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WTO Dispute Settlement, Investor-State Arbitration and Investment Courts: Exploring Themes of State Power, Adjudication and Legitimacy

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Introduction

Recent negotiations of trade and investment treaties, between and among states in the Asia Pacific region, Canada, the European Union and the United States, have tested investor-state dispute settlement (ISDS).[1] Those opposed to ISDS argue that it provides investors with the right to challenge

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1 See, eg, Jonathan Weisman, 'Trans-Pacific Partnership Seen as Door for Foreign Suits Against US' *New York Times* (New York, 25 March 2015), www.nytimes.com/2015/03/26/business/trans-pacific-partnership-seen-as-door-for-foreign-suits-against-us.html?_r=0; Elizabeth Warren, 'The Trans-Pacific Partnership clause everyone should oppose' *The Washington Post* (Washington, DC, 25 February 2015) www.washingtonpost.com/opinions/kill-the-dispute-settlement-language-in-the-trans-pacific-partnership/2015/02/25/ec7705a2-bd1e-11e4-b274-e5209a3bc9a9_story.html; 'The Arbitration Game: governments are souring on treaties to protect foreign investors' *The Economist* (London, 11 October 2014) www.economist.com/news/finance-and-economics/21623756-governments-are-souring-treaties-protect-foreign-investors-arbitration.

and, therefore, potentially impede domestic regulations implemented for legitimate public policy concerns, such as protection of the environment or public health. Others question whether ISDS contributes to, or is governed by, the rule of law. This latter concern is premised on allegations that cases are heard in confidential fora by arbitrators who are not bound by any rules of *stare decisis*, which together with the aforementioned ideological stance leads opponents to question the very legitimacy of the system.[2] Certainly, not all agree with such claims. In response, proponents argue that ISDS provides a fundamental mechanism through which the rule of international law is vouchsafed, by holding states responsible for violating good governance obligations they have undertaken in their investment treaties. Certain ISDS practitioners and treaty drafters additionally highlight enhanced procedural protections addressing issues such as arbitrator impartiality (eg, right to challenge arbitrator appointments), arguing that ISDS continues to progress toward an ever more transparent system, in which non-disputing parties can participate and awards are made public, rivalling the best domestic courts.[3]

Regardless of the position one takes on ISDS and the underlying substantive obligations it operationalises, the fact remains that political perceptions have crystallised in certain elite institutional and activist circles, as well as in the EU more generally, which have generated robust calls for (at least) its reform.[4] EU politicians and European Commission officials have responded with reform proposals focused on the establishment of an investment court.[5] Thus far, Canada and Vietnam – both of which held manifestly weaker bargaining positions in recent negotiations on comprehensive economic agreements – have accepted the inclusion of a

2 See, eg, 'Letter to Majority Leader Mitch McConnell, Minority Leader Harry Reid, Speaker John Boehner, Minority Leader Nancy Pelosi and Trade Ambassador Michael Froman' *The Washington Post* (Washington, DC, 30 April 2015) www.washingtonpost.com/r/2010-2019/WashingtonPost/2015/04/30/Editorial-Opinion/Graphics/oppose_ISDS_Letter.pdf

3 See, eg, 'An open letter about investor-state dispute settlement' (April 2015), www.mcgill.ca/fortier-chair/isds-open-letter

4 In 2018, the Court of Justice of the European Union also ruled that ISDS is incompatible with EU law: see Judgment of the Court (Grand Chamber) *Slowakische Republic (Slovak Republic) v Achmea BV*, C-284/16 (6 March 2018) http://curia.europa.eu/juris/document/document.jsf?text=&docid=199968&doclang=EN For a different view, see Opinion of Advocate General Wathelet *Slowakische Republic (Slovak Republic) v Achmea BV*, C-284/16 (19 September 2017) https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62016CJ0284

5 Proposal of the European Union for Investment Protection and Resolution of Investment Disputes (12 Nov 2015) http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153955.pdf (the 'Proposal').

permanent investment court in their respective agreements with the EU.[6] Moreover, the recent decision of the Court of Justice of the European Union, which found that the investment court established in the Comprehensive Economic Trade Agreement between Canada and the European Union (CETA) is compatible with EU law, means that the EU's model investment court system (ICS) is likely to remain a feature of its investment treaties going forward.[7]

The most dramatic innovation embodied in the EU's ICS is its replacement of ad hoc arbitration by arbitrators selected by consensus of the disputing parties, with decisions rendered by small panels of judges selected from a standing roster for those disputing parties by an institution performing a secretariat function. Modelled after the dispute settlement institutions that form part of the World Trade Organization (WTO), the EU's ICS also contemplates an appellate feature, involving yet another roster of appellate judges, who would be empanelled in smaller chambers to adjudicate individual appeals from panel decisions. Proponents of the EU's ICS model claim that it solves the legitimacy problems they believe to have plagued investor-state arbitration, principally by removing from disputing parties any ability to choose their adjudicators by consensus and by mandating appellate review governed by *stare decisis*.[8]

It is not surprising that the designers of the EU's ICS modelled it on WTO dispute settlement, which is obviously also concerned with adjudication of disputes arising from allegations of non-compliance with international economic treaty obligations. And, it is probably fair to say that one of the reasons the WTO's dispute settlement model has been thought successful is the perception that adjudication of trade disputes had moved beyond the realm of international politics toward creation of a judicial process where resolution of disputes is carried out by adjudicators

6 See Comprehensive Economic and Trade Agreement between Canada and the European Union, concluded 26 September 2014, signed 30 October 2016, consolidated text online http://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/text-texte/toc-tdm.aspx?lang=eng; *EU – Vietnam FTA: Agreed text as of January 2016*, online: http://trade.ec.europa.eu/doclib/press/index.cfm?id=1437 [EU – Vietnam FTA].

7 See Opinion 1/17 of the Court (30 April 2019) http://curia.europa.eu/juris/document/document.jsf?text=&docid=213502&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=707133.

8 United Nations Conference on Trade and Development (UNCTAD), *World Investment Report 2015: Reforming International Investment Governance* (New York Geneva: UN) at p 150. See also Freya Baetens, *Judicial Review of International Adjudicatory Decisions: A Cross-Regime Comparison of Annulment and Appellate Mechanisms*, (2017) 8(3) JIDS 432; Debra Steger, 'Enhancing the Legitimacy of International Investment Law by Establishing an Appellate Mechanism' in Armand de Mestral and Céline Lévésque (eds), *Improving International Investment Agreements* (Routledge 2012) at 257–264.

tasked with interpreting and applying WTO law operating independent of political influence. It is thus ironic that, at the very same time the EU ICS's designers were looking to the WTO as a way to solve problems with ISDS, cracks in the edifice of the WTO's dispute settlement arm were already beginning to emerge. Two successive US administrations have now refused to consent to the appointment of new WTO Appellate Body members following expiration of existing members' terms. More is said about this development in later sections of this paper. For now, the important point to make is that US assertion of political power in the WTO appointment process reminds us of the tenuous balance that exists between state power, adjudication and legitimacy in WTO dispute settlement. And, perhaps more fundamentally, it prompts questions about whether ISDS reformation based on the WTO's dispute settlement mechanism will solve the legitimacy crisis (real or perceived) that currently threatens the international investment law regime.

This paper aims to contribute to a discussion of this question by exploring the contours of state power and adjudication in the dispute settlement mechanisms underpinning the international trade and international investment law regimes. Given that response to the legitimacy crisis in international investment law has revolved around reforming ISDS, consideration of these themes is timely and helps to frame ongoing discussions about institutional reform in international investment law. With these thoughts in mind, this article begins with a brief historical overview of the development of dispute settlement mechanisms in the international trade law and international investment law regimes (Section 2). This section sets the groundwork for the rest of the paper by illuminating the fact that concerns about balancing state power with adjudicative institutions have always played a role in the evolution of the dispute settlement mechanisms underpinning these two regimes. As a result, themes of legitimacy have also played a key role in the development of these institutions. The legitimacy crises each of these regimes has endured over the past twenty years are discussed in Section 3. This part of the paper highlights adjudicative responses to legitimacy concerns. It also discusses the power states have exercised to address such legitimacy concerns, by means of such contrivances as treaty amendments and interpretive notes on substantive provisions, as well as the inclusion of mechanisms for non-state actor participation in the adjudication of individual disputes. Within this discussion, we also examine the institutional reforms taking place in the international investment law regime. With reference to CETA's investment court, we consider whether this institutional reform could result in its own set of complexities. More particularly, this paper considers whether the operation of CETA's

investment court could be stymied by an exertion of state power similar to that seen in the current WTO context. This line of inquiry is part of the grander objective of this piece, which is to consider whether an ICS, such as that established under CETA, can solve international investment law's legitimacy crisis. This broader question is revisited in Section 4, which provides some concluding remarks.

1. The evolution of international economic law dispute settlement models: understanding the balance between state power and independent dispute resolution fora

One cannot comment knowledgeably on current developments in the settlement of investor-state disputes without first considering the history of dispute settlement in international economic law more generally. This section provides a brief account of this history with reference to dispute settlement mechanisms in the international trade law and international investment law regimes. From this discussion, one can make a number of observations. The most obvious is that the settlement of disputes in the international trade law and international investment law disciplines developed separately after the Second World War. This bifurcation of the international trade law and international investment law regimes has also led to differences in the normative development of these regimes. The overarching theme that emerges out of this discussion highlights the tension between the continued direct exercise of state power to influence and/or resolve international economic law disputes versus delegation by states of such authority to non-state actors within the context of independent dispute resolution fora. As dispute settlement processes have developed in the international trade and international investment law regimes, there has been a concordant shift away from the power dynamics of diplomatic relations in favour of dispute resolution institutions grounded in the rule of law. That is not to say, however, that state power no longer plays a role in these dispute settlement mechanisms. Rather, as discussed throughout this paper, more recent developments continue to evince an ongoing recalibration of the balance between the direct exercise of state power and operation of the corresponding dispute resolution fora.

Dispute settlement in international trade law: diminishing state power

The starting point of our discussion is the General Agreement on Tariffs and Trade 1947 (GATT), a framework agreement that established some general rules to regulate inter-state trade relations, but no means for the

resolution of individual disputes.[9] GATT disputes were initially resolved through consultation.[10] Over time, this diplomatic form of dispute resolution evolved into more of a rules-based, but nevertheless still non-binding, system of dispute settlement.[11] GATT contracting parties began appointing panels of fellow trade diplomats to examine and report on issues arising out of disputes.[12] Those reports were subject to unanimous approval (ie, adoption) by the contracting parties through the GATT Council. Despite the perceived improvements that came with this more formalised form of dispute settlement, resolution of conflicts under GATT were by no means settled in a model that worked perfectly. Where disputes arose, GATT parties were not entitled to demand the establishment of a panel. The establishment of a panel required unanimous consensus by all contracting parties, which thereby gave respondent states the ability to avoid the dispute settlement process entirely through the exercise of de facto veto power.[13] Even when a panel heard a dispute and rendered a favourable decision to the complainant member, the adoption of the panel's report still required the unanimous consensus of GATT parties for its adoption. As a result, any member could avoid implementation of such a result by refusing to consent to the adoption of the panel's report.[14]

The perceived weaknesses of GATT's dispute settlement process led some states, and the US in particular, to pursue the establishment of revised procedures for dispute resolution during the Uruguay Round. The product of these efforts to effectively legalise and reinforce the bindingness of GATT dispute settlement was the 1994 WTO Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU),[15] which provided a unified dispute resolution process for conflicts arising under all

9 General Agreement on Tariffs and Trade, 55 UNTS 194 (entered into force 1 January 1948).

10 See GATT, *ibid* at Art XXII, the relevant portions of which indicate that '[e]ach contracting party shall accord sympathetic consideration to, and shall afford adequate opportunity for consultation regarding... representations… with respect to any matter affecting the operation of this Agreement'.

11 For an historical account of GATT dispute settlement, see Robert E Hudec, *Enforcing International Trade Law* (Butterworth 1993).

12 See n 9 above, Art XXIII.

13 See Andreas Lowenfeld, *International Economic Law*, (2nd edn, Oxford University Press 2008), c 7.

14 *Ibid*.

15 *Understanding on Rules and Procedures Governing the Settlement of Disputes*, 1869 UNTS 401 (1994) [DSU]. See also *Working Procedures for Appellate Review*, WTO Doc WT/ / AB/WP/6 (16 August 2010) www.wto.org/english/tratop_e/dispu_e/ab_e.htm [*AB Working Procedures*].

of the multilateral and plurilateral trade agreements concluded during the Uruguay Round.[16]

In order to ensure that conflicts are resolved efficiently, the DSU outlines strict timeframes for the initiation, adjudication, and adoption of dispute resolution and outcomes. If a dispute between WTO members cannot be resolved by way of consultations (as contemplated in Article 4), such dispute may be brought before an ad hoc panel usually composed of three individuals selected by secretariat officials.[17] The DSU affirms the right of a complaining member to have a panel process initiated. Respondent members no longer have an ability to exercise veto power to block the establishment of a panel.[18] Moreover, the DSU establishes a 'reverse consensus' rule for the adoption of panel reports, which means that members dissatisfied with the outcome of such rulings cannot block their adoption, with a compliance obligation arising upon such adoption.[19]

The only recourse provided by the DSU for a member dissatisfied by a panel report, prior to its adoption, is to pursue an appeal before the WTO standing Appellate Body, although such appeals are limited to 'issues of law covered in the panel report and legal interpretations developed by the panel'.[20] The Appellate Body is composed of seven persons appointed by consensus of the members through the Dispute Settlement Body, who can serve up to two four-year terms. Secretariat officials appoint three Appellate Body members to hear each case.[21] After receiving the written and oral submissions of the parties, an Appellate Body chamber may uphold, modify, or reverse the legal findings and conclusions of the panel.[22] As with panel reports, reports of the Appellate Body are adopted by the WTO members unless all agree not to adopt the Appellate Body's report. WTO members may express their views on the report of the Appellate Body, but they cannot block its adoption.[23]

WTO members also possess the capacity to respond to dispute settlement outcomes directly, at least in theory, by exercising their state power to seek amendments to the substantive obligation at issue by means of subsequent treaty amendment or interpretation, typically within the context of

16 Parties to each of the plurilateral agreements (Annex 4) may make a decision regarding dispute settlement procedures and how the DSU shall apply (or not apply).

