Introduction

JOANNA JEMIELNIAK, LAURA NIELSEN AND HENRIK PALMER OLSEN

The idea behind the book

The past two decades have seen a significant increase in the political reach and influence of international law.[1] A central element in this process has been an intensified juridification of international relations and, more specifically and importantly, a steep growth in international judicialization through a steadily growing population of international courts (ICs).[2] Nearly 90 per cent of the total historical output of legal decisions made by ICs was issued during this period, and ICs are gaining more autonomy from nation states: more ICs have compulsory jurisdiction, many allow agents other than states to initiate litigation before them, and several have the authority to review state compliance with international rules.[3] This development is best described as a shift from what might be called a *pacta sunt servanda* regime of synallagmatic relations between sovereign states to a more dynamic and self-sustaining regime of "living law", in which courts exert an increasing influence on legal development through their interpretation of international legal documents. This development has resulted in a number of universalizing tendencies in legal interpretation[4] and in engagement with a dynamic approach to legal regulation, whereby

[1] See Anne Marie Slaughter, *A New World Order* (Princeton: Princeton University Press, 2004); Karen J. Alter, *The New Terrain of International Law: Courts, Politics, Rights*, (Princeton: Princeton University Press, 2014).
[2] *Ibid.*
[3] *Ibid.*;*The Oxford Handbook of International Adjudication* (Cesare Romano, Karen Alter, and Yuval Shany (eds.)) (Oxford: Oxford University Press, 2014).
[4] See Joanna Jemielniak and Przemysław Mikłaszewicz, "Capturing the Change: Universalising Tendencies in Legal Interpretation" in Joanna Jemielniak and Przemysław Mikłaszewicz (eds.), *Interpretation of Law in the Global World: From Particularism to a Universal Approach* (Heidelberg: Springer, 2010).

the most influential ICs participate more actively in developing and adapting the law to majoritarian preferences.[5]

Understanding how and why ICs become frequent interpreters of international law with impacts on state behaviour (and why some do not) is important for understanding this development. One important dimension of this issue is the institutional, political and social context in which an IC operates. A recent study of this topic showed how this context influences the capacity of ICs to translate formal legal authority into authority in fact.[6] Hence, issues such as access to an IC, the existence of alternatives to international litigation and whether an IC makes decisions on technical issues or issues of high political importance influence the ability of ICs to establish authority in fact and thereby operate as an important agent in defining the law within its subject matter jurisdiction. Applying these general findings specifically to a study of the authority of the WTO Appellate body (AB), another recent study explained the widening of the WTO-AB's authority[7] by showing how the changes to the WTO dispute settlement system that went into effect in 1995[8] combined with various political factors (most fundamental, the fall of the Berlin Wall and, with it, the collapse of Soviet economic model and the subsequent international rise of neo-liberalist economical thinking, but coupled to other important politico-economic developments that happened around the same time[9]) rapidly transformed the WTO-AB into an IC with extensive authority in international trade law.

This book departs from the above-mentioned studies in two ways. First, the focus of this study is neither on ICs in general nor on the WTO-AB alone. Rather, this study's focus is on how *international judicial authority* is established and managed in the field of international economic law, which we define here as encompassing international trade

[5] See Miguel Poiares Maduro, *We, the Court: The European Court of Justice and the European Economic Institution* (Oxford: Hart Publishing, 1998); Alec Stone Sweet and Thomas L Brunell, "Trustee Courts and the Judicialization of International Regimes", *Journal of Law and Courts*, vol. 1 (2013), 61–88.

[6] See Karen J. Alter, Laurence R. Helfer, and Mikael Rask Madsen, "How Context Shapes the Authority of International Courts", *Law & Contemporary Problems*, vol. 79: 1 (2016).

[7] See Gregory Schaffer, Manfred Elsig, and Sergio Puig, "The Extensive (but Fragile) Authority of the WTO Appellate Body", *Law & Contemporary Problems*, vol. 79: 1 (2016).

[8] See Manfred Elsig and Jappe Eckhardt, "The Creation of the Multilateral Trade Court: Design and Experiential Learning", *World Trade Review* (forthcoming 2015).

