Leiden Journal of International Law (2019), **32**, pp. 199–203
doi:10.1017/S0922156518000626

BOOK REVIEW

N. Grossman et al. (eds.), *Legitimacy and International Courts*, Cambridge, Cambridge University Press, 2018, 387 pp., ISBN 9781108423854
doi:10.1017/S0922156518000626

R. Howse et al. (eds.), *The Legitimacy of International Trade Courts and Tribunals*, Cambridge, Cambridge University Press, 2018, 533 pp., ISBN 9781108424479
doi:10.1017/S0922156518000626

These two excellent additions to the series *Studies on International Courts and Tribunals* edited by Andreas Føllesdal and Geir Ulfstein, professors and co-directors of the Center for the Study of the Legitimacy of the International Judiciary at the University of Oslo (Norway), significantly deepen our understanding of one of the most important developments in international law over the past decades, i.e., the multiplication of international courts and other (quasi)adjudicatory bodies (ICs) based on worldwide, regional or bilateral treaties and their interactions with domestic courts aimed at multilevel protection of the transnational rule of law. The two books consider questions of legitimacy – e.g., in the sense of justification of authority – from interdisciplinary, comparative, normative, sociological, and contextual perspectives.

The first book begins with an overview of 'Legitimacy and International Courts – A Framework' written by the four editors. As the numbers, case law and influence of ICs grow, so too do questions about their legitimacy. Legitimacy challenges differ among courts depending on their subject matter, specific goals, design choices, legal sources, processes, audiences, institutional contexts, and results. 'Normative legitimacy' is concerned with the 'right to rule' (e.g., to issue judgments, decisions or opinions) according to agreed standards; it explains why those addressed by an authority should comply with its mandates even in the absence of perceived self-interest or brute coercion. 'Sociological legitimacy' derives from empirical analyses of perceptions or beliefs that an institution has a right to rule. Both the 'internal legitimacy' (e.g., the perceptions of regime insiders) and 'external legitimacy' (e.g., beliefs of outside constituencies) may be based on 'specific support' (e.g., of individual judgments) or 'diffuse support' (e.g., an individual state's favourable dispositions toward a court generally and willingness to tolerate unpalatable decisions). The overall 'legitimacy capital' may increase or decline over time depending on source-, process-, and result-oriented factors. Due to the universal recognition of human rights, source-based legitimacy may also require the consent of affected citizens and other non-state stakeholders. Process-based factors raise questions concerning, *inter alia*, the relevant dispute settlement parties and their procedural rights. Result-oriented factors concern how well ICs perform their functions (e.g., to settle disputes, protect rule of law, clarify indeterminate rules and principles) and enable the disputing parties to solve their problems (e.g., through rule-compliance). The current US assault on the World Trade Organization Appellate Body (WTO AB) system is mainly targeted at terminating the 'judicialization' of the WTO legal and dispute settlement system; it illustrates how successful 'judicial activism' – even if celebrated as

'the crown jewel' of the WTO legal system during more than 20 years – may provoke 'hegemonic power politics' and 'aggressive unilateralism' by rulers suffering from a 'diminished giant syndrome' in the changing global economy.

The introductory chapter uses justice (e.g., in the sense of justifiable rule-enforcement and treaty-interpretation), democracy (e.g., in the sense of promoting transparency, participation and democratic accountability), and effectiveness (e.g., in the sense of realizing the IC's goals) as three standards for assessing normative legitimacy. It then examines their relationships to sociological legitimacy, for example depending on how ICs are embedded within polities and prevailing public-interest conceptions of compliance constituencies that may promote or impede the 'compliance pull' of a court's decision and social beliefs in justice. Føllesdal explains[1] why calls for 'democratization' of ICs are better understood as suggestions for 'constitutionalizing' the 'global basic structures' of the multilevel, international, and domestic legal order so as to make ICs justifiable for all affected persons (e.g., by transparency, accountability, participation, related principles of 'cosmopolitan constitutionalism' and of human rights protection): 'Undemocratic ICs may thus be a valuable part of a legitimate global basic structure if that structure as a whole is sufficiently controlled by democratic mechanisms to be legitimate, i.e., it is justifiable toward all affected parties as equals';[2] but this 'if condition' is difficult to secure in reality, as illustrated by the current WTO AB crisis resulting from the illegal reduction of the number of AB judges to (as of October 2018) only three – even though no national parliament has authorized this illegal, intergovernmental violation of the collective WTO obligations to maintain the AB as legally prescribed in Article 17 of the WTO Dispute Settlement Understanding (i.e., as being 'composed of seven persons', with vacancies being 'filled as they arise').