17 DSU, n 15 above, Art 4.6, 4.7, 6 and 8.5.

18 *Ibid* at Art 6(1).

19 *Ibid* at Art 16.

20 *Ibid* at Arts 17.1, 17.4 and 17.6.

21 *Ibid* at Art 17.1.

22 *Ibid* at Arts 17.9–17.13.

23 *Ibid* at Art 17.14. In addition to its mechanisms for adjudication and institutional review, the DSU outlines a detailed process intended to secure state compliance with panel and Appellate Body recommendations (see Art 21–22).

committee work or subsequent multilateral or plurilateral negotiations.[24] Obtaining the requisite two-thirds or three-fourths majority thresholds for acceptance of such amendments is difficult and thus rare, however.[25] This same reality also makes it difficult for WTO members to affect, through the issuance of interpretive statements, decisions from WTO panels and/or the Appellate Body that they view as problematic. The WTO Marrakesh Agreement provides the Ministerial Conference and the General Council with exclusive authority to adopt interpretations of the WTO's multilateral trade agreements.[26] This interpretive authority is limited as it may not be used in a manner that would undermine the procedures for the amendment of the Marrakesh Agreement.[27] Despite the availability of this power, neither the Ministerial Conference nor the General Council have exercised this interpretive authority. Even if there was an attempt to issue such an interpretation, it would require consensus by three-fourths of the WTO members – a highly unlikely outcome given the diversity of interests represented by the 164 states who hold WTO membership.

All of these institutional features shifted power away from individual WTO members, concomitantly delegating it powers to appointed adjudicators. At the time, these changes were touted as enhancing the legitimacy of the WTO regime. To be sure, any attenuation of the power of disputant states to unilaterally affect the outcome of an international trade dispute must logically promote and strengthen the rule of international law. In the case

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24 Art X(3) of the *Marrakesh Agreement Establishing the WTO*, 1867 UNTS 154 (entered into force 15 April 1994) [the 'Marrakesh Agreement'] provides:

> 'Amendments to provisions of this Agreement, or of the Multilateral Trade Agreements in Annexes 1A and 1C, other than those listed in paragraphs 2 and 6, of a nature that would alter the rights and obligations of the Members, shall take effect for the Members that have accepted them upon acceptance by two thirds of the Members and thereafter for each other Member upon acceptance by it. The Ministerial Conference may decide by a three-fourths majority of the Members that any amendment made effective under this paragraph is of such a nature that any Member which has not accepted it within a period specified by the Ministerial Conference in each case shall be free to withdraw from the WTO or to remain a Member with the consent of the Ministerial Conference.'

WTO members thus at least hypothetically possess the ability to amend their treaty obligations, although such action requires a large portion of the WTO membership to agree to the proposed changes.

25 To date the General Council of the WTO has adopted only one amendment to a trade agreement. That amendment was adopted in 2005 and altered WTO rules regarding the compulsory licensing of pharmaceutical products. See General Council, 'Amendment of the TRIPS Agreement', WTO Doc WT/L/641 (6 December 2005) www.wto.org/english/tratop_e/trips_e/wtl641_e.htm.

26 See n 24 above, Art IX(2).

27 *Ibid.*

of the WTO's DSU, the Appellate Body would go on to establish a prolific, largely unified jurisprudence by which means it has interpreted a broad range of obligations contained within WTO agreements, establishing a supercharged WTO body of law.[28] This is not to say that the WTO's dispute settlement mechanism is perfect. The WTO's DSU was the object of heavy scrutiny in the years immediately following its adoption. Criticisms of panel and Appellate Body decisions, made by many of the same actors who have more recently led the charge against the ISDS (or their successors), raised similar ideologically based questions about the legitimacy of the WTO as an institution, which they (rightly) perceived to have been a product and promoter of neoliberal policy goals.[29]

Delegation of decision-making authority, away from states and towards independent, appointed adjudicators, has not been without controversy. From time to time, WTO members have expressed concern that their sovereign authority has been eroded by WTO adjudicators acting beyond their jurisdictional parameters but that the regime has left them without any effective means to implement any corrective measures. In such instances, WTO members have gone to great (albeit for most, largely rhetorical) lengths to reassert their power and control over the WTO's dispute settlement mechanism. These dynamics will be addressed in greater detail below. For now, the important point to remember is that the establishment of the WTO, and more particularly its more formalised dispute settlement mechanism, ushered in a period of restrained state power as regards the resolution of conflict over compliance with international trade law obligations.

Dispute resolution in international investment law: diminishing state power too

As in the international trade law context, dispute settlement mechanisms operating within the international investment law regime have evolved over time. Diplomatic protection is the traditional means of dispute resolution, offered by customary international law, for the resolution of disputes involving private parties (ie, 'aliens') who made (subsequently imperilled) investments in host states. Such disputes were pursued under the legal fiction that a host state could be held responsible by the affected alien's state by means of the espousal of its claim in an agreed forum, typically

28 See eg, Isabelle Van Damme, *Treaty Interpretation by the WTO* (Oxford University Press 2009).

29 See n 81.

some form of ad hoc or institutional arbitration.[30] From the 1980s to the 2000s, the conclusion of thousands of (mostly bilateral) investment promotion and protection treaties largely supplanted diplomatic protection as the predominant mechanism of dispute resolution arising from host state treatment of foreign investment.[31] A full outline of the history of the evolution of dispute settlement in international investment law is beyond the scope of this paper.[32] Instead, this discussion focuses on the step change shifts in dispute settlement mechanisms in international investment law subsequent to the Second World War.

Proposals for a multilateral instrument constructed to provide protection to foreign investors became popular after Second World War among government officials, business interests and scholars.[33] In 1948, the International Law Association (ILA) released draft statutes that proposed the establishment of an impartial forum for the resolution of foreign investment disputes.[34] This proposal set out to establish a mechanism that would settle: (1) any dispute arising out of any unreasonable or discriminatory impairment within the territory of any contracting party of the property of nationals of the other parties; and (2) any dispute concerning the observance or interpretation of any undertaking which a party may have given in relation to investments made by nationals of any other party.[35] Under the terms of this proposal, the national of a state party could initiate arbitral proceedings directly against a state as long as that state consented to such proceedings and local remedies were exhausted.[36] In such instances, a panel of three arbitrators was to decide the dispute; one arbitrator was to be appointed by each of the disputing parties, with

30 ILC, 'Draft Articles on Diplomatic Protection', with commentaries in *Yearbook of International Law Commission 2006, vol II* (UN 2006) (UN Doc A/61/10), Art 1 defines diplomatic protection as follows:

> '…diplomatic protection consists of the invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility.'

31 See, eg, Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 575 UNTS 159 (entered into force 14 October 1966), Article 27 [the 'ICSID Convention'].

32 See, eg, Taylor St John, *The Rise of Investor-State Arbitration: Politics, Law and Unintended Consequences* (Oxford University Press 2018).

33 For an overview of these proposals, see A A Fatouros, *An International Code to Protect Private Investment: Proposals and Perspectives* (1961) XVI(1) UTLJ 77.

34 'Draft Statutes of the Arbitral Tribunal for Foreign Investment and the Foreign Investment Court', reprinted in *IIA Compendium*, notes 279 at 259.

35 *Ibid* at Arts 1 and 4(b).

36 *Ibid* at Art 3(1).

the third (the 'umpire') appointed by agreement.[37] All arbitrators were to be selected from a roster created by the state parties.[38] The arbitral process contemplated under the ILA's proposal had many of the features that we see in current investor-state arbitral practice. For example, constitution of arbitral panels was subject to timeframes; panels could establish their own procedures; and panels had the discretion to admit evidence and to decide ancillary claims.[39] Moreover, panel decisions were binding on the disputing parties.[40] The ILA's proposal did not contemplate any appeal or annulment process. However, the proposal did permit either disputing party to apply for revision of an award if new facts that could impact the outcome of the case arose after an award was rendered.[41]

In 1949, the International Chamber of Commerce (ICC) adopted its International Code of Fair Treatment for Foreign Investment (the 'ICC Code').[42] The ICC Code called for strong guarantees for the protection of foreign investments, as evinced in its very first paragraph:

> 'The High Contracting Parties, desirous of promoting an expanding world economy and convinced that an ample flow of private investments is essential to the economic and industrial growth of their countries and to the welfare of their peoples, decide to establish, by the provision of civil, legal and fiscal safeguards, conditions of fair and non-discriminatory treatment for investments made in their territories by the nationals (physical or legal persons) of the other High Contracting Parties.'[43]

The ICC Code contained provisions calling for states to treat foreign investments in a fair and non-discriminatory manner (eg, national and most-favoured-nation treatment).[44] The ICC Code also prohibited restrictions on the transfer of funds and ensured fair compensation in cases of expropriation.[45] In contrast to the ILA statutes, the dispute settlement mechanism contemplated in this proposal was binding on inter-state arbitration before the ICC's International Court of Arbitration.[46] Detailed procedures for this process were never settled on as the ICC Code was never adopted by states.

37 *Ibid* at Art 4.

38 *Ibid* at Art 4(a). A state party could nominate three people for inclusion on the roster, only one of whom could be its national. Moreover, nominees to the roster had to have 'recognised competence in international law or international economic life.'

39 *Ibid* at Art 5 and 19–21.

40 *Ibid* at Art 29 and 31.

41 *Ibid* at Art 34–35.

42 *International Code of Fair Treatment of Foreign Investment*, ICC Pub No 129 (Lecraw Press 1948), reprinted in UNCTAD, *International Investment Instruments: A Compendium, Vol* 3 (1996) (the 'IIA Compendium') at 273.

43 *Ibid.*

44 *Ibid* at Art 2–7.

45 *Ibid* at Art 9–11.

46 *Ibid* at Art 10.

A decade later, another draft convention emerged. Initiated by European legal and business interests, the 1959 Draft Convention on Investments Abroad (Abs-Shawcross Draft Convention) found its way, through German sponsorship, to the Organisation for European Economic Cooperation for consideration in 1959. The substantive provisions of the Abs-Shawcross Draft Convention obliged states to ensure that foreign property was treated fairly and equitably, enjoyed constant protection and security, and was not 'impaired by unreasonable or discriminatory measures'.[47] In addition, states were obliged to provide 'just and effective' compensation in instances of direct or indirect expropriation.[48] As was seen in the ILA's proposal for an impartial foreign investment dispute settlement forum, the Abs-Shawcross Draft Convention provided for inter-state and an early form of investor-state dispute settlement.[49] An aggrieved investor had the ability to initiate arbitral proceedings against a state as long as that state agreed.[50] Absent state consent to this form of investor-state dispute settlement, disputes were to remain inter-state under the auspices of the International Court of Justice (ICJ). Where an investor had permission to initiate arbitration, the procedures contemplated in the Abs-Shawcross Draft Convention resembled some – but not all – of the features contemplated by the ILA's earlier proposal. A panel of three arbitrators was to decide the dispute; one arbitrator was to be appointed by each of the disputing parties, with the third (the 'umpire') appointed by agreement.[51] Constitution of arbitral panels was also subject to timeframes; panels could establish their own procedures; and panel decisions were binding on the disputing parties.[52] The Abs-Shawcross draft did not, however, propose the establishment of a roster of potential panellists from which to select arbitrators. It also did not contemplate revision of awards.

Two years later, in 1961, Louis Sohn and Richard Baxter prepared the Draft Convention on the International Responsibility of States for Injuries to Aliens (the '1961 Harvard Draft') at the request of the UN Secretariat as part of the effort to codify the international law on state responsibility.[53] According to the 1961 Harvard Draft, a state could, for example, be held liable under international law for denying an alien access to tribunal

47 See *IIA Compendium*, note 42 above, Vol 5 at 395, Art I. See also Hartley Shawcross, *The Problems of Foreign Investment in International Law* (1961) 102 RDCADI 334.

48 *Ibid* at Art III.

49 *Ibid* at Art VII.

50 *Ibid*.

51 *Ibid* at Annex para 1.

52 *Ibid* at paras 2–6.

53 Draft Convention on the International Responsibility of States for Injuries to Aliens, (1961) 55(3) American Journal of International Law (AJIL) 548.

or other administrative hearings or denying an alien a fair hearing.[54] A state could also be held liable for the decision of a tribunal or other administrative authority if that decision was discriminatory and violated the laws of the state concerned or it unreasonably departed from principles of fundamental justice.[55] Expropriation of an alien's property also triggered a state's obligation to promptly pay compensation.[56] As with the ILA's 1949 proposal and the Abs-Shawcross Draft Convention, the 1961 Harvard Draft contemplated a traditional form of inter-state dispute settlement as well as a hybrid form of dispute resolution that engaged both private and public dimensions. An injured alien was, in certain circumstances, permitted to initiate a claim directly against a state for damages suffered as a result of violations of substantive protections afforded aliens under the 1961 Draft.[57] However, an injured alien was still required to exhaust local remedies before commencing that claim.[58] Moreover, where the alien's state of nationality decided to espouse the claim of its national, any claims initiated by the injured alien directly against the state were suspended.[59] A state also had the power to waive or settle any actual or potential claim of its nationals.[60]

None of these proposals resulted in a multilateral agreement on investment. Difficulties concluding an agreement on that scale were largely due to differences of opinion between capital-importing and capital-exporting states on appropriate standards of protection for investors. Determined to gain extensive protections for their investors operating abroad, capital-exporting states turned their attention to bilateral versus multilateral treaty negotiations.

