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Introduction

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Since the end of World War II, there has been an expansion of free trade agreements (FTAs) in both numerical and geographical terms. In the period from 1948 to 1994, the General Agreement on Tariffs and Trade (GATT) received 124 notifications of regional trade agreements (RTAs), and since the creation of the World Trade Organization (WTO) in 1995, over 400 additional arrangements covering trade in goods or services have been notified. At present, negotiations of new RTAs continue to rise and the most recent development of FTAs has been the so-called plurilateral negotiations among several countries across or within certain regions. This includes negotiations in the Asia–Pacific Region for a Trans-Pacific Partnership (TPP) Agreement, the Transatlantic Trade Investment Partnership (TTIP), the Regional Comprehensive Partnership Agreement in Asia, the Pacific Alliance in Latin America and the Tripartite Agreement in Africa.

At first glance, the legal system in international trade is confusing. There is the multilateral system of the WTO, a large number of regional, plurilateral regimes, together with myriad bilateral agreements. On the enforcement front, almost every regime has established its own mechanism for dispute settlement. In other words, in parallel with, and as a result of, the expansion of FTAs, recent decades also witness the rise of fora where trade disputes are adjudicated.

There is a clear trend in the choice of the dispute settlement mechanism: more and more FTAs have abandoned the political model of diplomatic negotiations and moved toward a third-party adjudication system, in the form of ad hoc panels, a permanent judiciary or a combination of both. Sixty-five per cent of existing trade dispute settlement mechanisms (DSMs) have adopted a 'quasi-judicial model' that provides for ad hoc adjudicatory procedures. Under this model, the panels are established for purpose of resolving the specific dispute and dissolved once it has issued a decision. Although the vast majority of quasi-judicial mechanisms provide for a single instance of binding

third-party adjudication, some, being inspired by the WTO dispute settlement system, further include an appellate organ, e.g. the Association of Southeast Asian Nations (ASEAN) and the Southern Common Market in Latin-America (MERCOSUR). A small group of FTAs opt for the judicial model, which consists of the establishment of a permanent judiciary. In most cases, the jurisdiction of the court as such goes beyond just trade disputes and extends to a range of matters related to regional integration. The most well-known example is the Court of Justice of the European Union (CJEU).

As a result of the shift away from politically oriented approaches toward more sophisticated legalistic proceedings, trade dispute settlement is emerging and becoming a major branch of international adjudication.[1] The impact of international adjudication on the development of the trade regime cannot be overstated. Important examples include the CJEU and the WTO Appellate Body. The former has been a major driving force of the constitutionalization process of the European Union,[2] while at the WTO the approximately 500 disputes initiated over the last 20 years reveal the solid confidence members have placed in the dispute settlement system, which has been long regarded as the 'jewel in the crown'.

1 The Legitimacy Debate

International trade courts and tribunals (ITCs) have, like other parts of the international judiciary, come under increasing scrutiny over their functioning and operation. A large number of legitimacy issues have been raised in relation to international trade adjudication. Views and claims have been presented from a range of actors; inter alia, scholars, practitioners, NGOs and government officials. They point to the institutional and procedural features of the dispute settlement system, as well as the style of their adjudicating methods and the quality of legal reasoning, as the outcome of adjudication has affected a large group of stakeholders.

[1] By the end of 2014, the WTO had registered 474 disputes since its establishment in 1995, and NAFTA panels have delivered 75 decisions in the last two decades.

[2] J. H. H. Weiler, The transformation of Europe. *Yale Law Journal*, 100 (1991), 2403–83; J. H. H. Weiler, *The Constitution of Europe: 'Do the New Clothes Have an Emperor?' and Other Essays on European Integration* (Cambridge, UK: Cambridge University Press, 1999).

The term *legitimacy* has been used with a variety of meanings in the context of international law and global governance.[3] At the core, legitimacy is a question of whether the power or the authority to rule by an institution, in our case, international trade courts and tribunals, can be properly justified. Legitimacy can be understood in both normative and sociological terms. In the normative sense, the legitimacy of an institution depends on whether the institution fulfils certain defined standards when executing its mandates. Unlike the normative concept, sociological legitimacy does not make a normative commitment to any defined standards. It is an empirical concept, which concerns the extent to which external actors outside the institution are convinced by the authority of the relevant institution. In other words, sociological legitimacy underlines actual perceptions rather than predetermined standards. Our research focuses primarily on the normative legitimacy. Rather than investigating the perceptions of outside actors, we will explore the legitimacy concerns arising from the existing institutional structures and adjudicative practices.

