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World Trade Review (2015), 14: 1, 1–11
 doi:10.1017/S1474745615000129

Judicial Politics in International Trade Relations: Introduction to a Special Issue of the *World Trade Review*

DIRK DE BIÈVRE* AND ARLO POLETTI** Q1

ACIM, Universiteit Antwerpen, and LUISS School of Government, Rome

International institutions have acquired an almost obvious presence in international politics and the question of their design has received prominent attention in recent years. Apart from key organizational characteristics like size of their membership, policy scope, depth of cooperation, decision-making rules, and their degree of openness towards non-state actors, one of their most striking features is their differing degree of legalization or judicialization (Goldstein and Martin, 2000; Zangl, 2008). Some institutions possess strong enforcement mechanisms or rules, while others rely on voluntary cooperation by their members.

The policy field in which this evolution towards greater capacity to enforce commonly agreed-upon rules in international institutions has been the most prominent and has produced the most relevant and far-reaching consequences has been the issue area of multilateral trade. Since the World Trade Organization (WTO) was established in 1995, the multilateral trade regime has evolved from a typical case of intergovernmental international cooperation where states retain near-full control over decisions to an institution where enforcement powers are partially delegated to third party bodies. During the preceding half century, dating back to the entry into force of the General Agreement on Tariffs and Trade (GATT) in 1948, the reciprocal concessions in multilateral trade rounds was the cornerstone of the multilateral trade regime. In the current international trade regime under the WTO, however, reciprocal trade negotiations are not the only means through which WTO members can deal with the existing barriers to trade among them. With the creation of the WTO, members decided to strengthen the existing mechanisms for the enforcement of commonly agreed-upon rules, replacing the GATT's model of political-diplomatic dispute settlement with a quasi-judicial model of dispute settlement characterized by automatic right to review, the formulation of legally binding obligations, a standing tribunal of justices, and the authority to authorize sanctions and even cross-retaliation against recalcitrant members (Goldstein *et al.*, 2000; Stone Sweet, 1997, 1999; Zangl, 2008). Q2

In the course of the almost two decades since the creation of the WTO dispute settlement mechanism (DSM), judicial politics has gradually but inexorably

moved towards center stage. As this institutional innovation made the judicial pathway towards trade liberalization, increasingly appealing to members of the trade regime, the number of trade disputes increased dramatically (Weiler, 2001). While the vast majority of these disputes have not elicited compliance problems or significant public attention (Busch and Reinhardt, 2000; Wilson, 2007; Hudec, 1992), other disputes have been perceived to reach too deeply into practices of domestic governance and have thus become highly politicized, causing heated public debates at the domestic level and diplomatic tensions at the international level (Davis, 2003). Also, the legislative and judicial arms of the WTO have become increasingly intertwined as emerging economies have increasingly used litigation as a tool to influence bargaining dynamics in the context of multilateral trade negotiations, e.g. Doha Round. More generally, the decline of the WTO as a forum for negotiated trade liberalization, epitomized by inability of the Doha Round to achieve substantive trade liberalization commitments, is further increasing the importance of the WTO's judicial arm as a tool to maintain a liberal trade regime. Altogether, these developments have made judicial politics the dominant feature of the current multilateral trade regime and of international trade politics at large.

Unsurprisingly, since 1995, the so-called politics of WTO dispute settlement has been the subject of a rich and growing body of scholarly literature. These contributions have explored various aspects of the phenomenon, significantly contributing towards advancing our knowledge of the political-economic dynamics that underlie the politics of dispute settlement in the WTO. However, we believe our knowledge of judicial politics in international trade relations remains far from comprehensive. More specifically, we believe the almost exclusive focus of the existing literature on the politics of WTO dispute settlement has led scholars to overlook a number of issues that are key in order to acquire a comprehensive understanding of judicial politics in international trade relations at large. With some exaggeration, one might say that we know *too much about too little*. The aim of this special issue is to contribute towards a broader understanding of judicial politics in international trade relations by addressing three broad questions: (1) the origins and long-term effects of judicialization in the WTO, (2) the increasingly important phenomenon of judicialization in the context of Preferential Trade Agreements (PTAs), and (3) the relationship between judicial politics in the WTO and PTAs.