By the late 1960s, bilateral investment treaties (BITs) had taken over as the diplomatic instrument of choice for negotiating foreign investment arrangements between developed and developing nations.[61] That said, the 'treatification' of investment law proceeded in a relatively slow and haphazard manner throughout the 1960s and 1970s. There was little variability in the substantive protections included in such instruments. Provisions on expropriation required that compensation be consistent with the long-standing preference of developed states for 'prompt, adequate, and effective' compensation rather than the more recent preference of

54 *Ibid* at Art 6–7.
55 *Ibid* at Art 8.
56 *Ibid* at Art 10.
57 *Ibid* at Art 1(2)(a), 20 and 22.
58 *Ibid* at Art 1(2)(a) and 19.
59 *Ibid* at Art 23(1).
60 *Ibid* at Art 25.
61 UNCTAD, *World Investment Report 1996* (UN, 1996) at 147–148 https://unctad.org/en/Docs/wir1996_en.pdf

developing states for merely 'appropriate' compensation, to be determined by the expropriating government itself.[62] BITs (and commerce and navigation treaties with substantial investment components) during this era were primarily conceived, by their sponsors, as being about protecting foreign investments – particularly the property owned by foreigners – in developed countries (rather than the other way around, or at least not any more than putatively so).[63]

The new-liberal agenda of those who effectively cobbled together this patch-work and ad hoc 'international investment regime' during this early period played out most dramatically in the evolution of dispute settlement mechanisms contained within these treaties. Not unlike the unsuccessful multilateral investment treaty efforts discussed above, many bilateral treaties provided for inter-state dispute settlement, nominally over the interpretation or application of the treaty.[64] States subsequently began incorporating investor-state arbitration in treaties in the late 1960s,[65] with the practice finding more widespread adoption within a decade.[66] Consistent with prior attempts to create multilateral rules for the protection of foreign investors, the investor-state arbitral mechanism contemplated in BITs gave standing to foreign investors to commence claims against a host state with the possibility of claiming damages for breach of one or more of the disciplines of an investment treaty. Unlike previous iterations of dispute settlement in international investment law, the model of investor-state arbitration that developed during this time (and indeed continues to this day) generally did not require foreign investors to exhaust local remedies.[67]

Described as 'arbitration without privity',[68] consent to this dispute settlement mechanism is offered on a universal basis by the state parties to

62 UNCTAD, *Taking of Property: Series on Issues in International Investment Agreements* (UN, 2000) at 28–31 https://unctad.org/en/docs/psiteiitd15.en.pdf

63 *Ibid.*

64 *Ibid.*

65 Andrew Newcombe and Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer 2009) at p 45.

66 Jason Yackee, 'Bilateral Investment Treaties, Credible Commitment and the Rule of (International) Law: Do BITs Promote Foreign Direct Investment?' (2008) 42 *Law & Society Review* 805, 815.

67 For a discussion of how most favoured nation (MFN) clauses have been used to by-pass procedures outlined in investment treaties as a way of more readily accessing investor-state arbitration see for example: Elizabeth Whitsitt, *Application of Most-Favoured-Nation Clauses to Dispute Settlement Clauses: An Assessment of the Jurisprudence* (2009) 27(4) JENRL 527–557.

68 Jan Paulsson, 'Arbitration without Privity' (1995) 10 *ICSID Review* 232.

the treaty, for acceptance by claimant investors once a dispute has arisen.[69] The jurisdiction of an arbitral tribunal to hear disputes between foreign investors and host states is subsequently established once a foreign investor has initiated its claim against a host state for alleged investment treaty violations. Numerous arbitral institutions have come to support this arbitral mechanism,[70] the most prominent of them being the International Centre for the Settlement of Investment Disputes (ICSID).[71]

Representing one of the few successful efforts at multilateral treaty making in international investment law achieved in the 20th century,[72] the ICSID Convention precludes simultaneous recourse to diplomatic protection.[73] ICSID arbitrations are most often decided by a three-person arbitral panel but can be decided by any uneven number of arbitrators.[74] Where an arbitration is conducted by a three-person arbitral panel, each of the disputing parties appoints an arbitrator, with the presiding arbitrator chosen by various forms of consensus between the disputing parties.[75] Unlike awards issued by other

69 For a discussion of consent to the investor-state arbitration mechanism in ICSID in the context of domestic legislation, see Stephanie Mullen and Elizabeth Whitsitt, 'ICSID and Legislative Consent to Arbitrate: Questions of Applicable Law' (2017) 32(1) ICSID Review – Foreign Investment Law Journal 92–115.

70 For an overview of the various dispute settlement mechanisms, including the strengths and weakness associated with each form of dispute resolution, see August Reinisch and Loretta Malintoppi, 'Methods of Dispute Resolution' in Muchlinski et al, (eds), *The Oxford Handbook of International Investment Law* (Oxford University Press 2008) at 691–720. See also Dolzer and Schreuer, *Principles of International Investment Law* (2nd ed Oxford University Press 2012) at 211–229.

71 See ICSID Caseload Statistics (Issue 2016 – 2) https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202016-2%20(English)%20Sept%2020%20-%20corrected.pdf.

72 See *Convention on the Settlement of Invest Disputes between States and Nationals of Other States*, 575 UNTS 159 (entered into force 14 October 1966) (the ICSID Convention). The large number of states that have ratified the ICSID Convention perhaps best evidences the importance of ICSID as an institution within the international investment law regime. One hundred and fifty states have ratified the ICSID Convention, with Canada being the most recent country to ratify the convention in the wake of its aggressive foreign investment treaty negotiation strategies with African nations, the EU and South East Asian nations.

73 *Ibid* at Art 27.

74 *Ibid* Art 37.

75 ICSID Rules of Procedure for Arbitration Proceedings https://icsid.worldbank.org/en/Documents/resources/2006%20CRR_English-final.pdf, Rule 3. If a tribunal is not constituted within 90 days (or another time period agreed to by the disputing parties) of the date of registration of a request for arbitration, the Chairman of ICSID's Administrative Council may designate a person to be the President of the arbitral tribunal (Rule 4). A similar appointment process is contemplated in other arbitration rules (see United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration, 24 ILM 1302 (1985), with amendments as adopted in 2006 www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html.

arbitral tribunals established under investment promotion and protection treaties, ICSID arbitral awards cannot be subjected to domestic judicial review, but are rather only open to annulment proceedings provided for in the convention.[76] ICSID annulment proceedings are heard by three-person ad hoc committees, selected by the ICSID Secretariat, which possess only limited authority to review the decisions of ICSID arbitral tribunals.[77] Otherwise, subject to annulment, awards issued by ICSID arbitral tribunals are immediately binding and enforceable in all state parties to the ICSID Convention.[78]

As with the establishment of formal dispute settlement processes in the international trade law regime, the emergence of investor-state arbitration signalled a movement away from direct exercise of state power to resolve international investment law disputes toward its delegation to independent adjudicators. The emergence of ISDS also marked a departure away from the politics of diplomacy, represented in espousal of claims under the customary international law theory of diplomatic protection, toward independent adjudicators possessing institutional legitimacy as instruments for enforcement of the rule of international law.

This is not to say that the ISDS is perfect. As with the WTO's DSU, investor-state arbitration certainly had its critics. It just so happens that strikingly few disputes rose to the level of international arbitration, in the investment context, until the beginning of the 21st century. By contrast, WTO panels and the Appellate Body were immediately inundated with fresh disputes from their inception, which did not just require those responsible for running the DSU to hit the ground running; it also meant that they would be doing so with a political spotlight trained on their efforts from the start. In other words, whereas ISDS experienced an extended period of gestation and incubation, WTO dispute settlement faced intense scrutiny at the outset. As such, it might fairly be observed that it was inevitable that, at some point, it would be ISDS's 'turn' – which most certainly has been the case in recent years, particularly as far as Western Europe has been concerned.

76 See n 72 above at Art 52.

77 See *ibid* at Art 52(1), which stipulates that the annulment of an arbitral award is allowed only for the following reasons: (a) improper constitution of the tribunal; (b) the tribunal's manifest excess of power; (c) corruption on the part of one of the tribunal's members; (d) the tribunal's serious departure from a fundamental rule of procedure; or (e) the tribunal's failure to state the reasons for an award.

78 *Ibid* at Arts 53 and 54.

2. Legitimacy concerns in international economic law: examining the contours of adjudication and state power

The establishment of dispute settlement mechanisms based on the rule of law within the international trade and international investment law regimes has thus not been without controversy. As noted above, many have questioned the legitimacy of both the WTO dispute settlement mechanism and ISDS, mostly beginning with the former before taking on the latter. The following sections provide an overview of the so-called legitimacy challenges faced by these respective systems and the mechanisms adopted to respond to such challenges either by way of adjudication or the exercise of state power.

Adjudicative responses to legitimacy concerns in international trade law

Since its inception the WTO, particularly its dispute settlement mechanism, has been the subject of extensive scholarly attention. Regarded as a shift away from political dispute resolution toward a more legalistic form of conflict resolution, the WTO's dispute settlement mechanism was considered by some to be one of the great success stories in global economic governance.[79] The transformation of the GATT into the WTO was not particularly rapid and was rightly perceived to have represented more of a clash of titans, among G7 members, with the remaining hundreds of would-be WTO members largely forced into the role of interested bystanders. It was unsurprising, therefore, that, immediately after its establishment in 1994, the WTO came under persistent criticism from various quarters and, as the most politically prominent manifestation of the WTO, its dispute settlement system found itself under particular pressure from external and internal forces alike.[80]

Externally, a host of activists and non-governmental organisations (NGOs), predominantly based in the world's wealthiest countries but also purporting to speak for its poorest as well) regarded the WTO as a one-dimensional organisation established to serve as the guardian of a world

79 See, eg, William Davey, 'The WTO Dispute Settlement System: Dealing with Success' in Chaisse and Lin (eds), *International Economic Law Governance: Essays in Honour of Mitsuo Matsushita* (Oxford University Press 2016), c 2; William Davey, 'The WTO Dispute Settlement System: The First 10 Years' (2005) 8(1) JIEL 17–50; John H Jackson et al, 'The Role and Effectiveness of the WTO Dispute Settlement Mechanism' (2000) *Brookings Trade Forum* 179–236; Rober Hudec, 'The New WTO Dispute Settlement Procedure: An Overview of the First Three Years' (1999) 8(1) Minn J Global Trade 1.

80 The concept of 'internal' and 'external' legitimacy for the WTO was developed in JHH Weiler, 'Rule of Lawyers and Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement' (2001) 35 Journal of World Trade 191.

order based on, and subservient to, neoliberal economic policy.[81] As soon as the first tranche of cases had made their way through the panel and appellate processes, commentators,[82] lawyers[83] and politicians[84] began complaining that the WTO Appellate Body was engaged in judicial activism. These external interests launched numerous attacks on the WTO, including critiques that the institution's shift to 'behind the border' trade barriers intruded on state regulatory autonomy. Public concern about the WTO's seemingly undue intrusion into domestic regulatory space was fanned by a series of cases in which GATT and WTO panels had to determine the legality of regulatory measures touching on a variety of politically sensitive public policy issues, including health, consumer protection and environmental protection.[85] The outcomes generated by these cases, as well as the mere fact that they were being considered at all, engendered a great deal of anxiety, particularly among those holding ideological positions averse to new-liberalism, about the potential of the international trade

81 For an enlightening consideration of the global justice movement and its critiques of the WTO system, see Andrew Lang, *World Trade Law After Neoliberalism: Re-Imagining the Global Economic Order* (Oxford University Press 2011), c 3 [Lang, *World Trade Law After Neoliberalism*].

82 See for example, Claude Barfield, *Free Trade, Sovereignty and Democracy: The Future of the World Trade Organization* (2001) 2(2) Chicago J Int'l L 403; Daniel Tarullo, 'The Hidden Costs of International Dispute Settlement: WTO Review of Domestic Anti-Dumping Decisions' (2002) 34 Law & Pol'y Int'l Bus 109.

83 See, eg, John Ragost Navin Jonega & Mikhail Zeldovich, 'WTO Disute Settlement: The System is Flawed and Must Be Fixed' (2003) 37 Int'l Law 697.

84 See, eg, ICTSD, 'US DSU Proposal Receives Mixed Reactions', *Bridges Weekly Trade News Digest* (20 December 2002) www.ictsd.org/bridges-news/bridges/news/us-dsu-proposal-receives-mixed-reactions. In this report on a joint proposal by Chile and the US to provide WTO members more control over dispute settlement, the article quotes US Senator Max Baucus as saying, 'WTO panels are making up rules that the US never negotiated, the Congress never approved, and I suspect, that Congress would never approve'.

85 See, eg, Thailand – Restrictions on the Importation of and Internal Taxes on Cigarettes (Complaint by United States) (1990), GATT Doc DS10/R – 37S/200 (GATT Panel Report); United States – Restrictions on Imports of Tuna (Complaint by Mexico) (1991), GATT Doc DS21/R – 39S/155 (GATT Panel Report, unadopted); United States – Standards for Reformulated and Conventional Gasoline (Complaint by Venezuela) (1996), WTO Doc WT/DS2/R (Panel Report) as modified by United States – Standards for Reformulated and Conventional Gasoline (Complaint by Venezuela) (1996), WTO Doc WT/DS2/AB/R (Appellate Body Report) [US – Gasoline (AB)]; United States – Import Prohibition of Certain Shrimp and Shrimp Products (Complaint by Malaysia et al) (1998), WTO Doc WT/DS58/R (Panel Report) as modified by United States – Import Prohibition of Certain Shrimp and Shrimp Products (Complaint by Malaysia et al) (1998), WTO Doc WT/DS58/AB/R (Appellate Body Report) [US – Shrimp (AB)]; European Communities – Measures Affecting Asbestos and Products Containing Asbestos (Complaint by Canada), WTO Doc WT/DS135/R (Panel Report) [EC – Asbestos (Panel)] as modified by European Communities – Measures Affecting Asbestos and Products Containing Asbestos (Complaint by Canada), WTO Doc WT/DS135/AB/R (Appellate Body Report) [EC – Asbestos (AB)].

law regime to undermine a state's ability to regulate its own economy and society.[86] In response to these concerns, proponents of the international trade law regime unsuccessfully attempted to reassure these critics (and the broader public for whose hearts and minds they were effectively in competition) that the newly negotiated WTO Agreements incorporated enough flexibility for members to regulate in the public interest. Instead, those interests continued to resist expansion of the international trade law regime and advocated for a more deferential approach to the review of domestic regulation involving contentious areas of public policy.