The fundamental basis for the legitimacy of ITCs is the consent of sovereign states to their delegated powers. States' consent, in the form of ratification of or, accession to the constituent legal instrument, establishes the initial capital of legitimacy that is a structural asset held by the international courts. However, this legitimacy capital is also dependent on several other factors, such as the procedure and practice of the judicial mechanism. Furthermore, the legitimacy may fluctuate over time in response to how the delegated power is exercised. In other words, in addition to the original consent from the states, a number of elements are involved in the evaluation of the overall legitimacy of the adjudicator concerned.

The first element is the institutional arrangements of the courts and tribunals. The most outstanding feature of international trade adjudication is the high number of fora for dispute resolution and the institutional choice between the judicial model and the quasi-judicial model

[3] See, for example, D. Bodansky, Legitimacy in international law and international relations. In, J. L. Dunoff and M. A. Pollack, eds., *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (Cambridge, UK: Cambridge University Press, 2013), pp. 321–45; A. Buchanan and R. O. Keohane, The legitimacy of global governance institutions. *Ethics and International Affairs*, 20 (2006), 405–37; A. Von Bogdandy and I. Venzke (eds.), *In Whose Name? A Public Law Theory of International Adjudication* (Oxford, UK: Oxford University Press, 2014); N. Grossman, The normative legitimacy of international courts. *Temple Law Review*, 61 (2012), 61–106.

mentioned earlier. Therefore, the legitimacy assessment, as well as the standards involved, varies substantively depending on the structure and settings of the adjudicator.

The second aspect refers to procedure-related issues. In comparing judicial and quasi-judicial models, there are significant differences among ITCs on the selection of judges, the involvement of nonstate parties and the extent of proceeding transparency. It is thus of interest to explore the procedural impact on the adjudicator's overall legitimacy.

The third legitimating factor concerns judicial behaviour in the form of the style of legal interpretation and of fact-finding. It depends on the mandate of the court, evolves within the institutional and procedural framework and affects the outcome of the dispute.

Fourth, the output of the ITCs through decisions or judgments also plays a significant role in the legitimacy assessment. The output might be viewed in light of the effectiveness of the adjudicator in promoting the intended objectives stipulated in its mandate, as agreed among the state parties on its establishment. It can also be assessed in terms of the actual performance of the adjudicator, particularly as regards the de facto influence of the decision that goes beyond its stated mandate.

Finally, a distinction should be made between the internal and external legitimacy of international adjudicators.[4] Although internal legitimacy underlines the institutional and operational aspects of the adjudicator itself, external legitimacy focuses on the 'universe' outside the adjudicator. In particular, external legitimacy means the influence the adjudicator has on the norms, institutions and regime that the adjudicator is embedded in; it might even go beyond the regime with extended impact on other trade courts and national courts. The internal legitimacy of an international adjudicator may serve as a prerequisite for external legitimization, being an intermediate goal instead of an end in itself.[5]

Insofar as this book is concerned, the legitimacy assessment focuses on whether the ITCs are living up to the reasons and mandates for their establishment; it is a question of degree with the possibility of eroding and/or increasing legitimacy. Our research scope is broadly defined, including

[4] J. H. H. Weiler, The rule of lawyers and the ethos of diplomats: Reflections on the internal and external legitimacy of WTO dispute settlement. *Journal of World Trade*, 35 (2) (2001), 191–207.

[5] Y. Shany, Assessing the effectiveness of international courts: A goal-based approach. *American Journal of International Law*, 106 (2) (2012), 225–70, at 137.

institutional settings and establishment, the procedures, judicial practice in legal interpretation, fact finding and rule application, enforcement of and compliance with their decisions, as well as the influence of specific decision or the adjudicator in general.

2 Research Questions

This book is divided in two parts. The first part consists of studies of selected ITCs. Based on their functioning and operation, the examination of each court and tribunal attempts to address all the research questions listed next. The seven specific research questions cover a number of issues that are closely linked to the legitimating elements outlined in the previous section, presenting a collection of legitimacy concerns raised by both practitioners and scholars. Admittedly, certain questions may not be applicable for a given tribunal, or some other tribunals are facing legitimacy challenges that are not listed. There is thus also need for context-specific assessments, in addition to our guiding questions.

2.1 Selection and Composition of the Adjudicators

This question focuses on the selection criteria and procedure, as well as the resulting composition, of the judges, panelists and arbitrators that are adjudicating trade disputes. Examples of the specific matter to be addressed include the role and involvement of different stakeholders during the selection process, e.g. sovereign states, nongovernmental bodies and civil society; and the impact that the composition of adjudicators have on the functioning of the tribunal. The selection and composition of adjudicators are directly linked to a number of legitimacy concerns, and one much-debated issue refers to the independence of the courts and tribunals.

