economic reasons, they do pose many difficulties in achieving free trade in the multilateral trading system (DAMRO, 2006, p. 42). However, it is imperative to understand that the measures proposed by the DSB and the PTA mechanisms are not at all the same, nor have the same objectives (KWAK, MARCEAU, 2006, p. 468). The aim of a DSB decision is to restore order in the multilateral trading system, it is a decision for the whole community and not in relation to a specific Member. Decisions of the agreement mechanisms, on the other hand, seek to provide reparation to the party who has suffered harm.

Given that this situation is unlikely to constitute *lis pendens* or *res judicata*, the question of overlapping jurisdictions remains unsolved (KWAK, MARCEAU, 2006, p. 481-482).

SECTION 2: THE PTA AS AN OPPORTUNITY TO REFORM THE WTO

Structured international regulatory cooperation, based on the principles of GATT, offers advantages that are difficult to achieve unilaterally: predictability, liability, interactive engagement aimed at strengthening integration and efficiency gains generated by a larger scale. This is the reason for trying to improve, evolve and adapt the multilateral trading system to current global trends and needs. The challenge is to do so at a time when global economic power is becoming more diffuse.

In order to face the challenge posed by the PTA as an opportunity for the renewal of the WTO, this section will discuss (A) the need to strengthen the role of the Secretariat and to strengthen supervision and transparency; and (B) multilateralization as an alternative, (B.1) *de facto* or (B.2) critical mass.

A) The need to strengthen PTA supervision and the role of the Secretariat

As stated earlier in this article, it is generally recognized that the GATT revision procedure for PTA is quite insufficient. Efforts are therefore necessary to improve this system and minimize the potential negative effects of the proliferation of the PTA. Cottier and Faltea (2006, p. 69-72) indicate four measures to encourage Members' duty of transparency and to strengthen WTO supervision of the compatibility of the PTA with its rules.

The first is to simplify the notification procedure and unify the system, so that there is only one notification per PTA, regardless of its legal basis – Art. XXIV GATT, Art. V GATS or enabling clause[18]. The second is to set up a committee of independent experts to verify the compatibility of the agreements, in place of the Transparency Mechanism. This would serve to avoid the political conflict of inter-

18 The notification of a PTA is currently done according to its legal basis within the WTO framework, whether it is GATT (trade of goods), GATS (trade of services) or the enabling clause (developing countries).

est which can influence the positioning of Members when analyzing a PTA[19]. The third measure would be to strengthen the role of the Secretariat in overseeing its agreements, which, as explained, is currently quite limited, since the Secretariat cannot effectively oppose to an agreement. The fourth and final step is to think about new trade remedies. Those existing today are limited "pro futuro" and do not encourage PTA disciplines to comply with WTO rules.

Regarding the role of the Secretariat in the negotiation process, it has lost importance over time. Active members increase in the average size of trade missions, more attention given to trade negotiations and more services provided by lawyers have weakened the role of the Secretariat in negotiations (ELSIG, 2009, p. 71). At the same time, the reluctance of members to delegate powers to the Secretariat has also not changed.

It is therefore necessary to allow the Secretariat to be able to effectively provide its contributions. The WTO is a "member-driven" organization in which the Secretariat does not make itself heard enough. Allowing the Secretariat to do more to support political dialogue in WTO bodies and the work of WTO Members engaged in open plurilateral initiatives will strengthen the trading system (ELSIG, 2009, p. 72-74).

Another alternative, and perhaps the most - or the only - reasonable one, is that of multilateralization.

B) MULTILATERALIZATION AS A POSSIBLE SOLUTION

Mavroidis and Bollyky (2017, p. 21) explain that preferential trade agreements are a second-best solution to the problem of trade liberalization and better regulation, as these agreements do not cover all countries participating in world trade. However, it is still important to "multilateralize" the progress in international regulatory cooperation achieved byo these agreements and to integrate them into the WTO.