At the same time, the WTO faced growing pressures from within as well. With its now formally constituted dispute settlement system in its infancy, inaugural members of the Appellate Body appeared to grasp the need to establish legitimacy for their institution, not only vis-à-vis the interests of WTO members but also with respect to the wider political import (or at least the popular perception) of their decisions. For members, the initial rulings of the Appellate Body were important signals about its understanding of what would become the scope of their respective regulatory autonomy, but they were also indicators of who would actually be in charge of a system in which consensus was required to effectively overturn any Appellate Body decision. This second issue was brought to a head with respect to the Appellate Body's use of the authority granted to it under the DSU to establish rules of procedure for itself as a basis for encouraging submissions by non-members (ie, *amicus curiae*) on disputes that had reached it on appeal. While such action was cheered by certain members, such as Canada and the US, who were acutely aware of political perceptions concerning the closed and confidential nature of the processes established under the DSU, it was greeted less than warmly by other member governments for whom such concerns were less important than the practical desirability of just such a system.

In this way, both internal and external pressures shared the same underlying concern, *viz* the measure of authority required of states to be transferred to an adjudicator in order to see their disputes resolved in a manner that would promote the international rule of law. As for the expression of this concern manifested in the amount of deference (or lack thereof) to be shown to non-trade policy goals when considering whether a measure was in compliance with a WTO Agreement obligation (ie, how to be seen as having adequately balanced a liberal economic policy agenda

86 These developments are described in Robert Howse, 'From Politics to Technocracy – and Back Again: The Fate of the Multilateral Trading Regime' (2002) 96 AJIL 94, 102ff.

with sovereign regulatory interests), the proposed solutions were varied.[87] Attention quickly moved to possible methods that could be employed by WTO decision-makers when reviewing domestic regulation, with hopes of achieving consensus on a new set of ideas upon which the normative legitimacy of the WTO might be situated. One of the more ambitious projects in this regard involved efforts to regard the WTO positively using the lens of constitutionalisation.[88] But, such efforts failed to fully capture the imagination of the WTO's internal and external critics.

Instead, the Appellate Body appears to have shaped its own jurisprudence and procedural rules in an attempt to correct the impression that the WTO was overly intrusive in areas that were better addressed within the domestic realm of states. Those developments included the apparent reintroduction of regulatory purpose in the interpretation of national treatment and most-favoured-nation (MFN) treatment, modification of the 'necessity test' in GATT Article XX so that it included a 'balancing' test similar to the proportionality analysis familiar to public law, and the introduction of procedural – rather than substantive – scrutiny of measures under WTO law.[89] Not all of these developments have stood the test of time. Regulatory purpose has not been consistently incorporated into the interpretation of the WTO's non-discrimination norms and, as of late, has been sidelined as an irrelevant factor when determining whether a WTO member has violated its national treatment and MFN treatment commitments.[90] The introduction of the 'balancing' analysis into GATT Article XX has suffered a similar fate. Despite hopes that such a test would make room for consideration of the importance of non-trade values as part of the

87 Professor Howse has described a number of attempts to do this in his seminal article with Professor Nicolaïdis, 'Enhancing WTO Legitimacy: Constitutionalization or Global Subsidiartiy?' (2003) 16 Governance 73.

88 The work of Professor Ernst-Ulrich Petersmann is particularly notable in this regard. See, Ernst-Ulrich Petersmann, 'The WTO Constitution and Human Rights' (2000) 3(1) European Journal of International Law 19.

89 These jurisprudential developments are examined more fully in Lang, See n 81 above at pp 317–343.

90 *Ibid.*

interpretation of GATT's flexibilities,[91] many of the pronouncements of the Appellate Body have deprived this test of its potential jurisprudential significance. Instead, in the majority of cases in which the necessity test has not been satisfied, the basis for the decision has been the relative inefficacy of the measure in question to achieve its stated objectives, or the availability of equally efficient alternatives.[92]

Of all the Appellate Body's jurisprudential developments, its 'procedural turn' was the most well-received by scholars of international trade law who sought to re-imagine the role and purpose of the WTO in response to its legitimacy crisis.[93] Still, there are those who remain unconvinced that the Appellate Body's jurisprudential developments have adequately

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91 For discussions about the meaning and desirability of the 'balancing' test in GATT Art XX see Meinhard Hilf, 'Power, rules and principles: which orientation for WTO/GATT Law' (2001) 4 Journal of International Economic Law (JIEL) *111*; Robert Howse and Elisabeth Türk, 'The WTO Impact on Internal Regulations: A Case Study of the Canada – EC Asbestos Dispute' in G de Búrca and J Scott (eds), *The EU and the WTO: Legal and Constitutional Issues* (Hart Publishing 2001) 283–328; Jan Neumann and Elisabeth Türk, 'Necessity Revisited: Proportionality in World Trade Organization Law After Korea – Beef, EC – Asbestos and EC – Sardines' (2003) 37(1) Journal of World Trade 199 ; Axel Desmedt, 'Proportionality in WTO law' (2001) 4 JIEL 441; Mads Andenas and Stefan Zleptnig, 'Proportionality: WTO Law: in Comparative Perspective' (2007) Texas Int'l Law Journal *371* [Andenas & Zleptnig]; P Van den Bossche, 'Looking for Proportionality in WTO Law' (2008) 35 Legal Issues of Economic Integration 283.

92 For a critical discussion of this in relation to GATT Art XX(a) see Elizabeth Whitsitt, 'A Comment on the Public Morals Exception in International Trade Law and the *EC – Seals Products* Case: Moral Imperialism and Other Concerns' (2014) 3(4) Cambridge Journal of International and Comparative Law 1376-1391.

93 See, eg, A von Bogandy, 'Legitimacy of International Economic Governance: Interpretive Approaches to WTO law and the Prospects of its Proceduralization' in S Griller (ed), *International Economic Governance and Non-economic Concerns* (Springer-Verlag 2003) 103 at 121 (where the author proposed the so-called 'co-ordinated interdependence' for the WTO in response to the legitimacy crisis facing the international trade law regime. Within this model WTO law 'is an instrument to politically co-ordinate different regulatory systems with the primary objective of "forc[ing] Members to take the economic interests of other Members into account" in their regulatory decisions'.); n 87 above at p 87 (where the authors pose a model of 'global subsidiarity' as the foundation for the trade law regime. Within this model the authors contemplate a role for the WTO that pays deference to states while at the same time engages in strict procedural review); Gráinne de Búrca and Joanne Scott, 'The Impact of the WTO on EU Decision-making' in Gráinne de Búrca and Joanne Scott (eds), *The EU and the WTO: Legal and Constitutional Issues* (Hart Publishing 2001) 1, 16–29; Mads Andenas and Stefan Zleptnig, 'Proportionality and Balancing in WTO law: a comparative perspective' (2007) Cambridge Review of International Affairs 71-92 (where the authors note that Appellate Body's procedural turn establishes a useful combination of deference while at the same time providing for international scrutiny of trade-restrictive regulation). See also Padideh Ala'i, 'From the Periphery to the Centre? The Evolving WTO Jurisprudence on Transparency and Good Governance' (2008) 4 JIEL 779 (exploring the extent to which the WTO's transparency obligations may be used to scrutinise domestic regulatory structures).

addressed the underlying cause of the WTO's legitimacy crisis.[94] The current situation in which WTO members find themselves with the Appellate Body appointments process certainly lends credibility to such claims. Nonetheless, where WTO panels and the Appellate Body are able to function as contemplated by the DSU and their respective procedural rules, evidence suggests that WTO adjudicators do attempt to implement jurisprudential methodologies aimed at striking a balance between liberal trade objectives and sovereign interests.

State responses to legitimacy concerns in international trade law: exploring the contours of state power

TREATY AMENDMENT AND INTERPRETIVE STATEMENTS: THE LIMITS OF STATE POWER AT THE WTO

When such jurisprudential evolutions have failed, one might have asked why WTO members did not directly exercise state power by redrafting substantive obligations and/or their associated exceptions to address perceived legitimacy concerns within the international trade regime? The answer is that such modifications would require WTO members to pass an amendment in accordance with the Marrakesh Agreement.[95] The Marrakesh Agreement outlines a variety of voting thresholds that must be met in order for an amendment to become effective. The voting threshold that applies to a proposed amendment depends on the nature of the amendment sought. For example, amendments of GATT Article I (MFN) and Article II (Schedule of Tariff Concessions) require unanimous consent of all WTO members.[96] Amendments to other treaty provisions (eg, GATT Article XX) that would alter the rights and obligations of WTO members become effective upon acceptance by two-thirds of the WTO membership and, unless otherwise stipulated by the Ministerial Conference, are only

94 See, eg, Kurtz, *The WTO and International Investment Law: Converging Systems* (Cambridge University Press, 2016) at pp 67–68. See n 81 above at pp 346–347 in which Professor Lang suggests that the WTO's legitimacy crisis was not just brought on because of concerns about the WTO's expansion and intrusion into domestic regulatory space. In his view, '[the WTO's] legitimacy was undermined because it came to be understood that the WTO was profoundly and substantively shaping a new global economic order – but doing so in the absence of a legitimate and legitimating purpose, and without a clear sense of responsibility for the full range of outcomes produced'. As a result, Professor Lang contends that a crucial element of any response to the legitimacy crisis of the WTO is the 'reformulation of a legitimating collective purpose to ground the work of the trade regime'.

95 See n 24 above.

96 See *ibid* at Art X(2), which also provides for unanimous acceptance of amendments in relation to GATS Art II:1, Art 4 of the TRIPS Agreement and Art IX of the Marrakesh Agreement.

binding on those members which vote in favour of the amendment.[97] In practice, there has only been one instance in which a WTO Agreement has been amended.[98] WTO members sought amendment of the *Agreement on Trade Related Aspects of Intellectual Property Rights* (TRIPS Agreement) after it became clear that its compulsory licensing provisions could leave some WTO members unable to easily obtain generic medicines and thereby manage public health concerns.[99] The issue was first addressed by the WTO membership in 2001 at the Doha Ministerial Conference with an amendment to the TRIPS Agreement coming into force on 23 January 2017 after two-thirds of the WTO membership had ratified the amendment.[100] Thus, while the WTO contemplates amendment to its agreements as a way to facilitate institutional response to policy concerns (eg, public health), it seems fair to say that such amendments will continue to be rare phenomena. Even where amendment is possible, the example just described demonstrates that the process of amendment can be arduous and potentially ineffective given the large number of diverse states now members of the WTO.

This same impediment to the direct exercise of state power also makes it difficult for WTO members to influence, through interpretive statements, decisions from WTO panels and/or the Appellate Body that they perceive as having represented an intrusion on sovereign regulatory autonomy. The Marrakesh Agreement provides that the Ministerial Conference and General

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97 Art X(3) of the Marrakesh Agreement, *ibid* states:

> 'Amendments to provisions of this Agreement, or of the Multilateral Trade Agreements in Annexes 1A and 1C, other than those listed in paragraphs 2 and 6, of a nature that would alter the rights and obligations of the Members, shall take effect for the Members that have accepted them upon acceptance by two-thirds of the Members and thereafter for each other Member upon acceptance by it. The Ministerial Conference may decide by a three-fourths majority of the Members that any amendment made effective under this paragraph is of such a nature that any Member which has not accepted it within a period specified by the Ministerial Conference in each case shall be free to withdraw from the WTO or to remain a Member with the consent of the Ministerial Conference.'

98 See Agreement on Trade Related Aspects of Intellectual Property Rights, 1869 UNTS 299 (entered into force 15 April 1994) (the 'TRIPS Agreement') and General Council, Amendment of TRIPS Agreement, WTO Doc WT/L/641 (Decision of 6 December 2005).

99 'WTO IP rules amended to ease poor countries' access to affordable medicines', WTO News Item 2017 www.wto.org/english/news_e/news17_e/trip_23jan17_e.htm.

100 For a critical consideration of the TRIPS amendment see Wenwei Guan, 'IPRs, Public Health, and International Trade: An International Law Perspective on the TRIPS Amendment' (2016) 29(2) Leiden Journal of International Law 411. There are undoubtedly many reasons that explain the length of time that passed between initial contemplation of this amendment and its coming into force. One explanation likely has to do with the increasing number of states joining the WTO and the resultant change in the number of WTO members needed to meet the requisite ratification threshold during the time period in which the amendment was available for approval.

Council have exclusive authority to adopt interpretations of the multilateral trade agreements.[101] However, this interpretive authority is limited as it may not be used in a manner that would undermine the procedures for the amendment of the Marrakesh Agreement.[102] Neither the Ministerial Conference nor the General Council have exercised their interpretive authority. Even if there was an attempt to issue such an interpretation, it would also require consensus by three-fourths of the WTO members – a highly unlikely outcome given the diversity of interests represented by the 164 states who hold WTO membership. Consequently, at least in respect of responses to alleged legitimacy concerns in the international trade law regime based on a perceived lack of regulatory autonomy, the effectiveness of direct exercise of state power has been muted due to the impracticality of achieving the required WTO member voting thresholds.

NON-STATE ACTOR PARTICIPATION IN WTO DISPUTE SETTLEMENT: AN EXAMPLE OF THE LIMITS OF STATE POWER

As foreshadowed above, one example of the attenuation of state power to amend WTO treaties has taken place in the context of non-state actor participation within WTO dispute settlement. Participation of non-state actors in the WTO, including in its dispute settlement mechanism, was, and remains, a controversial issue within the institution. Those who support access of non-state actors to WTO dispute settlement see it as a way to enhance the legitimacy and effectiveness of the decision-making process.[103] Those who oppose non-state actor participation contend that such participation has the potential to place special interests ahead of legal concerns in the decision-making process – a result which undermines, rather than strengthens, the legitimacy of WTO dispute settlement.[104] The Appellate Body responded to these issues early in the tenure of its inaugural

101 See n 24 above, Art IX(2).

102 *Ibid.*

103 See, eg, Steve Charnovitz, 'Opening the WTO to Nongovernmental Interests' (2000) 24 Fordham Int'l Law Journal *173*; David Esty, 'Non-Governmental Organizations at the World Trade Organization: Cooperation, Competition, or Exclusion' (1998) 1(1) JIEL 123.