In this introduction, we further proceed in three steps. First, we define key concepts and briefly outline the state-of-the-art of the literature. Second, we identify a number of research gaps. Third, we highlight in which ways the special issue contributes to filling these gaps.

Taking stock of judicial politics in international trade institutions

The reform of diplomatic GATT dispute settlement into the highly legalistic WTO dispute settlement formalized in 1995, constituted the most prominent step

towards judicial institutions in the world trading regime. At the beginning of the eighties, GATT contracting parties effectively abandoned the practice of vetoing GATT panel rulings (Hudec, 1992). In 1989, GATT contracting parties formally abolished the defendant's veto against the establishment of a panel in a decision that took immediate effect, independently from any further progress in the Uruguay Round negotiations going on at the same time (GATT, 1990). In 1994, all future members of the WTO approved of the Dispute Settlement Understanding that incorporated these two crucial changes, while adding yet two other crucial properties: the possibility of appeal with an independent and permanent WTO Appellate Body, and the possibility to have WTO panels authorize cross-retaliation by the complainant in cases of enduring non-compliance (WTO, 1995). By introducing the automatic right to review, the formulation of legally binding obligations, a standing tribunal of justices, and the authority to authorize sanctions and even cross-retaliation against recalcitrant members, GATT negotiators created one of the most legalized or judicialized global institutions, enabling it to significantly constrain the behavior of its constituent members towards respecting commonly agreed-upon rules. This process of institutional transformation has commonly been captured with the term 'legalization' (Abbott *et al.*, 2000; Goldstein *et al.*, 2000; Bernauer *et al.*, 2014), or 'judicialization' (Zangl, 2008; Stone Sweet, 1997, 1999).

Both concepts denote an increased reliance on international law, yet can be used to denote two distinct properties of this evolution. The term legalization is generally used to cover the broad social phenomenon of an increase in the use of formal-legal rules to regulate a particular domain, *in casu* trade. It captures an increase in the degree of precision, obligation, and bindingness, as well as an increase in enforceability through adjudication by an independent third party. The term judicialization on the other hand refers more specifically to that latter aspect: the increase in enforceability through adjudication and the possible authorization of sanctions by an independent third party. The term judicialization is thus a sub-set of the broader concept of legalization, drawing attention to the presence of judicial institutions that enhance the enforceability of previously agreed-upon rules in international trade relations. The underlying assumption of our perspective is that precise, obligatory, and binding agreed-upon rules need to be backed by credible enforcement mechanisms for such rules to significantly constrain the behavior of trade actors.

In light of the significance, visibility, and far-reaching consequences of the reform of the mechanism of dispute settlement resolution of the WTO, it should come as no surprise that the bulk of the literature on judicial politics in international trade relations has so far focused on WTO dispute settlement. This literature has shed light on a number of important aspects of the political-economy of WTO dispute settlement: the determinants of dispute initiation (Bernauer and Sattler, 2011; Busch *et al.*, 2009; Guzman and Simmons, 2005; Kim, 2008), the strategic behavior by dispute settlement panels (Busch and Pelc, 2010; Garrett and Smith, 2002;

Kelemen, 2001), the choice of institutional venue for resolving trade disputes (Davis and Shirato, 2007; Busch, 2007), the reasons why disputes escalate (Busch, 2000; Davis, 2012; Guzman and Simmons, 2002; Sattler and Bernauer, 2010), the affects of litigation on the domestic balance of trade-related interest groups (Goldstein and Martin, 2000; Goldstein and Steinberg, 2008), and the conditions under which parties comply with decisions adopted through third party review (Bown, 2004; Davis, 2008). More generally, existing research shows that the judicialization of the WTO has brought about greater compliance with WTO rules (Zangl, 2008; Zangl *et al.*, 2011) and even acted as a buffer against protectionist policies being put into place in the very first place (Allee, 2005). Recent accounts of why the protectionist policies have not erupted as a result of the 2007–2008 financial crisis further stress this last point (Irwin and Mavroidis, 2008).

We certainly do not wish to argue that there is no further room for significant contributions in this important field of inquiry. Important aspects of the politics of WTO dispute settlement certainly require further investigation. For instance, finding appropriate ways of conducting large-N studies on compliance in WTO dispute settlement remains problematic both because determining and measuring compliance is inherently difficult (it is private information to the litigating parties) and because disentangling various potential causes for the policy change eventually leading to compliance requires an in-depth knowledge of the cases (Mavroidis, 2012). Also, research on the dynamics underlying the appointment of judges in WTO dispute settlement panels and the Appellate Body is still in its infancy (but see Elsig and Pollack, 2014). More research would also be welcomed on the so-called non-cases, namely how litigants select cases out of the total universe of potential cases (Bernauer *et al.*, 2014).