19 WTO Members, even if they should play the role of supervisors of the member-driven organization, are not neutral when analyzing the compatibility of a PTA with the law of the 'WTO. This is because all Members subscribe to a PTA, and fear retaliation in the event of a future notification concerning one of their agreements.

Multilateralizing progress in preferential trade agreements, as well as bilateral and regional initiatives, would reduce business costs, broaden regulatory cooperation and meet social preferences (if widely shared). In doing so, multilateralization would help unlock the social benefits of trade liberalization, both under the WTO and preferential trade agreements.

B.1) *De facto* multilateralization

Currently, a *de facto* multilateralization of preferential agreements is in place, since all the provisions which liberalize trade in services with regard to national suppliers can be extended to suppliers from States party to the agreement (B.1.1). Another possibility of achieving *de facto* multilateralization is through positive integration (B.1.2).

B.1.1) The example of the GATS

It is prescribed in the GATS and in article V of the GATS on economic integration agreements that national service suppliers of Members who are not parties to the agreement may benefit from these agreements as soon as they provide the preferential services in the territory. It is therefore a clause with TNPF effect, with the possibility of benefiting from the clauses of the PTA. Nonetheless, it is necessary to prove that the supplier is installed in the territory and carries out essential activities.

Foreign investors are mostly benefited, regardless of their nationality. This is the case with CETA, for example: American investors who are in Canada will benefit from this agreement.

This relationship between trade, services and investment had already been emphasized by Baldwin, who suggests an interconnection of these three disciplines as a distinctive characteristic of international trade in the XXI century (BALDWIN, 2011).

B.1.2) Towards positive integration

Beyond the example of multilateralization in services, thinking about a deeper regulatory integration would be a new and effective way to respond to the current challenges facing the WTO.

A new way because it would mean leaving with the spirit of GATT 1994 behind, which has done only negative integration, limited to prohibiting tariff barriers. The current objective is positive integration, to fight against non-tariff barriers to trade (such as divergent legislation). It is therefore necessary to promote a deep harmonization of national laws, such as CETA is trying to do, for example. And an effective one because a legislative change aimed at harmonizing the rules would undoubtedly have significant repercussions on trade relations. Changes and legislative harmonization in public health, health security, technical standards, etc.

Furthermore, in the case of positive integration, control comes from the Parties to the agreements, not from the WTO, by modifying their trade practices. Dialogue and cooperation agreements, for example, can help improve transparency, raise awareness among trading countries of the needs and costs for the others, and advance coordination between regulators, businesses and trade officials. And it's also a way to get away from the spaghetti bowl problem.

If a PTA has made it possible to modify national legislation, this will necessarily benefit third States. Thus, there would be a *de facto* multilateralization of certain provisions of economic free trade agreements (MAVROIDIS et. BOLLYKY, 2017). But this only works if the agreement goes in the direction of harmonizing national laws, not working if the States parties to the agreements are based on mutual recognition[20], because promoting deep integration of national laws is not the same as recognizing the equivalence of standards in force in a country (CARREAU, JUILLARD, 2004, p. 174). As Dominique Carreau et Patrick Julliard explains, mutual recognition does not imply legislative change, while positive integration does.

B.2) Multilateralization by critical mass

The gradual multilateralization of PTA-related initiatives to integrate them into the WTO can lead to a review of the decision-making processes of the multilateral trading system, in order to allow the con-

20 The concept of mutual recognition in European Union law implies that products imported into one Member State from another will be presumed to be in conformity with the rules of the first Member State.

clusion of non-discriminatory agreements between groups of specific Members - critical mass - in support of the multilateralization process (KRISHNA et. al., 2011, p. 45).