104 Gregory Shaffer, 'The World Trade Organization under Challenge: Democracy and the Law and Politics of the WTO's Treatment of Trade and Environment Matters' (2001) 25(1) Harvard Environmental Law Review *1*. Others contend that the legitimacy of WTO dispute settlement is not improved by the participation of non-state actors because their own democratic credentials are questionable and because such participation does not actually address the issue of transparency (see Joel Trachtman and Philip M Moremen, 'Costs and Benefits of Private Participation in WTO Dispute Settlement: Whose Right Is It Anyway?' (2003) 44(1) Harvard Int'l L J 221; Marco M Slotboom, 'Participation of NGOs before the WTO and EC Tribunals: Which Court is the Better Friend?' (2006) 5(1) World Trade Rev *69*.

members. In a dispute between India, Malaysia, Pakistan, Thailand and the US, over the legality of a US ban on imported shrimp, the Appellate Body broadly interpreted a WTO panel's right to seek information and technical advice under the DSU.[105] More particularly, the Appellate Body determined that '[a] panel has the discretionary authority either to accept and consider or to reject information and advice submitted to it, whether requested by the panel or not. The fact that a panel may *motu proprio* have initiated the request for information does not, by itself, bind the panel to accept and consider the information which is actually submitted.'[106]

In a subsequent ruling the Appellate Body decided that it also had the authority to accept and consider *amicus* briefs. The basis for the Appellate Body's ruling was Article 17.9 of the DSU, which permits the Appellate Body to create its own working procedures.[107] In so ruling, the Appellate Body did not establish any rules governing when it could make use of this authority. However, a year later, the Appellate Body set out to adopt a working procedure for the submission of *amicus curiae* briefs during its review of a dispute between Canada and the European Communities over the Communities' asbestos ban. The Appellate Body was careful to confine its new procedure to the *EC – Asbestos* dispute[108] and, in the end, the Appellate Body did not accept any *amicus* briefs in its review of the case. To some, the Appellate Body's solution to the issue of *amicus* participation might have seemed ideal. It incorporated a process to address concerns raised about the transparency of WTO dispute settlement while at the same time signalled to WTO Members that it would exercise its authority to permit *amicus* participation sparingly. WTO members were, however, dissatisfied with the Appellate Body's approach to the issue.

Many WTO Members were so unhappy that they called a special session of the WTO General Council held on 22 November 2000 to discuss the amicus procedure adopted by the Appellate Body.[109] During this session, WTO members overwhelmingly disapproved of *amicus curiae* submissions becoming part of the dispute settlement process. Moreover, many expressed a belief that the Appellate Body had overstepped its

105 DSU, see n 15 above, Art 13.

106 US – Shrimp (AB), see n 85 above, para 108.

107 Appellate Body Report, United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom, WTO/DS138/AB/R, 10 May 2000, para 39 (US – Lead and Bismuth II).

108 European Communities – Measures Affecting Asbestos and Asbestos-Containing Products, Communication of the Appellate Body, 8 November 2000, WT/DS135/9.

109 General Council, Minutes of Meeting (22 November 2000), WT/GC/M/60.

authority.[110] Observations recorded about the views of the Informal Group of Developing Countries in the minutes of the meeting provide one such example of this sentiment:

> 'The Group believed that the decision that had been taken by the Division of the Appellate Body hearing the appeal in the asbestos case to adopt an additional procedure to deal with written briefs received from persons other than a party or a third party to the dispute, went far beyond the Appellate Body's mandate and powers for the following reasons. First, although the Appellate Body was entitled to adopt its own working procedures, its recent decision went beyond those procedures, to an outreach activity that sought information from individuals without any basis in the DSU for such an action. The question was therefore a substantive rather than a procedural one, as it related to the substantive functioning of the Appellate Body. Hence, the Appellate Body might have acted in a way that de facto amended the DSU. […]
>
> …[T]he Appellate Body was part of the WTO and was therefore governed by the rules agreed to and delicately negotiated by Members. Those were the same rules that had given the Appellate Body its mandate. The Appellate Body was not a *supra* body within the organisation. Furthermore, it was for the General Council to make appropriate arrangements for consultation and cooperation with NGOs, as stipulated in Article V of the Agreement Establishing the WTO.'[111]

Notwithstanding the apparent groundswell disapproval of *amicus curiae* submissions expressed at the 22 November 2000 special session, in later negotiations to reform the DSU, *amicus curiae* participation has remained a contentious issue, with WTO members failing to negotiate any formal rules on the subject. Such failure is no doubt related to the complexity of issues raised (not just whether to accept *amicus curiae* submissions) in relation to proposed DSU reform and to divisions among the WTO membership on these issues. With the legislative arm unable to agree on such proposals WTO panels and the Appellate Body continue to possess the self-granted authority to consider *amicus curiae* submissions in some disputes notwithstanding the fact that this practice has been highly criticised by the WTO membership. To be sure, *amicus curiae* participation

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110 See, eg, observations made about the remarks of representatives from Uruguay, Hong Kong, India, Brazil, Mexico, Singapore (on behalf of all Association of Southeast Asian Nations (ASEAN) members), Switzerland, Pakistan, Costa Rica, Canada, Hungary (on behalf of Bulgaria, Czech Republic, Latvia, Romania, Slovak Republic and Slovenia), Korea, Jamaica and European Communities: *ibid* at paras 6, 22, 37, 47, 50, 61, 64, 66, 70, 73, 82, 84–85, 89, and 95, respectively.

111 *Ibid* at paras 12 and 15.

in WTO dispute settlement is still by no means assured. A recent study suggests that acceptance and consideration of *amicus curiae* briefs in WTO dispute settlement has depended upon certain constraints.[112] Without commenting on the correctness of these practices, the above discussion highlights the impediment in international trade law for states to directly exercise power to influence international economic law disputes. Similar to the inertia seen in relation to addressing trade law legitimacy concerns through interpretative notes, negotiations to reform the DSU remain elusive given the number of WTO members required to align and their competing interests. Thus, the status quo has been maintained with the Appellant Body continuing to rule on *amicus* briefs.

Resistance to Appellate Body appointments in the WTO: an example of amplified state power

In contrast to the foregoing examples of the exercise of state power being effectively stymied within a regime of their own making, the refusal of two successive US presidential administrations to appoint members to the WTO's Appellate Body is an example of how the de facto veto established by consensus decision-making can also be used to exploit residual power within the WTO system. The DSU did not originally include a detailed procedure for appointments to the Appellate Body. In addition to 'expertise in law, international trade and the subject matter of the covered agreements', the original architects of WTO dispute settlement insisted that the Appellate Body 'shall be broadly representative of membership'.[113] In 1994, a committee was established to further outline the appointment process. The committee clarified a number of issues including some terms of reference for appointment to the Appellate Body, namely that such appointments should be made with reference to different geographical areas, levels of development and legal systems.[114] The committee also proposed that a group of six, comprising the Director-General and the chairpersons of five bodies (ie, General Council, Dispute Settlement Body, and the Councils for Trade in Goods, Services and Trade-Related Intellectual Property Rights), should generate a joint proposal for nominees after 'appropriate consultation' with the WTO membership.[115] The selection process remains in place today with final appointment to the Appellate Body achieved by

112 Theresa Squatrito, 'Amicus Curiae Briefs in the WTO DSM: Good or Bad News for Non-State Actor Involvement?' (2017) World Trade Review *1*.

113 DSU, see note 15 above, Art 17.3.

114 Recommendations by the Preparatory Committee for the WTO approved by the Dispute Settlement Body on 10 February 1995, WT/DSB/1 (19 June 1995), para 6.

115 *Ibid* at para 13.

consensus. As a result, individual WTO Members possess the ability, albeit potentially at a diplomatic cost, to veto the appointment of individuals to the Appellate Body. Since the first round of appointments in Geneva in February 1995, the Appellate Body nomination process has become progressively more politicised with some WTO members electing to exercise state power through their veto as they have become increasingly concerned about activist decision-making within the Appellate Body.[116]

These dynamics are most dramatically playing out today with the US's current refusal to approve the commencement of the selection process for new appointees to the Appellate Body. At its November 2017 meeting the Dispute Settlement Body (DSB) failed, on its tenth attempt, to launch a selection process to fill a growing list of vacancies on the Appellate Body.[117] The US is withholding its support on appointments to the Appellate Body on the grounds that the DSB must first address its systemic concerns about the practice of such appointees to remain involved in WTO cases. The US has even taken the position that departing Appellate Body judges should be precluded from finishing their work on pending matters on the day each one's term expires.[118] Even more fundamentally the US has, even before the current, nativist and protectionist president came to office, expressed concern about what it has perceived as 'judicial activism' by the Appellate Body.[119] The US's adamant refusal to even attempt to seek consensus with other members on appointments has many speculating that it intends to

116 See Manfred Elsig and Mark A Pollack, 'Agents, trustees, and international courts: The politics of judicial appointment at the World Trade Organization' (2014) 20(2) European Journal of Int'l Relations *391*.

117 See News Report on the Status of Appellate Body Matters www.wto.org/english/news_e/news17_e/dsb_22nov17_e.htm.

118 *Ibid*.

119 The US has for some time wanted WTO members to have more control over WTO dispute settlement, including the ability of WTO members to refuse adoption of reports by consensus (see its contributions in the midst of DSU rule negotiations (TN/DS/W/52)). For an example of US dissatisfaction with decisions on zeroing, see Dispute Settlement Body, Minutes of Meeting held on 23 January 2007, WT/DSB/M/225 (8 March 2007) at paras at 73–76 (where the US refused to support adoption of the Appellate Body Report in *United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS/AB/R/322 (9 January 2007) because of a number of flaws in the report). The Appellate Body's rulings on zeroing have also been the subject of critical scholarly commentary: see, eg, Roger Alford, 'Reflections on US – Zeroing: A Study in Judicial Overreaching by the WTO Appellate Body' (2006) 45(1) Columbia Journal Transnational Law *196*.

derail WTO dispute settlement altogether.[120] Such conjecture was only strengthened by a statement made at the WTO Ministerial Conference in December 2017 by United States Trade Representative, Robert Lighthizer, which set the stage for such an agenda:

> '…many are concerned that the WTO is losing its essential focus on negotiation and becoming a litigation-centred organisation. Too often members seem to believe they can gain concessions through lawsuits that they could never get at the negotiating table. We have to ask ourselves whether this is good for the institution and whether the current litigation structure makes sense.'[121]

Such sentiments are undoubtedly concerning for anybody who advocates for the peaceful resolution of international disputes and for the rule of international law.[122] Further and in contrast to the foregoing examples, the US's position paradoxically illustrates how a single state may exercise significant power given the consensus requirement for Appellate Body appointments if that state is prepared to forsake all the benefits that accrue, both for itself and for the order within which its traders operate, of independent dispute resolution based on the rule of law.

Adjudicative responses to legitimacy concerns in international investment law

As was the case in the early days of the WTO, many have suggested that ISDS is in the midst of a legitimacy crisis.[123] Aggrieved foreign investors

120 See, eg, Gregory Shaffer, Manfred Elsig and Mark Pollack, 'Will the US Undermine the World Trade Organization?' *Huffington Post* (New York, 23 May 2016); 'The US is causing a major controversy in the World Trade Organization. Here's what's happening', *Washington Post* (Washington, DC, 6 June 2016); 'Trump is Fighting an Open War on Trade. His Stealth War on Trade May be Even More Important', *Washington Post* (Washington, DC, 27 September 2017); 'The Slow Killing of the World Trade Organization', *Huffington Post* (New York, 11 November 2017) https://ssrn.com/abstracts=3087524).

121 Opening Plenary Statement of the US Trade Representative Robert Lighthizer at the WTO Ministerial Conference (December 2017) https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/december/opening-plenary-statement-ustr.

122 To that end, Canada has spearheaded a group of 13 countries interested in strengthening and modernising WTO dispute settlement. Most recently, the so-called 'Ottawa Group' met in Davos in January 2019 to continue this discussion (see 'Joint Communiqué of the Ottawa Ministerial on WTO Reform Group Meeting in Davos', 24 January 2019 https://international.gc.ca/world-monde/international_relations-relations_internationales/wto-omc/2019-01-24-davos.aspx?lang=eng). To date the US has rejected the reform proposals put forward by this group and reform proposals of other WTO members.

123 See, eg, Susan Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions' (2005) 73(4) Fordham Law Rev *1521*; Ari Afilalo, 'Towards a Common Law of International Investment: How NAFTA Chapter 11 Panels should solve their Legitimacy Crisis' (2004) Georgetown Int'l Environmental Law Rev *51*.

have pursued damages claims for alleged breaches of broadly worded substantive norms as a result of measures adopted and maintained in sensitive areas of state governance. Recent examples include the successful damages claim by US investors arising from the flawed environmental review process for a proposed gravel quarry in Nova Scotia, Canada,[124] unsuccessful damages claims by a US pharmaceutical company arising from Canadian court decisions that invalidated patents for two of its drugs,[125] and two unsuccessful damages claims made by a tobacco company arising from tobacco reduction measures adopted in Uruguay and Australia, respectively.[126] With the initiation of these sorts of challenges, concerns about the need to counter-balance goals of investment protection with other objectives such as regulatory sovereignty have featured prominently in discussions about ISDS, notwithstanding the fact that the most controversial claims have invariably been dismissed.[127]

Perhaps the most dramatic jurisprudential examples that have stoked fears about the allegedly unbalanced operation of ISDS and international investment law concern disputes arising in the wake of economic emergencies, starting with the swathe of damages claims brought by foreign investors in the aftermath of the Argentine financial crisis at the turn of the century. Many of the awards rendered thus far have denied Argentina any refuge under BIT exception clauses for measures 'necessary' for the maintenance of 'public order' or the protection of 'essential security interests'[128] – presumably on the basis that the specific measures at issue were not necessary and/or did not vouchsafe essential national security interests. The fact that tribunals did not always come to the same conclusion

124 *Bilcon of Delaware Inc v The Government of Canada*, NAFTA (UNCITRAL 1976), Award on Jurisdiction and Liability (17 March 2015). Canada has applied to set aside the arbitral award on grounds that the award contains decisions on matters beyond the scope of the submission to arbitration and is in conflict with Canada's public policy. Canada's notice of application www.pcacases.com/web/sendAttach/1727.