[9] See Schaffer, Elsig, and Puig, "The Extensive (but Fragile) Authority of the WTO Appellate Body".

law, investor-state arbitration and international commercial arbitration. Second, the focus of the book is not exclusively on the political and social contexts and their shaping effect on international adjudicative institutions but rather on the institutions themselves: their (legal) history, their (legal) culture and their (legal) behaviour. Originating from a conference that was organized by the Centre of Excellence for International Courts (iCourts) and Copenhagen Centre for Commercial Law (CCCL) of the Faculty of Law of the University of Copenhagen and was entitled "Establishing Judicial Authority in International Trade Law" (Copenhagen, 12–13 December 2013), in which leading international economic law scholars from around the world participated and discussed the topics that are now collected in this volume, the ambition has been to study how various aspects of legal culture affect judicial authority in international economic law. This investigation is accomplished through three interlinked parts with the following themes: (1) emergence, (2) precedent and (3) legitimacy. These three issues together provide an important supplementary perspective to existing research in the field, in that this approach seeks to show how the institutional history, the instrument of legal precedent and the perceived legitimacy underpinning the agency of these institutions shape judicial institutions in international economic law.

Economic law and the other fields of international law

When focusing in particular on (public) international trade law, it is important to note that this area is different from other subsystems of international law. The interests of states in facilitating the trading system result in a process that seems much more predictable and enforceable than the processes that occur in human rights law, international criminal law or international environmental law. Most significantly, in the trade area, states "make money" in the sense that private stakeholders within their jurisdictions acquire financial benefits, generate wealth, ensure and create jobs, and so on. In contrast, for example, international environmental law is often viewed as an area that "costs" money (even though this view is a very rough generalization). On the other hand, human rights and international criminal law are areas that by their nature reach into the core of sensitive domestic politics. These areas are very value sensitive and will therefore often be dominated by politics.[10]

[10] See also Alter, Helfer, and Madsen, "How Context Shapes the Authority of International Courts".

Comparing this characteristic to trade, it is important to note that international trade law is detached from current politics, at least to a certain degree, in the sense that it follows primarily economic trends. A popular saying when teaching trade law is that if you want to know why public international controversies have arisen, "follow the dollar sign"; in other words, states typically do not engage in WTO cases unless there is a real loss of trade and thus national jobs and profits. Jobs and enterprise benefits are in the end a major factor when evaluating the factors that get politicians re-elected. However, this simple fact also informs why such a broad (even if sometimes denounced as "fragile")[11] judicial authority is vested in the WTO's dispute settlement mechanism, as well as in other types of dispute resolution in the economic area. Another comparison between human rights and international criminal law on one side and international trade law on the other is that, in the trade area, no country really holds an absolute position in this field because all countries engage in trading and investing across the border. Some countries do so to a greater extent than others, and some countries do so with greater success than others, but there is no decisive divide in trade views between East and West, the new world and the old world, or the European Union and the United States, as there would be had we picked another and more politically sensitive topic, such as human rights and international criminal law.[12] The same pragmatic difference in modus operandi can also be traced in the functioning of the WTO. Unlike the United Nations, where political battles are fought, diplomats strive to keep political battles out of the WTO.[13] Whereas the conflicts between some countries that are played out in the United Nations may cause the world tremble because those countries may be nuclear powers and on the verge of entering into an armed conflict, the very same states may have remained allies in the

[11] See Schaffer, Elsig, and Puig, "The Extensive (but Fragile) Authority of the WTO Appellate Body".

[12] It is worth emphasizing that the role of global trade in diminishing the traditional North-South divide between the developed and developing world, while controversial, also certainly escapes bipolar categorizations, especially when the key role of such powerful economies as India and China (characterized as the "Southern engines of growth") in the global economic landscape is considered. See Gouranga Gopal Das, "Globalization, Socio-Institutional Factors and North–South Knowledge Diffusion: Role of India and China as Southern Growth Progenitors", *Technological Forecasting and Social Change*, vol. 79 (2012).

[13] The most political stance was probably taken when Israel blocked an observer and Egypt reacted by blocking all observers, *see e.g.*, Craig vanGresstek, *The History and Future of the World Trade Organization*, 164–166, available at www.wto.org/english/res_e/booksp_e/historywto_05_e.pdf.

trade area due to shared economic interests. An exception is of course when states use economic and trade sanctions against each other.