While more research on the politics of WTO dispute settlement is certainly needed, this brief overview bears witness of the richness of this literature. It seems fair to argue that we know quite a lot about how WTO dispute settlement works.

Locating some gaps in the existing literature

In our view, there are a number of important things we need to know more about to begin acquiring a comprehensive understanding of judicial politics in contemporary international trade relations. While the politics of WTO dispute settlement is an important component of this phenomenon, our knowledge of judicial politics in international trade relations at large remains far from comprehensive. First, broader questions and implications concerning the judicialization of the WTO have received surprisingly little attention. Second, judicialization is by no means a phenomenon restricted to multilateral trade relations. Indeed, the proliferation of preferential trade agreements (PTAs) has gone hand in hand with a gradual increase in the number of dispute settlement and enforcement provisions in these trade agreements. Finally, looking at the relationship between the WTO and PTAs from the perspective of judicialization raises the question of the compatibility between the two.

The origins and long-term effects of judicialization in the WTO

As mentioned above, numerous studies have analyzed the politics of dispute settlement in the WTO. However, two important questions have received surprisingly little attention in the literature so far: why members of the trade regime designed and committed to a quasi-judicial dispute settlement mechanism in the WTO, and whether such judicialization of the WTO makes cooperation more likely in the long-term.

First, it is somewhat puzzling to note how little research has been devoted to explaining the extraordinary move to greater enforceability of commonly agreed-upon rules represented by the creation of the WTO DSM. Surprisingly, it remains somewhat of a theoretical riddle why such a judicialized institutional mechanism was set up in the first place. To be sure, some theoretically driven accounts of why the WTO DSM was created have been put forward in the literature, yet they remain unsatisfactory for a number of reasons. For one, these studies approach the problem from a functionalist perspective, explaining the creation of the DSM with reference to the purposes it is supposed to fulfill, i.e. allowing for efficient breach of rules under conditions of uncertainty (Downs and Rocke, 1995; Rosendorff, 2005; Schwartz and Sykes, 2002), filling contractual gaps between members of the regime (Horn *et al.*, 2010), and enhancing credibility of commitments by installing sanctioning devices against defection (Pelc, 2010). Functionalist accounts however, tend to employ research designs that merely establish that the observed outcome is consistent with their predictions, thus only weakly linking the evidence adduced to the underlying causal mechanisms (Thompson, 2010). Moreover, this approach adopts a static view of actors' preferences, neglecting how past and new experiences, pre-existing institutional arrangements, and actors' interactions can affect those preferences and ultimately institutional design choices. In addition, existing analyses suffer from a US bias, considering the motives of US policy makers as sufficient to explain this important international institutional process of reform, and neglecting how other important trade actors, in particular the EU, might have affected the negotiation processes leading to this particular design choice.

Second, as a result of the almost exclusive focus on the politics of dispute settlement in the WTO, the existing literature has overlooked the less visible, but perhaps more important, question whether judicialization makes WTO members more or less likely to further cooperation in the WTO, either by deepening existing commitments or by expanding the WTO's reach to a host of new issue areas. The degree of enforceability of prospective agreements is a key factor affecting the calculus actors make when deciding to commit to such agreements (Downs and Rocke, 1995; Fearon, 1998; Koremenos *et al.*, 2001). Judicialization in the WTO can thus be expected to crucially affect the very prospects for cooperation in the international trade regime. Yet, we still lack a systematic understanding and appreciation of whether judicialization hinders or strengthens the WTO capacity to foster cooperation in international trade relations. In a seminal contribution, Goldstein and Martin (2000) warned us about the unintended effects of judicialization, Q3

suggesting that increased 'bindingness' of trade rules would likely decrease the propensity of trade-related domestic interests in WTO members to support new multilateral trade agreements. Some studies have sought to complement this analysis by showing that stronger enforcement of rules increased the propensity of the European Union (EU) to engage constructively in the Doha Round (De Bièvre, 2006; Poletti, 2011). More research is needed to cast light on this important litigation–negotiation nexus in the trade regime (Bernauer *et al.*, 2014). For instance, journalists' accounts, policy-oriented research, and even scholarly studies on the Doha Round of multilateral trade negotiations concur in stressing the 'shadow of WTO law', the threat or the actual use of litigation, was a key determinant of policy preferences, bargaining strategies, and tactics of parties prior to and during the Doha Round. To our knowledge however, no systematic and theoretically informed study has yet been produced to investigate whether, under what conditions, and how the decision by one WTO member to initiate a legal dispute against another affects cooperative dynamics in the context of WTO negotiations.