125 *Eli Lily and Company v The Government of Canada*, UNCITRAL 1976 (NAFTA), Final Award (16 March 2017).

126 *Philip Morris Asia Limited v Australia*, Award on Jurisdiction and Admissibility, PCA Case No 2012-12, IIC 777 (2015), 17 December 2015; and *Philip Morris Brands Sàrl et al v Uruguay*, Award, ICSID Case No ARB/10/7, IIC 844 (2016), 28 June 2016.

127 See, eg, Caroline Henckels, 'Protecting Regulatory Autonomy through Greater Precision in Investment Treaties: The TPP, CETA and TTIP' (2016) 19(1) JIEL *27*.

128 US – Argentina BIT (entered into force 20 October 1994) https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/162/argentina---united-states-of-america-bit-1991-, Art XI.

was seen as further evidence of disfunction of the so-called 'system' of international investment law as well.[129]

Given these developments it is perhaps unsurprising that those of a particular ideological inclination would raise questions about whether the international investment law regime incorporates enough flexibility for states to regulate in the public interest and extend their complaints to the very function of ISDS as well. As the evolution of WTO dispute settlement demonstrates, such questions are not unique in global economic governance. Even more importantly, such concerns can lead to useful dialogue that facilitates – rather than detracts from – the legitimacy of dispute resolution mechanisms. Overthrowing ISDS may appear to address some of the concerns raised by opponents of international investment law generally. However, it is not the only (or even the most obvious) means by which to tackle such concerns, assuming that such concerns are indeed justified.

As also seen in the WTO, there is ample evidence arbitral tribunals have made jurisprudential attempts to balance investor protections against the rights of host states to regulate in the public interest. Arbitral tribunals have applied the principles of proportionality and deference in apparent attempts to ensure that host states would not be held liable for losses alleged by foreign investors to have arisen from the adoption of regulations of general application that further a legitimate public purpose.[130] Proportionality has, for example, played an important role in arbitral consideration of the appropriate parameters of the prohibition on uncompensated indirect expropriation.[131] It has also emerged in arbitral assessments of a host state's liability for violations of the fair and equitable treatment (FET) standard.[132] Arbitral tribunals have also accepted that a host state may treat foreign investors differently when such distinctions are reasonable, non-

129 See Jürgen Kurtz, 'Building Legitimacy Through Interpretation in Investor-State Arbitration: On Consistency, Coherence, and the Identification of Applicable Law' in Douglas et al (eds), *The Foundations of International Investment Law: Bringing Theory into Practice* (Oxford University Press 2014) at 257 [Kurtz, 'Building Legitimacy'], 284–289; Jürgen Kurtz, 'Adjudging the Exceptional at International Law: Security, Public Order and Financial Crisis' (2008) Jean Monnet Working Paper 06/08 [Kurtz, 'Adjudging the Exceptional'] www.jeanmonnet program.org/papers /08/080601.pdf.

130 For an incisive discussion see Caroline Henckels, *Proportionality and Deference in Investor-State Arbitration* (Cambridge University Press 2015).

131 See, eg, *Tecnias Medioambientales Tecmed SA v Mexico*, ICSID Case No ARB/(AF)/00/2, Award (29 May 2003) at para 119; *Methanex Corporation v United States of America*, NAFTA (UNCITRAL), Award (3 August 2005) at part IV, Ch D, para 7.

132 See, eg, *Occidental Petroleum Corporation and Occidental Exploration and Production Company v The Republic of Ecuador*, ICSID Case No ARB/06/11, Award (5 October 2012), paras 402–427.

discriminatory, and in the public interest.[133] This is not to say that all of these jurisprudential turns have alleviated concerns about the legitimacy of investment arbitration. For a certain cast of opponents, arguably nothing will. Nonetheless it is, in our view, inaccurate to characterise ISDS and international investment law, generally, as being incapable of, or indifferent to, addressing legitimacy concerns.

State responses to legitimacy concerns in international investment law: exploring the contours of state power

In contrast to the rigidities that exist with respect to the treaty-based infrastructure of the WTO, there is potentially greater flexibility in international investment law for states to exercise their power to amend their treaties or even to influence and/or resolve individual disputes in response to perceived legitimacy concerns. The discussion below provides some examples of this increased flexibility and demonstrates that amplification of state power so as to appear to respond to legitimacy concerns is possible.

Treaty amendment and interpretive notes: state power exercised

States may renegotiate or amend their investment treaty commitments to address concerns about the breadth of investment treaty obligations. To be clear, this is not to say that states should turn to this alternative. There is much to be gained from maintaining stable treaty relations and the ability to renegotiate investment treaty commitments is still a mechanism available to states under the right circumstances. Amending a bilateral treaty is infinitely easier than amending a multilateral treaty that sets high numerical thresholds for amendment.

International investment law practice reveals manifold examples of circumstances in which states have sought to make substantive and procedural changes to their instruments in respect to concerns that could be seen as threats to the legitimacy of international investment law generally. For example, some recently negotiated investment treaties include clarifications with respect to the factors to be considered when assessing claims of indirect expropriation without compensation. Investment treaties have long contained protections against uncompensated takings. The North American Free Trade Agreement (NAFTA), for example, prohibits a host state from adopting or maintaining measures 'tantamount to nationalisation or expropriation'.[134] In response to loudly voiced concerns about the potential abuse of this and

133 See, eg, *SD Myers v Canada*, First Partial Award (13 November 2000) at para 250; *GAMI v Mexico*, Award (15 November 2004), paras 114–115.

134 NAFTA, 32 ILM 289, 605 (entered into force 1 January 1994), Art 1110(1).

similar provisions, some states have sought to introduce greater clarity with respect to the circumstances in which an indirect expropriation requiring compensation might occur. States have, for example, delineated a list of factors for arbitral tribunals to examine when considering whether a host state is liable for indirect expropriation. Such factors include but are not limited to the economic impact of a government's action, the duration of the measure, the extent to which a government's actions contradict an investor's reasonably held investment-backed expectation, and the character of the government's action.[135]

States have also consistently attempted to narrow the scope of other substantive investment protections, such as the FET obligation, both in argument as respondent in individual cases and through the introduction of new treaty language in the investment chapters of so-called mega-regional agreements (which, with their adoption, can replace a host of bilateral treaties). CETA, for example, attempts to 'clarify' the FET standard by limiting its application to six enumerated grounds: denial of justice, breach of due process, manifest arbitrariness, targeted discrimination, abusive treatment or any other elements adopted by CETA parties.[136] CETA parties have also seemingly sought to restrict the potential scope and application of its FET standard by de-emphasising the significance of the concept of legitimate expectations. Paragraph 4 of Article 8.10 indicates that in applying the FET obligation CETA adjudicators *may* (but are not required to) consider whether a host state has frustrated such expectations. Paragraph 4 also indicates that only specific representations used to induce investment and upon which an investor relies may ground a legitimate expectations argument.

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135 Eg, CETA, *see* n 6 above, Annex 8-A(2). These changes are also reflected in the most recent 2012 US Model BIT, Article 6, Annex B https://2009-2017.state.gov/documents/organization/188371.pdf. For an overview of this provision see Lee M Caplan and Jeremy K Sharpe, 'United States' in Chester Brown, ed, *Commentaries on Select Model Investment Treaties* (Oxford University Press 2013) 755, 787–793. This annex in the US Models BITs was included in response to arbitral decisions like *Metalclad Corp v United Mexican States*, ICSID Case No ARB(AF)/97/1, Award (30 August 2000) [*Metalclad*, Award], para 111 (where the tribunal construed 'tantamount to expropriation' as creating a third category of expropriation that included non-discriminatory measures of general application which substantially interfere with an investors investment). See also *Pope & Talbot*, Interim Award, see n 150 below at para 144.

136 *Ibid* at Art 8.10(2). In an attempt to lessen the impact of the concept of legitimate expectations as a predominant factor in FET jurisprudence, Art 8.10(4) provides that '… the Tribunal *may [or may not]* take into account whether a Party made a specific representation to an investor to induce a covered investment, that created a legitimate expectation, and upon which the investor relied in deciding to make or maintain the covered investment, but that the Party subsequently frustrated' [author's own emphasis]

The Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), which entered into force for Australia, Canada, Japan, Mexico, New Zealand and Singapore on 30 December 2018, also contains an attempt to clarify what constitutes a breach of the FET standard.[137] Not only is it explicitly tied to the customary international law minimum standard of treatment,[138] it also includes an annex containing a confirmation of the parties' understanding of customary international law as being a source of law that emanates from 'a general and consistent practice of states that they follow from a sense of legal obligation'.[139] The annex further confirms that '[t]he customary international law minimum standard of treatment of aliens refers to all customary international law principles that protect the investments of aliens'. Instead of articulating an exclusive list of enumerated grounds by which to assess breaches of this treaty standard, the CPTPP specifies that FET includes (but is not limited to) the obligation not to deny justice or breach due process rights.[140] The parties' decision to avoid enumerating an explicit list of grounds that may be considered as providing a basis for a FET claim may be seen as giving CPTPP adjudicators more discretion when deciding such claims. The language of CPTPP Article 9.6(2)(a) is inclusive, suggesting that there may be other bases upon which an investor could successfully argue violation of the FET standard of protection. The potential for such a finding may, however, be counterbalanced against the CPTPP parties' approach to legitimate expectations, given how paragraph (4) provides that findings to the effect that a party's acts or omissions are inconsistent with an investor's expectations cannot, alone, form the basis of a FET claim. Whether these newly crafted FET provisions (CETA Article 8.10 or CPTPP Article 9.6) will obtain the hoped-for recalibration sought by those who believe international

137 CPTPP (entered into force 30 December 2018) is available on a number of government websites. See, eg, Canada's website https://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cptpp-ptpgp/index.aspx?lang=eng accessed 1 May 2019, Art 9. The CPTPP subsequently came into force for Vietnam on 14 January 2019.

138 *Ibid* at Art 9.6(1).

139 *Ibid* at Annex 9-A.

140 *Ibid* at Art 9.6(2)(a). As with CETA, the CPTPP also attempts to reduce the importance of legitimate expectations in FET determinations. Art 9.6(4) provides '[f]or greater certainty, the mere fact that a Party takes or fails to take an action that may be inconsistent with an investor's expectations does not constitute a breach of this Article, even if there is loss or damage to the covered investment as a result'.

investment law can and should be reformed will only be revealed over time and through subsequent practice.[141]

In addition to modifying treaty language that defines the standards of treatment typically seen in most investment treaties, states have also attempted to incorporate more elaborate exemption clauses in their international economic law arrangements. Such clauses might exempt states from their investment treaty obligations, or preclude them from having to pay damages, when they regulate for legitimate public policy objectives such as health or the environment. Many of these provisions bear some resemblance to WTO law. Canada has been a forceful advocate for the incorporation of such clauses. For example, in its 2004 Model Agreement for the Promotion and Protection of Investments, Canada has the following general exceptions clause modelled on WTO law:

> '1. Subject to the requirement that such measures are not applied in a manner that would constitute arbitrary or unjustifiable discrimination between investments or between investors, or a disguised restriction on international trade or investment, nothing in this Agreement shall be construed to prevent a Party from adopting or enforcing measures necessary:
>
> (a) to protect human, animal or plant life or health;
>
> (b) to ensure compliance with laws and regulations that are not inconsistent with the provisions of this Agreement; or
>
> (c) for the conservation of living or non-living exhaustible natural resources.'

In CETA the general exceptions clause (Article 28.3(1)) expressly incorporates WTO exceptions into the agreement. Similar exceptions have also begun to inform investment treaty practices in Australia, Japan and states in South East Asia.[142] The US has not yet been persuaded to include these types of clauses into its investment treaties. Nonetheless, it does reference similar exceptions in conjunction with its provisions on indirect expropriation.[143] One explanation for such reluctance may be the fact that substantive provisions, such as national treatment, have already

141 Some experts have doubts about whether these provisions will have any meaningful impact on the broad scope and operation of the FET obligation: see Lise Johnson and Lisa Sachs, 'The TPP's Investment Chapter: Entrenching, rather than reforming, a flawed system' (2015) Columbia Centre on Sustainable Investment, CCSI Policy Paper http://ccsi.columbia.edu/files/2015/11/TPP-entrenching-flaws-21-Nov-FINAL.pdf.

142 *Ibid*.

143 2012 US Model BIT, see n 135 above at Annex B(4)(b), which provides that '[e]xcept in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment do not constitute indirect expropriations'.

been interpreted so as to include the same kind of balancing test as part of the analysis of prima facie breach, without any limitation on justifications.[144]

The US has taken steps, however, to clarify the operation of its essential security interest's exception in the wake of investment claims commenced as a result of Argentina's economic crisis. For example, in its 2004 Model BIT, the US clarified that it intends its invocation of this defence to be self-judging and thus falls under the sole competence of the host state.[145] The extent to which treaty provisions such as these will impact upon the scope and application of investment treaty obligations in practice remains to be seen. There are also those who are sceptical of the practical impact that such provisions may actually have for host states trying to regulate in sectors that touch on issues such as climate change, health and economic development.[146] In any event, the conclusion we wish to take from these developments is simply that states generally do retain the sovereign authority to respond through treaty negotiations to any concerns about regulatory autonomy in international investment law.

States can also clarify uncertainties and ambiguities in investment treaty texts by issuing joint interpretations with their other treaty partners as provided under the treaty or by means of an exchange of diplomatic notes.[147] Applicable customary international law on the interpretation of treaties generally recognises that if such acts evince subsequent practice or subsequent agreement of the parties, they are to be taken into account by tribunals in disputes arising under those agreements.[148] In contrast to the institutional

144 See, eg, Todd Weiler, 'The Treatment of SPS Measures under NAFTA Chapter 11: Preliminary Answers to an Open-Ended Question', Boston College International and Comparative Law Review 26 (2003) 229.

145 *Ibid* at Art 18.