This background is particularly important in the context of Part I of this volume, concerning the *establishment* of the judicial authority, where the historical perspectives and the differences between various parts of the world are outlined. The need for countries to have a predictable trading system is the most important explanation for why a "World Trade Court" with mandatory and compulsory jurisdiction was set up with the WTO dispute settlement mechanism. The same holds for the decisions of that court, which, at least to a considerable extent, are enforceable and have some "teeth" in comparison to other fields, in which a dispute settlement mechanism is missing altogether, is not compulsory or is in place in areas where only a smaller number of states participate.

Another aspect that differentiates this area from other fields of international law is that the international and regional trading system includes several layers of dispute resolution systems: the WTO DSM is the "world trade court", many regional trade agreements maintain separate mechanisms, and private companies also engage in commercial arbitration and investor-state dispute resolution. The spheres of economic interest of the states and private actors in this area are also not completely different, as the latter players are important stakeholders that directly affect a country's trade policies in market economies. Moreover, as discussed in detail *infra*, the procedural and institutional standards that are developed in the private field of commercial arbitration and in the public-private field of investment treaties influence trade dispute settlement in a variety of ways (from forum shopping strategies to specific procedural solutions). This characteristic is also unique to international economic law in comparison to for example, human rights, international criminal law, or international environmental law, where only rarely, if ever, will there be an underlying case that involves private parties seeking the resolution of a dispute before several fora and perhaps via parallel proceedings before dispute resolution bodies of different types.[14]

[14] Whereas the phenomenon of forum shopping has also been identified in the area of human rights, in our opinion, the unique feature of international economic dispute resolution is forum shopping *across* different orders and types of bodies (or, in other words, *across* layers of underlying disputes, as illustrated by Figure I.1 in this chapter). Cf. Laurence R. Helfer, "Forum Shopping for Human Rights", *University of Pennsylvania Law Review*, vol. 148 (1999), 285–400.

The definition of international economic law

For the purposes of this volume, we assume a broad definition of international economic law, which encompasses trade law and its various dispute settlement mechanisms, investor-state relations and dispute settlement and international commercial arbitration. The inclusion of all three of these areas is necessary to fully understand the systemic and functional character of economic law, with a special focus on how disputes in this field actually arise and to what degree private social actors participate directly or indirectly in shaping the law. The volume thus seeks to break with the tradition of presenting each of these fields as separate and unrelated phenomena.

As will be discussed in this book, the above-mentioned shift from the *pacta sunt servanda* regime of synallagmatic contractual relations towards an increasingly judicialized regime of "living law" can be traced not only in international trade dispute settlement but also in the resolution of international investment and commercial disputes. While rarely considered together, these three areas of international economic dispute resolution disclose not only a number of significant, parallel developments but also mutual inspiration and the "borrowing" of procedural mechanisms and solutions, as well as an overlap in experts and even fora, which is observable on the procedural, institutional and personal levels.

This chart is inserted to illustrate the different "layers" of disputes in the field of international economic law.

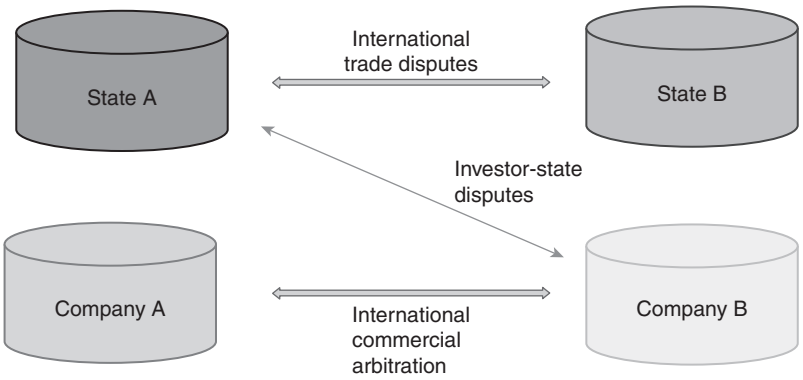

Figure I.1 Different "layers" of disputes in the field of international economic law

The top layer represents international law disputes, in which state-to-state controversies in the field of international trade law are handled either through dispute settlement of a free trade agreement or via the multilateral system of the WTO. Within this layer, private participation is usually not discussed, as the states are the acting parties, although nearly all disputes are driven heavily by the affected industry, and one can therefore often speak about private parties that stand immediately behind the government litigating the case; in some instances, such private parties effectively manage the case for the government. On the other hand, the affected industry is the direct party in the underlying dispute, which can be channelled through a commercial arbitration, handled as an investor-state dispute or both.