Sellers[3] agrees with Føllesdal that 'democracy plays at best an indirect and supporting role in measuring or advancing the legitimacy of international courts and tribunals';[4] while it is true that '[j]udges should be the servants of the law and justice, and their legitimacy arises from their effectiveness in fulfilling this function',[5] 'democratic principles' (e.g., as defined in Arts. 9–12 of the Lisbon Treaty on European Union) are also 'principles of justice' constraining judicial interpretations of the applicable law and procedures. Shany proposes that legitimacy and effectiveness tend to operate in a mutually reinforcing manner (e.g., states are more likely to implement judicial decisions if they perceive courts as legitimate);[6] yet, Shany admits that they may also be mutually undermining (e.g., in case of confidential investment arbitration criticized by adversely affected civil societies that were excluded from participating in investor-state arbitration).

Different ICs have different normative goals (e.g., prospective or restorative justice and remedies, bindingness of rulings, or advisory opinions), design choices (e.g., regime-embedded or regime-independent tribunals), audiences (e.g., regime insiders, non-state actors), institutional environments (e.g., competing or overlapping jurisdictions), and modes of interacting with other courts (e.g., preliminary or advisory rulings at the request of national courts). Hence, the justification of 'justified authority/legitimacy' of ICs, their 'legitimacy capital', and their contribution to 'social capital' (e.g., based on trust increasing the market value of economic rights) depend on the particular context of ICs. Nine book chapters explore the legitimacy of particular dispute settlement mechanisms, i.e., of the International Court of Justice, the International Criminal Court, the European Court of Human Rights, the Inter-American Court of Human Rights, the European Court of Justice (CJEU), the International Tribunal for the Law of the Sea, arbitration based on the rules of the International Center for the Settlement of Investment Disputes, WTO panels, and human rights treaty bodies. The three concluding chapters discuss cross-cutting issues of the legitimacy

[1]A. Føllesdal, *Legitimacy and International Courts*, Ch. 11.
[2]A. Føllesdal, ibid., at 323.
[3]M. Sellers, ibid, Ch. 12.
[4]Ibid., at 352.
[5]Ibid., at 353.
[6]Y. Shany, ibid., Ch. 13.

https://doi.org/10.1017/S0922156518000626 Published online by Cambridge University Press

of ICs (like 'constitutionalization', democracy, and effectiveness), compare legitimacy across courts, and probe the relationship between cross-cutting challenges of international adjudication; they offer rich insights into the manifold dimensions of 'legitimacy of origin' of ICs, the 'personal legitimacy' of judges and prosecutors, operational 'legitimacy of judicial exercise', 'output legitimacy' of judgments and jurisprudence, the perception of their sociological legitimacy by compliance constituencies, and social reactions by governments, diplomatic communities or civil society (e.g., against perceived 'judicial biases' or 'judicial overreach').

The WTO Agreement and the more than 400 additional trade agreements notified to the WTO since its entry into force in 1995 or concluded before, have set up more ICs and quasi-judicial dispute settlement mechanisms than in any other area of international law. In most cases, the jurisdiction of the ICs goes beyond trade, for instance by protecting sovereign rights to protect non-economic public goods like public morals, public order, public health, national security, and 'sustainable development'; their jurisprudence often affects not only economic actors, but also government policies (e.g., their transparency, non-discriminatory nature, efficiency, rule of law) and citizens benefitting from or adversely affected by such policies (like the millions of citizens dying every year from consumption of toxic tobacco products).