Critical mass exists when a sufficiently large body of Members agrees to cooperate under the auspices of the WTO. An important feature of this approach is that the agreements do not discriminate against non-signatory countries. Doctrine is particularly interested in how this phenomenon of PTA multilateralization can influence the decision-making process within the WTO, examining the possibility of adopting a modified consensus rule. Warwick report (WARWICK COMMISSION, 2007), introducing its version of critical mass decision-making, argues that there was a lesson to be learned from the Tokyo Cycle.

During these negotiations, integrated by nearly 100 members, only a small group, led mainly by the United States and the European Community, actively participated in negotiations organized like an inverted pyramid (WINHAM, 1986). First, the negotiations took place in bilateral contexts (United States-EC) and in small groups (United States, EC, Japan and Canada). Second, after an initial agreement between these groups, the dominant players attempted to multilateralize the results by offering certain concessions to other potential parties to the agreements. Towards the end of the negotiations, some developing countries became more involved in the negotiations, but the concessions offered by the main players were perceived as too vague and as not meeting the objectives of the Tokyo Declaration. The main agreements have been concluded between the United States, the European Community and Japan. In other words, the critical mass was very low during the negotiations on non-tariff barriers. Lots of decision-making power concentrated on a reduced number of economic agents.

In summary, the Warwick report concludes that the results of critical mass negotiations do not affect the balance of rights and obligations and that the rights acquired by signatories are extended to all members on a non-discriminatory basis, obligations falling solely on signatory[21]. Thus, the report shares the view that critical mass

21 Non-signatories will not have any obligations but will be able to benefit from the results: the free-rider phenomenon, which here is not particularly problematic.

and non-discrimination, here as the most-favored-nation extension to non-participants, are aligned.

Adopting a critical mass approach would make it possible to "multilateralize" trade rules without involving all WTO Members, a proposal which may seem attractive when it is justified to have a regulatory approach to trade widely shared but not necessarily global.

CONCLUSION

The aim of this article, based on the analysis of the main issues of relationship between the PTA and the WTO, was to define whether the proliferation of PTA represented a crisis or an opportunity for the WTO. This question is the result of the challenges confronted by the WTO in the face of the proliferation of the PTA in recent decades, also affected by the complexification of GVC. As demonstrated at the beginning of this study, even if these agreements comply with WTO law, the problems they pose are due to the scale of their growth. It is a phenomenon that follows the trend of a generalized crisis of multilateralism.

To answer this question, in the first section, this article has analyzed the symptoms indicating that the proliferation of the PTA is a normative and an institutional crisis of the WTO.

In the normative sense, the principle of the single undertaking and the consensus rule explain why Members resort to plurilateral solutions in order to easily reach common ground. In addition, considering the weak legislative evolution since GATT 1947, insufficient to follow recent trends in international trade, such as the appearance of new disciplines (investments, industrial property, etc.), the PTA, through WTO-plus or WTO-extra provisions, deal with subjects not covered by the WTO. Finally, the acceleration of GVC has radically complicated the rules of origin, which remain a very important topic and difficult to resolve.

From an institutional point of view, the study demonstrated the insufficient supervision made by the WTO with regard to the PTA, resulting from the non-evolution of the applicable legislation and the weak transparency mechanism. In addition, another major problem

arises from the conflict of jurisdiction between the DSB and the dispute settlement mechanisms present in the PTA.

At the end of the first section, this research allowed us to conclude that the growth of the PTA is both the source and the consequence of a WTO crisis. Knowing that we are therefore facing a crisis, the challenge is to know if it is possible to transform these challenges into opportunities to renew the organization and recover its power.

In the second section, this article has tried to think of reasonable alternatives to take advantage of the new scenario of international trade to improve the multilateral trading system. As possible solutions, we identify a strengthening of the supervision made by the WTO of the PTA countries, with a more powerful Secretariat, and the multilateralization of the benefits perceived by the PTA parties, whether *de facto* or via a critical mass of Members.

We hope that this article can provide a panoramic understqnding of the problems currently encountered by the WTO in the face of the trend of regionalism and the initiatives to be implemented for enriching results.

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