

# 1 *The Blurring of the Public and the Private in International Trade Law*

International law long has been faulted for being irrelevant and illusory. According to political scientists of the realist tradition, powerful states simply ignore it when advancing national goals.<sup>1</sup> To positivist legal theorists, international law is not law at all because it does not issue from a central authority and is not backed by a sanction.<sup>2</sup>

1. See Morgenthau (1963, p. 278), who called international law “a primitive type of law primarily because it is almost completely decentralized law.” For a critique of legalistic approaches to international relations as based on false assumptions, see Kennan (1951). These political realists considered international law dangerous for the United States were it to be taken too seriously. In their view, a state that focuses on international law as opposed to international politics cloaks strategic concerns essential for its security in legalistic and moralistic garb that rivals may use to seek advantage but ignore when impeding their interests. Kennan (p. 95) maintained that the “most serious fault” in past U.S. foreign policy was its “legalistic-moralistic approach to international relations.”

2. Austin ([1832] 1971, p. 352) maintained that international law is not law, but simply a form of “positive morality” because there are no commands issued by a sovereign “armed with a sanction.” Kelsen (1942), on the other hand, believed that international law is law, but of a “primitive” form, because it depends on self-help, without any centralized power, to apply it. In a similar vein, Hart (1994, pp. 213–37) argued that international law is like primitive law in that it lacks “secondary rules” to

As Max Weber contended, international law should not “be called law, precisely because there is no legal authority above the state capable of enforcing it.”<sup>3</sup>

Whatever one’s definition of law, international economic law gained standing during the 1990s with the end of the cold war and growing interest in economic globalization. At the same time, international economic norms and rules penetrated more deeply into domestic systems. Although such rules may not be directly applicable in domestic legal systems, nations, from the weakest to the most powerful, take them into account more frequently when enacting, implementing, and interpreting domestic laws and regulations.<sup>4</sup>

At the international level, the impact of law is nowhere more clear than in the realm of trade. At the conclusion of eight years of trade negotiations, 128 countries and customs territories agreed to create the World Trade Organization (WTO), which commenced on January 1, 1995. Even in a strict positivist sense, WTO law consists of rules that a centralized institution (the WTO Dispute Settlement Body) enforces through adopting judicial judgments that, if not complied with, trigger sanctions. Although the WTO lacks police power, its judicial panels are empowered to authorize the withdrawal of trade concessions.<sup>5</sup> All states, even the most powerful ones, have responded to WTO judgments by modifying

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assess the validity of its “primary” substantive rules. Consequently, while international law may constitute law, it does not constitute a legal system.

3. See Weber (1947, p. 128): “As is well known it has often been denied that international law could be called law, precisely because there is no legal authority above the state capable of enforcing it. In terms of the present terminology this would be correct, for a system of order the sanctions of which consisted wholly in expectations of disapproval and of the reprisals of injured parties, which is thus guaranteed entirely by convention and self-interest without the help of a specialized enforcement agency, is not a case of legal order.” On the notion of an acceptance model of law as opposed to the command model of Austin and Weber, see Gottlieb (1985, p. 187). See also McDougal and Lasswell (1996, pp. 113–43).

4. See Stephen (2000, pp. 66–68). For example, most of the 245 pages of the U.S. Uruguay Round Agreements Act of 1994 modify domestic laws of the United States in order to implement its WTO obligations, even though the act also provides that no person other than the federal government may challenge a U.S. law or regulation before a U.S. court for failing to comply with WTO law. See Uruguay Round Agreements Act of 1994, §§102, P.L. 103-465, 108 Statute 4809 (codified as amended at 19 U. S. Code §3512).

5. WTO texts may not use the term “sanctions,” but affected parties, commentators, and legal practitioners commonly refer to them. See Charnovitz (2001, p. 792).

domestic regulations and practices, or, in the few cases where domestic politics blocked modification, have accepted the resulting sanctions.<sup>6</sup> In the first eight years after the WTO was established, 279 formal complaints were filed, as a result of which 68 panel and Appellate Body reports were adopted and numerous settlements reached, with 16 panels pending. International trading relations have been governed increasingly through law—or, better stated, through power mediated by law—with all countries, developed and developing alike, initiating more legal complaints against one another.<sup>7</sup>