The book edited by Howse et al. explores the normative and sociological, legitimate authority of trade courts beyond the consent of the sovereign states to their delegated powers; it analyzes how these delegated powers were exercised, subject to which procedures, legal interpretation and fact-finding methods, their respective outcomes (e.g., in terms of judgments of quasi-judicial dispute settlement mechanisms), their social perception by insiders (e.g., the internal legitimacy as perceived by diplomats in trade organizations) and by citizens affected by the jurisprudence more generally (e.g., due to its impact on domestic legal systems and policies). The first part of this book consists of studies of 11 international and domestic trade courts, i.e., the WTO adjudicating bodies; the CJEU; the European Free Trade Area (EFTA) Court; the US Court of International Trade; the Federal Court of Canada; the Southern Common Market in Latin-America (MERCOSUR) courts; the Andean Court of Justice; the Economic Court of the Commonwealth of Independent States (CIS); the Common Market for Eastern and Southern Africa (COMESA) Court of Justice; the West African Economic and Monetary Union (WAEMU) Court of Justice; and the Association of Southeast Asian Nations (ASEAN) Trade Dispute Settlement Mechanism. Each of these case studies addresses the following seven research questions: (i) selection and composition of the adjudicators; (ii) procedural rules; (iii) fact-finding; (iv) interpretative approaches; (v) forum shopping; (vi) implementation and interaction with national courts; and (vii) tribunal-specific legitimacy concerns resulting, e.g., from the embeddedness of each court into a particular legal and political regime. Due to the focus on (quasi-)judicial models with automatic rights of referral of a dispute to permanent courts or to quasi-judicial procedures with an appeal body functioning similar to a court, the purely *ad hoc* North American Free Trade Agreement dispute settlement mechanisms are not explored in this book.[7] Only two of the case studies (i.e., on the CJEU and on WTO adjudication) in this second book partially overlap with those in the first book reviewed above. The empirical and normative analyses of the legitimacy problems of these trade courts complement those of the worldwide jurisdictions explored in the first book reviewed above, for example, regarding the 'vertical interactions' among worldwide, regional and domestic courts, and their (non)co-operation in multilevel governance of the world trading system. Due to the participation of most authors in the 'Pluricourts' research project directed by Føllesdal and Ulfstein, they use definitions of 'judicial legitimacy' similar to those used in the first book and offer additional insights into the complexities of 'multilevel judicial governance'.

As the effectiveness of international trade adjudication (e.g., in terms of rule of law for the benefit of traders, producers, consumers and other citizens) depends on the implementation of international decisions in regional and domestic legal and judicial systems, the 11 case studies

[7]R. Howse et al. (eds.), 'Introduction', *The Legitimacy of International Trade Courts and Tribunals*, at 10.

https://doi.org/10.1017/S0922156518000626 Published online by Cambridge University Press

offer a wealth of additional information and comparative analyses of worldwide, regional, and domestic judicial systems and of their interactions (e.g., due to 'consistent interpretation' of domestic trade laws in conformity with relevant international judicial decisions, denial of 'direct legal effects' of international judgments inside domestic legal orders). The fact that the CJEU and the EFTA Court remain much more developed judicial systems than the ICs in other regions of the world, illustrates how the evaluation of judgments depends not only on the 'cognitive interpretation methods' applied by judges (like 'judicial balancing' methods); the institutional and constitutional context of adjudicators (e.g., their institutionalized co-operation with national courts through preliminary ruling proceedings) and their 'institutional choices' (like the denial by the CJEU of being legally bound by WTO judgments binding the EU) may be of no less importance for evaluating the legitimacy and effectiveness of their jurisprudence, 'judicial activism' or 'judicial deference'. The ASEAN dispute settlement mechanism, which remains the only IC for trade adjudication in Asia, has never been used for solving trade disputes, mainly due to the political 'ASEAN way' of dispute settlement and the preference of ASEAN governments for submitting disputes to WTO dispute settlement mechanisms. While this regional practice reflects a comparatively higher trust by ASEAN governments in WTO adjudication, it hardly permits objective conclusions on the 'social legitimacy' of WTO adjudication; the US blockage of the nomination of new AB judges since 2016, for instance, reflects increasing distrust of the US government in WTO AB jurisprudence (notably the AB jurisprudence limiting the use of trade remedies and subsidies).

The judicial independence, legitimacy and judicial impact of the CIS Court and of its 'interpretative opinions' remain doubtful due to the dominant political influence of the Russian Federation. The Andean Community Court of Justice differs from the quasi-judicial, interstate MERCOSUR dispute settlement mechanisms by its protection of judicial remedies also for non-state actors; it has developed a rich jurisprudence over 30 years, albeit mainly focused on intellectual property rights, notwithstanding increasing efforts by the Court to co-operate also with other national jurisdictions and 'legal constituencies' beyond the field of intellectual property law. African governments rarely litigate against each other in regional economic courts; the restrictive interpretative approach of the COMESA Court has also not attracted private economic actors to sue governments. Due to this different context, the African COMESA Court – rather than handling any trade disputes – has evolved into an administrative tribunal for COMESA employees. The WAEMU court has rendered less than three decisions per year, most of them also focusing on staff disputes and a few advisory opinions. These two case studies of regional trade courts in Africa reflect legitimacy deficits of law and adjudication in regional economic integration in Africa, where governments repeatedly dismissed judges or terminated regional jurisdictions on political grounds. The US Court of International Trade and the Federal Court of Canada have developed a rich jurisprudence, yet limited to reviewing federal agencies' decisions on certain trade matters and often subject to very deferential standards of judicial review. These two case studies illustrate how much the scope of jurisdiction and the perceived 'social legitimacy' of federal trade courts in these common law countries remain more limited compared to regional trade courts in Europe.