146 See Henckels, n 127 above.

147 In some instances, investment treaties expressly include provisions on the permissibility and binding quality of these types of interpretive notes. See, eg, NAFTA, note 134 above, Art 1131(2) which provides that '[a]n interpretation by the Commission of a provision of [NAFTA] is binding on a Tribunal established under [NAFTA Chapter 11]'. See also Canada – China BIT, Art 18 and 20. For an overview of all of the strategies that states can implement to control their liability under investment treaties see Lise Johnson and Merim Razbaeva, 'State Control over Interpretation of Investment Treaties' (2014) *Vale Columbia Center on Sustainable International Investment* http://ccsi.columbia.edu/files/2014/04/State_control_over_treaty_interpretation_FINAL-April-5_2014.pdf. On the need for recalibration of interpretive powers between states and investment tribunals see Anthea Roberts, 'Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States' (2010) 104(2) AJIL 179.

148 Vienna Convention on the Law of Treaties, 1155 UNTS 331 (entered into force 27 January 1980), Arts 31(3)(a) and (b), which state that treaty interpretation shall take into account '(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; [and] (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.'

rigidities at the WTO that prevent this type of strategy from meaningfully impacting WTO adjudicators, international investment law has traditionally been structured (ie, through bilateral arrangements) so that states retain the authority to respond to decisions that are perceived as running counter to sovereign interests. Consider, for example, the actions taken by NAFTA Parties following a series of Chapter 11 claims and decisions that apparently raised concerns (at least among the government lawyers responsible for defending against these claims) about tribunals' interpretations of the 'fair and equitable' treatment standard. Using the tri-lateral, ministerial-level, Free Trade Commission (FTC), they caused an interpretive statement to be issued that they evidently hoped they could use to restrict the interpretation of NAFTA's FET standard going forward.[149] The timing of this interpretive statement generated criticism, given how it was issued after a NAFTA tribunal had found Canada liable for violations of the FET standard but before the tribunal issued an award on damages in the case.[150] Nevertheless, NAFTA

149 NAFTA Free Trade Commission's Notes of Interpretation of Certain Chapter 11 Provisions (31 July 2001) www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/NAFTA-Interpr.aspx?lang=eng, states:

> 'Minimum Standard of Treatment in Accordance with International Law
>
> 1. Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investors of another Party.
>
> 2. The concepts of 'fair and equitable treatment' and 'full protection and security' do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.
>
> 3. A determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1).'

Pope & Talbot Inc v Canada, UNCITRAL 1976 (NAFTA), Interim Award (on merits) (2000) [*Pope & Talbot*, Interim Award], *Pope & Talbot Inc v Canada*, UNCITRAL 1976 (NAFTA), Award on the Merits of Phase 2 (2001) [*Pope & Talbot*, Merits Phase 2]. The FTC interpretation was released on 31 July 2001 before the Tribunal ruled on the damages component of the dispute was issued on 31 May 2002.

150 *Pope & Talbot Inc v Canada*, UNCITRAL 1976 (NAFTA), Award in Respect of Damages (2002) at paras 47–69. The authors wish to disclose that Dr Weiler participated as counsel for the claimant in this arbitration.

tribunals have accepted that interpretation as binding and have interpreted NAFTA's FET obligation with reference to the FTC interpretation note.[151]

This brief account highlights the ability states retain to shape the contours of international investment law, generally, allowing them to address concerns about the legitimacy of the systems they have collectively established as they arise (assuming, of course, that any amount of reform would actually satisfy ISDS's more vociferous critics). As stated above, such re-imagining is more difficult in the international trade law context because of the institutional rigidities that exist within the WTO (eg, amendment and interpretation procedures). By contrast, because of the predominance of BITs and regional agreements over a single, global multilateral agreement, states have been able, and can continue, to directly address legitimacy concerns through treaty negotiations, amendments and interpretative notes. This power extends to considerations of institutional reform that are ongoing under the auspices of UNCITRAL's Working Group III and that have already taken place in the investment treaties recently negotiated between some states.

Reforming international investment law's dispute settlement mechanism: the CETA example

The EU and some of its economic partners, such as Canada and Vietnam, have opted for ISDS-reform-by-replacement, with the introduction of an investment court system (ICS) seemingly modelled on the WTO dispute settlement system. Inclusion of this form of dispute settlement mechanism is intended to address some of the legitimacy challenges that the current model of ad hoc arbitration has faced. But will ICS really solve international investment law's perceived legitimacy crisis? Might we expect to see the tensions previously seen in the WTO context re-emerging with ICS? What

151 This is not to say that NAFTA tribunals always agree about what the customary international law minimum standard is. Some see the standard as evolving (see, eg, *Merrill & Ring Forestry LP v Canada*, ICSID Case No UNCT/07/1 Award (2010) at para 192) while others have interpreted the standard more restrictively (see, eg, *Glamis Gold Ltd v United States of America*, UNCITRAL (NAFTA), Award (2009) at para 599). The FTC interpretation has been the subject of some debate. For an overview of that discussion see David Gantz, 'The Evolution of FTA Investment Provisions: From NAFTA to the United States – Chile Free Trade Agreement' (2004) 19 American University International Law Review International 679. Moreover, many have criticised the NAFTA state parties for issuing the FTC interpretation: see, eg, Charles H Brower II, 'Why the FTC Notes of Interpretation Constitute a Partial Amendment of NAFTA Article 1105', 46 Virginia Journal of International Law 347 (2006); Charles H Brower II, 'Structure, Legitimacy, and NAFTA's Investment Chapter', 36 Vanderbilt Journal of Transnational Law 37 (2003); Charles H Brower II, 'Investor-State Disputes Under NAFTA: A Tale of Fear and Equilibrium', 29 Pepperdine Law Review 43 (2001).

might the CETA's architects learn, if anything, from the WTO's experience, as opposed to the structure of its DSU circa 1994? Before we can contemplate such questions, we must examine the ICS envisioned for the CETA.

The CETA establishes an investment court with two levels of adjudicative oversight. The Tribunal of First Instance,[152] or 'Tribunal' as it is termed in CETA, is composed of fifteen Tribunal members.[153] Five Tribunal members must be nationals of an EU state; five must be Canadian nationals; and five may be nationals of third states.[154] In contrast to investor-state arbitration (where appointment of arbitral tribunal members resides with the investor and the defendant state), a committee – comprised exclusively of representatives from the CETA parties themselves – appoints members to this standing tribunal.[155] Tribunal members are to be appointed for a five-year term, once renewable. The terms of seven of the 15 Tribunal members appointed immediately after the entry-into-force of the agreement, selected by lot, are to extend to six years.[156]

Those appointed to the Tribunal must possess a number of qualifications, including demonstrated expertise in international law. It is also stipulated as desirable that they possess expertise in international investment law, international trade law and the resolution of disputes arising under either of these regimes.[157] Disputes are to be decided by a division of three Tribunal members. Two members are expected to hold the nationality of the respective treaty parties, while the third and presiding member is to be a national of a third country.[158] Once a claim has been submitted, the President of the Tribunal will appoint three members to hear the case. Such appointments are to be made on a rotating basis, so as to ensure that the composition of each division is 'random and unpredictable, while giving

152 EU TTIP Proposal (12 November 2015), Art 9(3).

153 CETA, see n 6 above, Art 8.27. See also EU – Vietnam FTA, see n 6 above, c X, s 3, sub-s 4, Art 12, which establishes a similar tribunal of first instance that is composed to nine tribunal members.

154 CETA, *ibid* at Art 8.27(2). A footnote to this provision specifies that each party 'may instead propose to appoint up to five Members of the Tribunal of any nationality. In that case such members of the tribunal shall be considered to be nationals of the party that proposed his or her appointment.' The EU – Vietnam FTA, *ibid* has similar nationality requirements (see *ibid* at Art 12(2)).

155 CETA, *ibid* at Arts 8.27(2) and 8.28(3). See also EU – Vietnam FTA, *ibid*.

156 CETA, *ibid* at Art 8.27(5); EU – Vietnam FTA, *ibid* at Art 12(5).

157 See CETA, *ibid* at Art 8.27(4); EU – Vietnam FTA, *ibid* at Art 12(4). Whether it will be possible to fill all of these positions with professionals who actually possess real dispute settlement experience, rather than just academic experience (ie, experience writing about disputes from the outside looking in) remains very much an open question, given how acceptance of a position on the tribunal would necessarily entail discontinuing one's dispute settlement practice.

158 CETA, *ibid* at Art 8.27(6); EU – Vietnam FTA, *ibid* at Art 12(6).

equal opportunity to all Tribunal members to serve.'[159] As is contemplated in the WTO context, the Tribunal of First Instance is authorised to adopt its own working procedures.[160]

The Appellate Tribunal contemplated in the CETA is somewhat different than that which was first proposed by the EU and then subsequently established in the EU – Vietnam BIT. Unlike those instruments, which outline the number of Tribunal Members and establish terms of appointment and renewal,[161] the CETA leaves much of the administrative and organisational issues concerning how an Appellate Tribunal would function to be determined by the CETA Joint Committee – a body which is to comprise representatives from the EU and Canada.[162] As a result, issues such as the number of Appellate Tribunal members, remuneration of Tribunal members, and the initiation and procedure for conducting appeals have yet to be determined. Once these decisions have been made, a disputing party may appeal a decision of the Tribunal of First Instance within 90 days of the issuance of an award. In so doing, the disputing party is obliged to refrain from pursuing other appellate processes or remedies such as annulment or revision.[163]

This institutional reform is, in some ways, reminiscent of developments seen in the international trade law regime during the Uruguay Round with respect to the establishment of the WTO DSU. Certainly, one of the most significant changes brought about under CETA's ICS is the establishment of a review mechanism (similar to that seen in WTO dispute settlement) that allows for broader review of first instance tribunal decisions than has been permitted in traditional ISDS. As explained above, investor-state arbitral

159 CETA, *ibid* at Art 8.27(7); EU – Vietnam FTA, *ibid* at Art 12(7).

160 CETA, *ibid* at Art 8.27(10); EU – Vietnam FTA, *ibid* at Art 12(10).

161 The appeals mechanism contemplated by the EU and incorporated into its FTA with Vietnam establishes a tribunal composed of six members, with two members being EU nationals, two nationals of the other treaty party and two nationals of third countries. As with the first instance tribunal, members of the appeal tribunal are appointed for a six-year term, subject to renewal for one additional term. However, three of the six members appointed immediately after the entry into force of the agreement have terms that extend to nine years. Selection of those three members is determined by lot. Provisions on the required qualifications, nomination of members and constitution of tribunal divisions hearing appeal proceedings are similar to first instance tribunals.

162 CETA, see n 6 above, Art 26.1 and 8.28(7).

163 *Ibid* at Art 8.28(9)(b).

awards are binding on disputing parties with limited potential for review.[164] Apparent lack of appellate oversight within the traditional ISDS model has been one of the fundamental concerns raised in conversations about the legitimacy of ISDS. Those who believe that all that is required to shore up the legitimacy of ISDS is to answer the allegation that arbitral awards lack interpretive coherence and result in unpredictable outcomes have advocated for inclusion of an appellate mechanism; the EU's ICS certainly provides it.[165]

Evaluated in isolation from other aspects of the CETA, it may be difficult to criticise this development in the settlement of investment disputes. If the legitimacy of the international investment law regime is based upon coherence of reasoning and generating legal certainty, then there may be much to be gained from establishing a dispute settlement mechanism that restrains political influences by delegating tasks of legal interpretation and application to adjudicators who have some security of tenure and whose decisions in the first instance are open to review. Many have attributed similar developments in the settlement of international trade disputes with

164 See ICSID Convention, see n 72 above, Art 52–54. Here, it is important to note that there has been an increase in the number of ICSID annulment applications made by disputing parties. Despite that increase, most annulment applications are either not successful or are discontinued (recent annulment statistics can be found online: https://icsid.worldbank.org/en/Pages/resources/ICSID-Caseload-Statistics.aspx). In non-ICSID arbitrations, parties may challenge awards in the courts of the country in which the tribunal has its seat or by the courts charged with enforcing the award. The grounds for challenge are, however, limited: see UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006, Art 34–36 http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf New York Convention, 330 UNTS 38 (entered into force 7 June 1959), Art V.

165 See, eg, Yenkong Ngangjoh-Hodu and Collins C Ajibol, 'ICSID Annulment Procedure and the WTO Appellate System: The Case for an Appellate System for Investment Arbitration' (2015) 6(2) Journal of International Dispute Settlement (JIDS) 308; Debra Steger, 'Enhancing the Legitimacy of International Investment Law by Establishing an Appellate Mechanism' in Armand de Mestral and Céline Lévesque (eds) *Improving International Investment Agreements* (Routledge 2012) at 257–264. See also Mark Feldman, 'Investment Arbitration Appellate Mechanism Options: Consistency, Accuracy, and Balance of Power' (11 January 2016), *Peking University School of Transnational Law Research Paper No 16-2* http://ssrn.com/abstract=2713168 or http://dx.doi.org/10.2139/ssrn.2713168; Karl P Sauvant (ed) *Appeals Mechanism in International Investment Disputes* (Oxford University Press 2008).

the development of a body of coherent and predictable jurisprudence on a wide variety of matters.[166]

Whether the investment court established under CETA will alleviate the legitimacy concerns that have arisen in relation to investment arbitration remains an unanswered question, however. Indeed, one hesitates to make any hasty conclusions about the impact that this institutional reform might ultimately portend. As we have seen in the WTO context and in the international investment law context to date, one would anticipate that adjudicators appointed to the Tribunal of First Instance and Appeal would adapt a series of jurisprudential responses to any concerns arising within the particular context of the CETA's treaty provisions. What may be more important to think about in the early stages of the CETA's development (and for institutional reform more broadly) is how this new dispute settlement mechanism might operate in conjunction with other institutional features adopted to address other perceived legitimacy concerns. For example, can the CETA be amended? If so, what is the mechanism by which these amendments may take place? Are CETA parties able to clarify treaty interpretive issues as we see in the current international investment law regime?