Judicialization in PTAs

The relative neglect of judicial politics in the context of PTAs stands out as an even more surprising gap in the current literature. Research on the increasingly important phenomenon of preferential trade agreements has increased dramatically in recent years. The focus of these studies has been primarily on the causes of regionalism, its trade liberalizing effects, and its relationship with the multilateral trading system (Dür and Elsig, 2014). However, recent research has shown that one of the most striking features of the current wave of regionalism is the increasing presence of strong enforcement mechanisms in PTAs (Dür *et al.*, 2014). Allee and Elsig (2014), for instance, show that 83% of around 600 existing PTAs include provisions on dispute settlement, of which slightly less than half allow for some type of legal dispute settlement, i.e. ad hoc arbitration, the use of a standing dispute settlement body, or suggest the WTO or other outside dispute settlement mechanisms. Moreover, 99% of PTAs that allow for legal dispute settlement include language that explicitly states that tribunal decisions are binding and 65% have a sanctions provision that spells out the rules governing how retaliation can be used to try and address non-compliance.

Despite the increasing importance of PTAs in current international trade relations, research on both the causes of the ongoing move towards greater enforceability of rules in these agreements and its systematic effects on the degree of liberalization of international trade remains scanty at best.

Dispute settlement design in regional PTAs was one of the first aspects of PTAs to be explored (McCall Smith, 2000). Yet, despite attempts to update this early study (Jo and Namgung, 2012), our understanding of the causes driving judicialization in PTAs remains limited for a number of reasons. First, these studies fail to include measures that are key to capture the degree of enforceability of PTAs such as the presence of sanctions provisions. Second, existing large-N studies, similar to

functionalist accounts of WTO judicialization, do not engage in process tracing of design choices. Finally, existing studies do not explicitly consider the important question of over time design evolution. The overall process of increased judicialization of PTAs is not only caused by the creation of new agreements with strong enforcement mechanisms, this overall process is also driven by changes that render enforcement mechanisms in already existing agreements stronger. Explaining the causes of change towards greater enforceability in existing agreements is therefore also essential to acquire a comprehensive understanding of judicialization in PTAs.

It is also largely unclear whether the increasing judicialization of PTAs actually matters for policy outcomes in terms of international trade liberalization. While the literature has started to probe into questions like what determines whether dispute settlement provisions in regional trade agreements are actually used (Gomez-Mera and Molinari, 2014), other important questions remain. Does the judicialization of PTAs foster trade flows or not? What is the optimal degree of judicialization in PTAs to foster trade liberalization? As almost half of world trade is nowadays conducted under the aegis of PTAs and there is widespread consensus on the idea that these are here to stay in the long-term, it is crucial to understand whether their increased judicialization fosters or rather inhibits international trade flows.

WTO and PTAS

Finally, crucial aspects of the relationship between the WTO and PTAs have remained largely unexplored. Much of the debate on this topic has centered around the question whether PTAs are building blocks or stumbling blocks for the multilateral trading system (Baldwin, 1997; Dür, 2007). Scholars have also investigated the question of the forum shopping behavior of states when litigation is an available strategy in both the WTO and PTAs (Busch, 2007; Flett, 2014). However, looking at the relationship between the WTO and the existing network of PTAs from the perspective of judicialization raises the perhaps more fundamental question of compatibility, i.e. how and why the two have proved largely compatible so far. PTAs were originally conceived as exceptions to non-discriminatory trade under the WTO. Yet, we will soon be forced to consider non-discriminatory trade to be the exception if the present wave of regionalism continues at the current pace. Despite this trend, WTO members have not reacted in a hostile manner against PTAs and have largely avoided to challenge them with the judicial tools at their disposal under the WTO. Understanding how and why PTAs have proved compatible with judicial politics in the WTO is crucial given that PTAs are likely to become the linchpin of future international trade cooperation as a result of the decline of the WTO as a forum for negotiated trade liberalization.