To exemplify situations in which all three cases can arise *in casu* concerning the same private companies in two countries, one can imagine the scenario where a private company B enters into a contract with private utility company A about setting up a power plant in state A. When the construction is nearly finished, state A changes its legislation so that the power plant can no longer generate the same revenue for its production of energy because state A wants to favour green energy and therefore enacted a rule that obstructs the importation of certain parts used in the production and running of the conventional power plant in conjunction with heavy taxes on conventional energy production. When this happens, company A can no longer honour the contract with company B and wants to either have the power plant substantially transformed to produce more environmentally friendly energy or simply rescind the contract and not pay the rest of the instalments. Therefore, company B brings an international commercial arbitration case against company A to force company A to honour the original agreement. In addition, company B brings an investor-state case against state A in which it seeks compensation for its loss associated with the extra cost involved with having to purchase some parts domestically that can no longer be imported. Finally, company B convinces the government of state B to bring a WTO complaint that addresses the import restrictions and any potential discriminatory aspects of the legislation. The WTO case is added at the top level to have the measure itself removed. Although the WTO dispute may require several years to resolve, this strategy may nevertheless be a good investment for the company to sponsor (building up the case legally with its own counsel) or in other ways assist the government (or simply lobby the government into taking

action) because this approach can pave the way for more business in state A in years to come.[15]

On a more abstract level, the three layers interact in several other ways. For example, one can imagine the scenario where a company (and/or a state) has two or more parallel proceedings in different venues and a ruling in one venue becomes persuasive for the ruling in another venue. However, the scenario can be even more abstract so that the interpretation from one layer of the disputes can be borrowed in an entirely unrelated dispute in another venue that concerns altogether different parties.[16]

Judicial authority

The substance of the book centres on the theme of "establishing judicial authority". An important element in establishing judicial authority, whether in international trade law or in any other field of law, is the building up of legitimacy for the body that has been granted the competence to manage this authority. Solid authority cannot be built from scratch without legitimacy, and authority that is not consistently supported by legitimacy will erode and disappear.[17] However, this statement does mean that legitimacy and authority coincide. If this were true, then the more authority an institution has, the more legitimate it must be. However, that is not always the case. ICs may very well acquire extended authority (for instance, authority over more legal issues, authority to issue more binding decisions and authority to commission more evidence during trial) without necessarily becoming or appearing more legitimate to all agents. On the contrary, increasing authority may well lead to decreasing legitimacy because authority attaches to responsibility. Hence, if an institution increases its authority, it also becomes more blameworthy for events over which it has a

[15] The issue of parallel proceedings in investor-state proceedings and the WTO is outlined by Tereposky and Nielsen in Chapter 4.

[16] In addition, Jemielniak and Nielsen in Chapter 10 also discuss the possibility of states opting for arbitration mechanisms that were developed in a commercial (and not investment) setting rather than resorting to, for example, the WTO to solve their state-to-state disputes, highlighting the complexity of forum shopping and the interplay between the types of dispute settlement even further.

[17] Alter, Helfer, and Madsen apparently find that "authority in fact without legitimacy" is possible, see Alter, Helfer, and Madsen, "How Context Shapes the Authority of International Courts". However, they do not explain how this is possible.

say or in which it is involved.[18] Still, studying international judicial authority in international economic law is in part, a study in legitimacy; it is a study of the practice of building continued support for the international bodies that have been empowered to adjudicate trade law issues. On a very practical level, it is worth noting that one factor that has certainly boosted the legitimacy of the WTO DS system is the extensive *usage of* and *adherence to* the system from very early on by members.[19]

By analogy, had investor-state and international commercial arbitration not had both legitimacy and authority on a transnational level (although drawn from different sources and secured by different means), those systems would not have been used and relied on so often by private parties.[20] However, the diffusion processes in the area of dispute resolution in international economic law are also to be seen in such widely discussed phenomena as the judicialization of commercial arbitration[21] and its consolidation as a *sui generis* transnational legal order,[22] exceeding the limits of a mere *a casu ad casum* settlement of controversies and transforming into a system of administration of justice. This evolution of commercial arbitration adds yet another layer of considerations to the above-described strategies of possible forum shopping, but it is also indicative of the complex interplays among the three layers

[18] See e.g.Birgit Peters and Johan Karlsson Schaffer, "The Turn to Authority beyond States", *Transnational Legal Theory*, vol. 4 (2013), 315; Michael Zürn et al., "International Authority and Its Politicization", *International Theory*, vol. 4 (2012), 69.