The answer to these questions lies in CETA's establishment of administrative committees. Under the CETA, Canada and the EU have established a CETA Joint Committee that is to be responsible for all trade and investment policy issues between the parties.[167] Chaired by government officials on both sides of the Atlantic who are responsible for trade, the Joint Committee will be composed of representatives from both Canada and the EU.[168] Under the terms of its mandate, the Joint Committee will

166 Apart from some exceptional cases, WTO panels follow Appellate Body jurisprudence when deciding trade disputes. See, eg, *Argentina – Definitive Safeguard Measure on Imports of Preserved Peaches*, WT/DS238/R (14 February 2003) (Panel Report) at para 7.24 disagreeing with *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R (14 December 1999) (Appellate Body Report) at para 131. See also a series of disputes involving the legality of zeroing: *United States – Anti-Dumping Measure on Shrimp from Ecuador (Complaint by Ecuador)* (2007), WTO Doc WT/DS335/R (Panel Report); *United States – Measures Related to Shrimp from Thailand (Complaint by Thailand)* (2008), WTO Doc WT/DS345/R (Panel Report) as modified by *United States – Measures Related to Shrimp from Thailand (Complaint by Thailand)* (2008), WTO Doc WT/DS345/AB/R (Appellate Body Report); *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico (Complaint by Mexico)* (2008), WTO Doc WT/DS344/R (Panel Report) as modified by *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico (Complaint by Mexico)* (2008), WTO Doc WT/DS344/AB/R (Appellate Body Report).

167 CETA, see n 6 above, Art 26.1.

168 *Ibid* at Art 26.1(1).

exercise both a supervisory and a facilitative function.[169] Among its many roles, the Joint Committee may consider or agree on amendments to the CETA.[170] It can also adopt interpretations of CETA provisions and, in doing so, purport to bind Tribunals established under the CETA's investment chapter.[171] In addition to the Joint Committee, the CETA also provides for the establishment of a Committee on Services and Investment intended to facilitate consultation of the parties on issues pertaining to the CETA's investment chapter.[172] More particularly, this committee can make recommendations to the Joint Committee about: (1) the adoption of interpretations under the investment chapter; (2) the adoption of dispute settlement and transparency rules; (3) the adoption of mediation rules; (4) further elements of the FET obligation; and (5) the functioning of the Appellate Tribunal.[173] Thus, Canada and the EU have reserved for themselves, as a state or a conglomeration of states, respectively, the ability to exercise sovereign authority to respond to concerns through treaty interpretation or amendment, as well as administrative and organisational matters regarding the functioning of the Appellate Tribunal.

Similar to what we have seen treaty parties do under the NAFTA, the CETA contemplates the issuance of interpretive notes that would clarify rights and obligations under the investment chapter. As a result, there is some flexibility built into the agreement to manage concerns about what the treaty parties consider to be incorrect interpretations of treaty provisions. For example, one could envision a scenario in which officials from Canada and the European Commission might also clarify the role of legitimate expectations in the context of an FET violation. In such an instance, adjudicators would be bound by such interpretive statements.[174] This mechanism is operationalised through the Joint Committee and the Committee on Services and Investment. Consequently, the structure and governance of these committees will be critical to the exercise of such power. Some also believe that, if used judiciously, issuance of interpretive notes may have the potential to alleviate some of the concerns that may arise in the context of, and have implications for the legitimacy of, the CETA's new dispute settlement mechanism. The same observation might be made in the context of the CETA amendments. As is true of other international trade law and international investment law treaties, the CETA contemplates

169 See *ibid* at Art 26.1(4)(a), which states: 'The CETA Joint Committee shall supervise and facilitate the implementation and application of this Agreement and further general aims'.
170 *Ibid* at Art 26.1(5)(c).
171 *Ibid* at Art 26.1(5)(e).
172 *Ibid* at Art 26.2(c).
173 *Ibid* at Art 8.44(3).
174 See n 179 below.

that the state parties may wish to amend the agreement. Under the CETA, the power to amend treaty provisions, including those within the investment chapter, ultimately rests with the CETA's Joint Committee. As discussed above, the power to amend a treaty such as the CETA may provide states with an ability to respond to concerns about the legitimacy of dispute settlement mechanisms and, perhaps more importantly, the decisions adjudicators make in actual cases concerning the rights and obligations outlined in the CETA's investment chapter. Having said that, it is important to recognise and unpack the potential challenges that these administrative committees may pose for the legitimacy of the CETA's newly established investment court.

At first glance, the mere establishment of committees under CETA to monitor implementation and application of the agreement may pose concerns to those who believe that the rule of law is best served when there is separation between state power and adjudicative functions. The CETA's Joint Committee and the more specialised committee on Services and Investment are to exercise functions that interact with, and potentially influence, adjudication under the CETA's investment chapter, including administrative and organisational matters regarding the functioning of the Appellate Tribunal. On the other hand, the WTO's Ministerial Conference has 'authority to take decisions on all matters under any of the Multilateral Trade Agreements' and the General Council takes on these responsibilities in between sessions of the Ministerial Conference. In addition, the General Council is also responsible for convening the DSB and the Trade Policy Review Body. Together, the Ministerial Conference and General Council, bodies comprised of representatives of all WTO members, oversee all aspects of the WTO's work. The WTO also maintains a number of other committees tasked with carrying out specialised functions in relation to particular aspects of international trade. All of this is to say that the idea that states oversee functioning of different aspects of the CETA, including its new investment court, is not a new institutional development in global economic governance. In fact, express provision for this type of organisational structure, in which treaty parties are required to meet annually with the objective of addressing concerns about the implementation and application of CETA, may do much to facilitate greater transparency about issues arising under CETA and discourage treaty parties from refusing to at least meet with a bona fide intent to try to resolve those issues.

That said, it is important to reflect on the challenges that may beset the CETA's institutions, including the functioning of its ICS. Is it possible that the CETA's dispute settlement mechanism could find itself in the same predicament we now see happening at the WTO with the Appellate

Body? Could one of the CETA's parties stymie operation of the ICS if it considers its decisions as being too 'activist'? If so, what does that mean for the legitimacy of the new investment court? At this very early stage, answers to such questions have yet to emerge. Nonetheless, with the following discussion we attempt to shed some light on these questions.

As noted above, sovereign authority to amend or issue treaty interpretations at the WTO is largely attenuated by the voting thresholds that must be surpassed under the Marrakesh Agreement. Surpassing these thresholds (usually by two-thirds or three-fourths majorities) is made more difficult given the number and diversity of WTO members. As a result, we have seen the WTO dispute settlement mechanism operates with a great deal of independence when it comes to the interpretation and application of trade treaties. And, even where it has appeared that the majority of WTO members were unhappy with the decisions of WTO adjudicators (eg, regarding *amicus curiae* participation), they have been unable to change that course of practice. When decision-making requires consensus of all or even just most WTO members, we see bridled state power threaten the very existence of WTO dispute settlement mechanism.

Under the CETA, ultimate decision-making authority regarding its implementation and application is to largely rest with the Joint Committee.[175] Its decisions and/or recommendations are to be made by 'mutual consent'. Thus, both Canada and the EU retain a veto over decisions that squarely fall within the Joint Committee's mandate, including decisions about the functioning of the CETA's dispute settlement mechanism. If we assume that those appointed to the Joint Committee adopt positions consistent with the parties who appointed them (and in whose bureaucracies they are likely to be employed), the process of decision-making at the committee level could be similar to what we currently see with BITs. Each CETA party maintains a veto right over issues of treaty implementation, amendment and interpretation, and thus could exercise sovereign authority through its veto.

Things would, of course, become more complicated should those appointed to the Joint Committee take positions inconsistent with their respective appointing authorities. Given the diversity of state interests represented by the EU, it is at least possible that their appointees may not align with the majority of EU members concerning the appropriate decisions to take regarding implementation and application of the

175 CETA, see n 6 above, Art 26.3. See also CETA, Art 8.44(2), 8.44(3)(b) and 8.44(3)(c) which permits the Committee on Services and Investment, in conjunction with the CETA parties, to adopt: (1) a code of conduct for tribunal members; (2) dispute settlement and transparency rules; and (3) mediation rules.

CETA. We have already seen a divergence of views within the EU about the advantages and disadvantages of the CETA. In some instances, dissenting voices about the CETA have even threatened to block the deal altogether. Recall the difficulties that the CETA faced in the autumn of 2016 when a region of Belgium – Wallonia – delayed EU ratification of the deal over concerns about the investment chapter and with increased competition from Canadian beef and pork.[176] While this disagreement was eventually resolved, clearing the way for parties to sign the deal, ratification of the deal only led to its provisional, piecemeal implementation and it remains controversial in some EU Member States.[177] Should such differences of opinion within the EU flow through to the CETA's institutional mechanisms, including decision-making at the committee level, then it is possible that an EU appointee representing interests independent of the EU could stymie the committee's ability to make decisions by 'mutual consent'.

The CETA thus stands out as an interesting agreement that may be conceptualised as 'bilateral' or 'multilateral'. Such characterisations are a matter of perspective. As detailed above, how appointees to the Joint Committee characterise the agreement will be particularly important as the CETA's institutions take hold and the legitimacy of the institutions develop. If appointees conceptualise their role as advancement of interests of CETA parties, then consensus-based decision-making at the committee level will align with the notion of state power that would otherwise be exercised by the CETA parties. Perhaps more problematic, is the prospect that an EU committee member may choose to pursue their national interests over those of the EU and then could potentially paralyse the CETA's ICS, at least until the committee member could be replaced.

176 See, eg, Paul Magnette, 'Wallonia blocked a harmful EU trade deal, but we don't share Trump's dreams', *The Guardian* (London 14 November 2016) www.theguardian.com/commentisfree/2016/nov/14/wallonia-ceta-ttip-eu-trade-belgium; 'Wallonia is adamantly blocking the EU's trade deal with Canada', *The Economist* (London 22 October 2016) www.economist.com/europe/2016/10/22/wallonia-is-adamantly-blocking-the-eus-trade-deal-with-canada.

177 See, eg, Beatriz Rios, 'Italy threatens to block CETA ratification', *Euractiv* (14 June 2018) www.euractiv.com/section/ceta/news/italy-threatens-to-block-ceta-ratification. In addition, Belgium has requested a ruling from the ECJ on the compatibility of CETA's ICS with EU law, which may signal continued discontent with some elements of the Trans-Atlantic Deal (see 'Belgian Request for an Opinion from the European Court of Justice' (6 September 2017) https://diplomatie.belgium.be/sites/default/files/downloads/ceta_summary.pdf.

Conclusion

This paper began with an outline of the challenges that ISDS appears to be facing. In the midst of calls for greater legitimacy, and in the wake of finding themselves on the receiving end of binding damages claims, states (or at least the officials responsible for their functioning in this field) have been prompted to pursue reform. While some states have indicated a willingness to abandon ISDS altogether, others, chief among them Canada and the EU, have advocated for the establishment of an ICS modelled on the WTO. They appear hopeful that such reforms can resolve the perceived legitimacy crisis while maintaining some semblance of residual protection for investors. Whether they have succeeded is a question that cannot be answered at this very early stage. Rather, the objective of this paper was merely to take a step back and consider the interplay between sovereign authority and dispute resolution mechanisms in the international trade and international investment law regimes generally. Tracing the contribution of the historical development of dispute settlement mechanisms in the international trade law and international investment law regime, our primary aim has been to outline how each has involved attempts to establish independent dispute settlement mechanisms while at the same time retaining (or at least appearing to retain) sovereign regulatory authority. The most obvious observations that arise from this discussion is that in each case such interests have been balanced differently and that, in each case, the very legitimacy of the mechanism has been threatened.

As we outline above, adjudicators have themselves responded to concerns over regime legitimacy using a variety of jurisprudential techniques. The power a state has to respond to such perceived crises (either through treaty amendment or interpretative notes), while restricted in the trade law context, appears to remain rather wide open in the investment law context. In fact, the flexibility of states to reimagine their treaty relationships in international investment law is one of the reasons we see a variety of positions being taken on ISDS (including adoption of an ICS) in the investment chapters of newly negotiated FTAs.

The ICS established under the CETA is one such example. Its inclusion in this trans-Atlantic deal is undoubtedly linked to a variety of concerns raised about the legitimacy of ISDS. Given the untested nature of such a mechanism in international investment law, it is natural that this type of reform would raise questions about the balance being struck between sovereign authority and the establishment of an independent dispute settlement mechanism. The above discussion has surveyed how this balance

might be achieved with particular reference to the influence that the CETA's Joint Committee and Committee on Services and Investment is likely to have on the functioning of the ICS. At first glance, the establishment of these administrative committees may appear to recalibrate the balance in favour of sovereign regulatory authority at the expense of the rule of international law. On closer examination, however, it may be that the right balance may have been struck. In fact, explicit requirements that the CETA parties meet to review implementation and application of their agreement may do much to facilitate increased legitimacy by insisting that parties come together despite any other differences between them.

When discussing the relationship between sovereign authority and dispute settlement, the most pressing institutional issue would appear to be the need for decision-making processes at the committee level and the preservation of a diversity of interests among committee members. Much remains to be decided regarding how the CETA's committees will operate. What seems clear is that any decision reached by the Joint Committee must be consensual (ie, by mutual consent). Whether expressly stated or not, this is also the case with any bilateral treaty arrangement. Both treaty parties must consent to treaty amendments in order for such amendments to be binding. Therefore, there appears to be little chance for a committee representative from Canada or an EU Member State to hold the entire dispute settlement process hostage out of a fit of procedural pique, as has happened in the WTO context.

The more fundamental questions will remain: (1) whether any amount of tinkering with the ways in which investment disputes are resolved could ever satisfy critics whose opposition is ideologically rather than operationally or jurisprudentially driven; (2) what sort of institution ensures sufficient flexibility for treaty parties to guide jurisprudential developments without jeopardising the elemental need for independence on the part of adjudicators; and (3) whether the corrective steps taken with newer instruments such as the CETA have penetrated so deeply – in an attempt to maintain a sovereign regulatory authority – as to have rendered the substantive investment protections CETA purports to offer illusory? As countless authors of this type of paper have previously observed, only time will tell.