Overview of the special issue

The contributions in this special issue start filling these important theoretical and empirical gaps in the literature. The special issue is the end result of a two-day

workshop at the Antwerp Centre for Institutions and Multilevel Politics (ACIM) at the University of Antwerp on 27 and 28 May 2014.[1]

The contribution by Eckhardt and Elsig offers an analysis of the creation of the WTO dispute settlement that shows how experiential learning affected the preferences and strategic choices of US and EU negotiators that ultimately led to the creation of such institution. Their contribution highlights how the sparse existing explanations for this design outcome have been unable to account for how the context of experiences with the existing GATT dispute settlement rules and case law, as well as templates, i.e. early design choices in the GATT and in other agreements, significantly shaped outcomes by affecting the expectations and positions of key negotiators.

The contribution by Poletti, De Bièvre, and Chatagnier addresses the key question of whether the judicialization of the WTO increased the odds of successful cooperation in multilateral trade negotiations. They develop a formal game theoretic explanation of the way in which the credible threat to resort to, and actual use of, WTO litigation fostered state's propensity to cooperative behavior in the Doha Round of multilateral trade negotiations. The authors show that, contrary to conventional wisdom, the shadow of increased enforcement does not necessarily make actors shy away from further cooperation, but actually opens up a bargaining window and ultimately increases the chances for cooperation in multilateral trade negotiations, since the ability to impose costs on a defendant through litigation increases the complainant's bargaining power in such negotiations. They show how this argument can account for how Brazil, a potential complainant, and the EU and the US, two potential defendants, approached and bargained agricultural negotiations in the Doha Round.

Two further contributions to the special issue deal with the phenomenon of judicialization in PTAs. The contribution by Bezuijen seeks to uncover the determinants of changes over time of third party dispute settlement provisions in regional trade agreements. On the basis of a new dataset, which offers a refined measure of third party dispute settlement in regional trade organizations, the author considers the role of three potential explanatory factors, i.e. differences in the relative power of the members, the degree of trade interdependence between them, and the degree of contract completeness. She explores the explanatory force of each of these factors separately as well as when they occur jointly, and speculates about further factors that can influence the further judicialization of existing arrangements, as well as of cases where judicial institutions were wound down. She finishes this case-sensitive comparative analysis with a case study of the reasons

1 We gratefully acknowledge financial support from the Research Foundation Flanders (Fonds voor Wetenschappelijk Onderzoek – Vlaanderen, FWO), the special research fund of the University of Antwerp (Bijzonder Onderzoeksfonds, BOF UA) and the Faculty of Political and Social Sciences of the Universiteit Antwerpen. We would also like to thank Andreas Dür for comments on an earlier version of this introductory article, as well as all the contributors to this special issue.

for the abolishment of judicialized dispute settlement in the Latin American Free Trade Association.

The contribution by Hicks and Kim offers a comprehensive assessment of the variability of judicialization across PTAs and its impact on trade flows. Based on an original dataset of PTAs signed by countries in Asia, the authors show that agreements where member states retain a great deal of discretion with regard to their liberalization commitments are associated with an increase in intra-PTA trade. Stronger enforcement through judicial institutions by contrast is negatively associated with more trade. By distinguishing the stringency of liberalization commitments convened in a PTA from the stringency the degree of judicialization of its enforcement mechanism, and testing this on refined new dataset, they significantly advance the literature on flexibility in trade agreements in general and PTAs in particular.

The final contribution by Mavroidis sheds light on the important question of WTO-PTAs compatibility. He asks which actions are available to actors within the WTO, and finds that neither the creation of new rules on PTAs – the legalization option – nor increased litigation – the judicialization option – are desirable or feasible against any reasonable benchmark. As the near absence of tariffs in the current world trading system has greatly reduced the negative trade diversion effects of PTAs, Mavroidis argues that the latter are primarily regulatory agreements. As a result, negotiators would be well-advised to build bridges between the WTO system and ongoing PTA negotiations by relying on transparent plurilateral agreements that can gradually attract more members to accede to them, rather than stubbornly sticking to single undertaking agreements.

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