2.2 Procedural Rules

Procedural rules here are broadly defined, covering all rules governing the relevant processes of adjudication by courts and tribunals. They may have substantial impact on the overall legitimacy of the adjudicator concerned, for example, by determining which group is able to bring a dispute to the tribunal. The issue of standing is linked to the broader debate of the access to the tribunal, the participation of civil society and rights and obligations of third parties. Procedural rules are also often relevant in the transparency

debate, enquiring the extent of openness of the proceedings, information disclosure and the decision-making process.

2.3 Fact-Finding

The process of fact-finding establishes the case-specific background and context the relevant law and its interpretation apply to. This process involves a number of specific issues, ranging from the allocation of burden of proof and standards of review, to rules on evidence and information from nondisputing parties.

2.4 Interpretative Approaches

One major adjudicative function of trade courts is to provide legal interpretation of the applicable rule of law. An adjudicator normally establishes, or attempts to establish, consistent interpretative approaches. ITCs also develop, through their case law, specific techniques, e.g. concerning a textual or dynamic interpretation, and the role of precedence and reference to other courts and tribunals. The interpretative methodology mirrors the attitude of the adjudicator on many critical legitimacy questions, e.g. interface between trade and environment or human rights and the preservation of domestic regulatory space for sensitive policies.

2.5 Forum Shopping

As a result of the proliferation of trade agreements, there is usually more than one forum that has jurisdiction in a trade dispute between specific parties. The applicant's preference in the choice of forum is linked to many factors, inter alia, the expenses incurred in both economic and political terms, the duration of the proceedings and the subsequent enforcement of the decision. The very existence of forum shopping is a 'luxury problem' definitely better than no forum for resolution, and a healthy level of competition among tribunals may also improve the quality of rulings and the expediency of proceedings. However, the reality of jurisdictional overlap and the phenomenon of parallel litigations have raised the risk of inconsistent judicial decisions and fragmented legal interpretation that might ultimately render a dispute concerned unsolved and general trade law inconsistent or contradictory.

2.6 Implementation and Interaction with National Courts

Most ITCs are linked to distinct mechanisms for implementation. Questions then arise on whether such mechanisms further guarantees, increases or decreases, the credibility and legitimacy of the rulings, as well as that of the system as a whole.

Domestic implementation of decisions from an international tribunal may, to a certain extent, be considered a national 'screening' process. The approach and attitude engaged in by different domestic bodies, of administrative, legislative or judicial nature, may reveal their perception of the legitimacy of the ruling as well as of the tribunal delivering it. Such domestic perceptions are usually reflected in approaches like direct/indirect effect of international rulings, together with relevant principles on the relationship between international and domestic law, such as consistent interpretation.

2.7 Tribunal-Specific Legitimacy Concerns

We recognize that ITCs are embedded in varying legal regimes and local political climate. The functioning of a given adjudicator reflects social, political, economic and cultural realities. Any legitimacy assessment therefore has to be grounded on an elaborate understanding of the system and environment within which the adjudicator is established and operate.

The second part of the volume includes cross-cutting studies that aim to provide legitimacy assessment of international trade adjudication across the board. This part is interdisciplinary in nature, including not only research by legal scholars but also contributions from political scientists and political philosophers. The chapters in this part address specific issues of judicial independence, interaction and access to courts, and it also provides a philosophical analysis in the light of global justice theory.

3 Selection of Trade Courts and Tribunals

The preceding research questions require case-by-case assessment of each court and tribunal, as opposed to a collective evaluation across the board. For that purpose, we selected 11 trade courts and tribunals as the research subjects in the first part of the volume.

As mentioned earlier, a majority of the contemporary mechanism for trade disputes has adopted the quasi-judicial model or judicial model or a combination of both. While the quasi-judicial model refers to an ad hoc adjudicatory system, the judicial model takes the form of a permanent body of a judicial nature. What they have in common is the automatic right of referral of a dispute to third-party adjudication. Therefore, during our selection process, one important selection criterion was that the adjudicator must have certain judicial features, either as a permanent court or, for those following the quasi-judicial model, with an appeal body functioning similar to court. We therefore did not include dispute settlement mechanisms that are pure ad hoc in nature, e.g. North American Free Trade Agreement. We also took into account the geographic distribution of our research subjects, striving to cover several different regions of the globe. Furthermore, we placed great emphasis on trade courts and tribunals that are understudied. Last but not least, we also included two domestic judiciaries, examining their functioning and performance in trade dispute resolution, as well as their interaction with relevant international adjudicators.