The second part of this book consists of four chapters with cross-cutting studies of the independence of trade courts (based on empirical comparisons of 16 permanent trade courts), of judicial interactions among trade courts, a comparative study of the access to trade courts, and of accusations against international trade courts that they maintain distributive injustice. The latter chapter by Føllesdal convincingly explains why it is not clear that other institutions would be better situated than trade courts, given the state-orientated nature of the international trading system and the judicial powers to interpret the non-trade exemption clauses broadly (e.g., as it is done in WTO jurisprudence) and to use evolutionary interpretation, case law, and systemic interpretation (e.g., taking into account the human rights obligations and related 'constitutional restraints' of states) in judicial interpretations of trade rules: 'formal treaty reforms may not be what global distributive justice requires, but rather changes in interpretive practices of the WTO

system'.[8] In both international trade and investment law, making 'judicial comity' among courts conditional on respect for human and constitutional rights of citizens (e.g., following the successful precedent of the 'solange jurisprudence' of constitutional and regional courts in Europe) and civil society pressures can help in bringing the 'global basic structure' underlying international and domestic legal systems more into conformity with the human and constitutional rights of citizens.

The final chapter summarizes 'conclusions' by the editors, such as the advantages of the judicial over quasi-judicial models (e.g., in terms of institutional permanence, broader access for stakeholders, judicial independence enabling more coherent judicial rule-clarifications and jurisprudence). As it is difficult to find common design structures explaining the underuse of a number of trade courts (notably in Africa, Asia and Latin America), the judicial failures of some regional trade courts to mobilize local constituencies appear to be due to deeper 'constitutional failures' of 'constitutionalizing' government powers and limiting abuses of public and private power. The book ends with the question: 'will we see a reversal in the recent rise of the regional and global judiciary?'.[9] 'BREXIT', the American and Chinese 'trade wars' of 2018, and the collective violation by all WTO members of their collective legal duties to protect the WTO AB as prescribed in Article 17 of the WTO Dispute Settlement Understanding (i.e., as being 'composed of seven persons', with vacancies 'being filled as they arise') are signs of increasing power politics also by trading countries that have been longstanding supporters of the rules-based world trading system and of impartial third-party adjudication. As national parliaments have given executives no democratic mandate for destroying the WTO legal and dispute settlement system (e.g., by rendering the AB dysfunctional) and the GATT/WTO trading system has enabled billions of people to overcome poverty, humanity still seems far away from being capable of civilizing and constitutionalizing intergovernmental power politics for the benefit of citizens and their human rights. Regrettably, also the EU has failed to act in accordance with its mandate to protect 'strict observance of international law' in its external relations (cf. Art. 3 of the Treaty on European Union), for instance by promoting a majority decision by the WTO General Council (based on Art. IX:1 WTO Agreement) on the filling of AB vacancies, and authoritative interpretations (based on Art. IX:2 WTO Agreement) confirming and defending certain AB interpretations against political US claims of 'judicial overreach'.

The editors of both books are to be congratulated for their important contributions to the 'Studies on International Courts and Tribunals' and their elaboration of common theoretical foundations for assessing the complex 'legitimacy challenges' of multilevel judicial governance, both at worldwide, regional, and national levels of governance. As legal systems – national and international – consist of dynamic, legal interactions among citizens, peoples, and multilevel governance agents with limited, delegated powers, the constitutional legitimacy of multilevel judicial protection of rule of law is not inferior to the legitimacy of multilevel political governance institutions. The perennial constitutional task of promoting and 'institutionalizing public reason' protecting the human and constitutional rights of citizens cannot succeed in limiting the ubiquity of abuses of public and private power unless 'access to justice' as a human right is more effectively protected by judges as guardians of democratic constitutionalism and of the rule of law. Even if populist rulers (like US President Donald Trump) continue to argue that judges should be agents of the rulers appointing them, these two books will assist all legal practitioners, academics and students in better understanding how international courts (as compared in the first book) and their multilevel, judicial governance (as explored in the second book) may be progressively improved so as to protect human and constitutional rights of citizens and related public goods more effectively.

*Prof. Ernst-Ulrich Petersmann**

[8]A. Føllesdal, ibid., at 499.

[9]R. Howse et al., 'Conclusions', ibid., at 510.

*Emeritus Professor of International and European law of the European University Institute, Florence, and former head of its Law Department; European University Institute, Via Bolognese 156, 50139 Florence, Italy [ulrich.petersmann@eui.eu].

https://doi.org/10.1017/S0922156518000626 Published online by Cambridge University Press