[19] See also Alter, Helfer, and Madsen, "How Context Shapes the Authority of International Courts"; Schaffer, Elsig, and Puig, "The Extensive (but Fragile) Authority of the WTO Appellate Body". As of 31 March 2016, 504 disputes were filed; see http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm (last visited on 31 March 2016). This has resulted in 123 adopted Appellate Body reports and only 20 22.6 awards (retaliation i.e., noncompliance) reports issued, concerning a total of 9 cases (as some concern the same case), see www.worldtradelaw.net (last visited on 31 March 2016).

[20] The sources of the transnational legitimacy of arbitration have been identified as a delegation of the powers extended by the individual states (in a traditional, monolocal approach); the general legitimation granted by the international community of states (in the Westphalian or pluralistic model); or the autonomous standing of arbitration as a *sui generis* transnational legal phenomenon, which is largely emancipated from the original consensus of the states. See in detail:Emmanuel Gaillard, *Legal Theory of International Arbitration* (Leiden: Martinus Nijhoff Publishers, 2010), 15ff.

[21] cf. e.g. Richard B. Lillich and Charles N. Brower, *International Arbitration in the 21st Century: Towards "Judicialization" and Uniformity?: Twelfth Sokol Colloquium* (New York: Transnational Publishers, 1994); Fali S. Nariman, The Spirit of Arbitration: The Tenth Annual Goff Lecture, Arbitration International vol. 16 (2000).

[22] See Gaillard, *Legal Theory of International Arbitration*.

of international economic dispute resolution, which the book aims to unveil and address, as we believe that these issues should no longer be treated as separate and isolated developments. Because legitimacy is a key issue in the discussion of judicial authority, we found it useful to dedicate the entire third part of this book to a detailed discussion of this topic, particularly to the question of the legitimacy of decision-making.

However, before arriving at this issue, we first aim to show how the establishment of judicial authority in international economic law rests on three very diverse historical developments, a diversity that shows itself very clearly by focusing, as we do in Part I of the book, on regional differences in the development of judicial authority. Following this discussion, we move to what is legally speaking at the heart of disseminating judicial authority: the use of precedent in legal argumentation.[23] As was noted by Chang-fa Lo at the Asia WTO Research Network (AWRN) at 10, NTU, Taiwan, 14–15 June 2015, WTO cases have been used to encourage trade negotiations,[24] something that would not have been possible but for precedent. As a consequence, precedent with a certain authority can influence countries' negotiating positions. A similar theme is that governments are sometimes seen to use reference to international law as leverage for making unpopular changes domestic law after a WTO ruling against such a change.[25] Precedent is therefore covered in Part II of this book.

[23] For an overview of precedent in all three layers of disputes, *see* Giorgio Sacerdoti, "Precedent in Settlement of International Economic Disputes: The WTO and Investment Arbitration Models", *Contemporary Issues in Int'l Arbitration and Mediation: The Fordham Papers* (2011). For a more general introduction to how precedent is used in the legal decisions made by international courts, see Marc Jacob, *Precedents and Case-based Reasoning in the European Courts of Justice* (Cambridge: Cambridge University Press, 2014). Although it is a study of precedent use in the CJEU, we believe that many of the findings reflect a similar situation in other active international courts.

[24] Citation confirmed with the author. The email is on file with the editors.

[25] Similarly, the European Union had to reform the sugar area after the *EC – Sugar* case, *see* European Communities – Export Subsidies on Sugar, Report of the Appellate Body, WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R, 28 April 2005. Another type of "compliance" is described by Shaffer as compliance with the rules "outside the dispute settlement decisions", i.e., the implications for national regulatory governance, see Gregory Shaffer, "How the WTO Shapes the Regulatory State", School of Law, University of California, Irvine, legal Studies Research Paper Series No. 2015–10, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2480664&download=yes (last visited on 19 February 2015).