The selected ITCs are as follows:

3.1 The World Trade Organization Dispute Settlement System

Dispute settlement is a central pillar of the multilateral trading system and of the WTO's contribution to the stability of the global economy. As the only multilateral forum for trade disputes, the WTO consists of ad hoc panels and the permanent Appellate Body and deals with interstate disputes over the application and interpretation of WTO rules pursuant to the procedures and requirements provided in the WTO Dispute Settlement Understanding. On the one hand, through the record of nearly 500 disputes over the last 20 years, member states have shown their solid confidence in the system, which is thus considered the most influential adjudicator of international trade disputes. On the other hand, different aspects of its legitimacy are continuously discussed, which is the focus of our research.

3.2 The Court of Justice of the European Union

The Court of Justice of the European Union (CJEU) in Luxembourg encompasses three distinct courts, i.e. the Court of Justice, the General Court, and the Civil Service Tribunal, which exercise the judicial

functions of the European Union and aim to achieve greater political and economic integration among EU member states. Originally established in 1952 as the Court of Justice of the European Coal and Steel Communities, CJEU currently holds jurisdiction to review the legality of institutional actions by the European Union, ensure that member states comply with their obligations under EU law and interpret EU law at the request of the national courts and tribunals. Nowadays, as one of the most active and influential international adjudicators, the CJEU has been widely recognized for its contribution in the formation of the EU internal market and achieving of intra-EU free movement of goods and services. Its institutional design and practical functioning provide significant inspiration for, and influence on, the establishment of a number of regional courts.

3.3 The European Free Trade Association Court

The European Free Trade Association (EFTA) Court is a rather exceptional judicial body created by the equally exceptional Agreement on the European Economic Area (EEA) between the EU member states and certain EFTA states, i.e. Iceland, Norway and Liechtenstein. The Court is not an institution of the EFTA but rather an independent organisation under public international law established by those three EFTA states. The EFTA Court has jurisdiction with regard to EFTA states that are parties to the EEA Agreement and is mainly competent to deal with infringement actions brought by the EFTA Surveillance Authority against an EFTA state with regard to the implementation, application or interpretation of EEA law rules, giving advisory opinions to courts in EFTA states on the interpretation of EEA rules, and dealing with appeals concerning decisions taken by the EFTA Surveillance Authority. Together with the study on the CJEU, the examination of the EFTA Court will provide a broad picture of the functioning and performance of European adjudicators and their influence on Europe's economic integration and cooperation.

3.4 The Economic Court of the Commonwealth of Independent States

The Economic Court of the Commonwealth of Independent States (ECCIS) is not only the oldest regional court in the post-Soviet region, but it also acts as the sole regional adjudicator with jurisdiction over trade matters. Having come into being more than 20 years ago, the ECCIS was originally mentioned in the 1991 agreement between Belarus,

the Russian Federation and Ukraine. The Court is empowered to settle disputes concerning the fulfilment of economic commitments within the framework of the Commonwealth of Independent States (CIS), to interpret provisions of international agreements and the CIS acts related to the economic issues and to settle other disputes related to the CIS participating states. The complexity and sensitivity of the regional political climate not only leaves in question the influence and impact the ECCIS is able to generate on economic integration; they also cast considerate uncertainty on the overall legitimacy of the adjudicator.

3.5 The Association of Southeast Asian Nations Dispute Settlement System

Since its founding, ASEAN's primary purpose has been to promote peace and stability in Southeast Asia. However, peaceful settlement of disputes was not referred to in the founding ASEAN Declaration of 1967. As ASEAN's institutions developed, the creation of formal mechanisms for dispute settlement has been incremental. The earliest mention of dispute settlement in an ASEAN agreement was in the 1971 Declaration on the Zone of Peace, Freedom and Neutrality and the 1976 Declaration of ASEAN Concord. On this basis, ASEAN has developed three key mechanisms for dispute settlement: the 1976 Treaty of Amity and Cooperation, the 1996 Protocol on Dispute Settlement Mechanism and subsequently the 2004 Protocol for Enhanced Dispute Settlement Mechanism for disputes relating to ASEAN economic agreements, and the provisions of the 2007 ASEAN Charter that serve as an overarching framework for dispute settlement in ASEAN.

Despite its nonuse in solving trade disputes, the ASEAN dispute settlement mechanism nevertheless stands as one significant forum in Asia, which otherwise presents a general lack of international adjudicators for trade disputes. Therefore, its performance, functioning and legitimacy are explored, taking into account elements such as local culture, legal tradition and political climate.

3.6 The Andean Community Court of Justice and the Southern Common Market in Latin-America Dispute Settlement System

In Latin America, the most important dispute settlement mechanisms are established under the Andean Community and MERCOSUR, which represent two different models of trade adjudication in the region. While