The blurring of the public and the private spurs the growth of international economic law. WTO law, while formally a domain of *public* international law, profits and prejudices *private* parties. As international economic relations become legalized, lawyers listen and market their wares. Private parties—particularly well-connected, wealthier, and better-organized ones—attempt to use the WTO legal system to advance their commercial ambitions. A more effective WTO public law incites U.S. and European private legal strategies, which in turn yield further WTO public law. WTO law thereby becomes “harder” law through which private actors exercise influence in its shadow. WTO law represents a significantly enhanced legal framework, even though the dispute settlement system of the General Agreement on Tariffs and Trade (GATT), the WTO’s predecessor organization existing from 1948 to 1995, was legalized over time, and even though political and social forces still constrain WTO law’s deployment.<sup>8</sup> The WTO system is broader in scope and membership, more precise in application, more binding in effect, and more

6. See “EC—Regime for the Importation, Sale and Distribution of Bananas” (EC Bananas case), WTO Document Series WT/DS27/R (May 22, 1997); and “EC—Measures Affecting Meat and Meat Products” (EC Meat Hormones case), WTO Document Series WT/DS26/R/USA (August 18, 1997).

7. See Steinberg (2002, p. 339) concerning how the United States and European Communities shape WTO law. Also Busch and Reinhardt (2003); and Shaffer (2003), concerning structural disadvantages developing countries face in WTO dispute settlement. The impact of WTO law does not necessarily contradict realist notions, since arguably the world’s most powerful states have played a central role in drafting WTO rules and have benefited most from their enforcement.

8. The GATT trading system refers to the system under the agreement signed in 1947 focusing on trade in goods. Upon the creation of the WTO on January 1, 1995, GATT became one agreement among many under the WTO’s umbrella, including those covering intellectual property protection and trade in services. For an overview of the GATT system, see Dam (1970); and Hudec (1993).

actively used.<sup>9</sup> The reaction of private parties throughout the world in opposition to or support of the WTO system and its stream of legal complaints and verdicts is just one indication of WTO law's relevance to states and their constituents.<sup>10</sup>

The growing interaction between private enterprises, their lawyers, and U.S. and European public officials in the bringing of most trade claims reflects a trend from predominantly intergovernmental decision-making toward multilevel private litigation strategies involving direct public-private exchange at the national and international levels.<sup>11</sup> Given the trade-liberalizing rules of the WTO, this trend has an outward-looking, export-promoting orientation, comprised of more systematic challenges, often by larger and well-organized commercial interests, to foreign barriers to trade. International trade disputes are, in consequence, not purely public or intergovernmental. Nor, however, do they reflect a simple co-optation by businesses, particularly large and well-organized ones, of government officials. Rather, they involve the formation of public-private partnerships to pursue varying, but complementary, goals.

Pundits sometimes apply the term "neoliberalism" to this focus on the elimination of trade barriers. Neoliberalism refers to a model of societal relations in which government regulation and social welfare guarantees are reduced in order to foster the play of market forces driven by private enterprises pursuing profit maximization.<sup>12</sup> The extent to which ideology has changed since the mid-twentieth century is captured by comparing today's use of the term with its use in the 1950s. At that time, scholars

9. Abbott and Snidal (2000, p. 421) have presented a typology of international hard and soft law based on three criteria: the stringency of the legal "Obligation," the "Precision" of detail, and whether there is "Delegation" to an enforcing authority. This book goes beyond these formalist measures by examining how WTO law operates in practice.

10. See, for example, Christopher G. Caine (2000, p. 20) for Business without Borders interview with lobbyists for multinational corporations on their lobbying strategies and goals for the WTO. On the efforts of nongovernmental organizations (NGOs) to gain direct access to the WTO, see Bruce Stokes, "New Players in the Trade Game," *National Journal*, December 18, 1999, p. 3630. Greg Hitt, "Fund Raising for Seattle WTO Meeting Raises Concerns," *Wall Street Journal*, May 17, 1999, p. A28, notes that invitations were extended to large corporations, in consideration of a fee, to attend receptions with trade delegates at the WTO Ministerial Meeting in Seattle.

11. For a review of "intergovernmental" theory (focusing solely on "state" actors), as well as "transgovernmental" and "transnational" theories of international relations, see Pollack and Shaffer (2001b, pp. 20–33).

12. See Shaffer (2001, p. 608), who notes, however, that one can favor both liberalized trade and social welfare protection policies.

such as Robert Dahl and Charles Lindblom referred to “neoliberalism” as an ideology “characterized by an almost doctrinaire fixation on certain means, particularly those legitimized during the critical years of the New Deal, such as unquestioned support for trade unions, a strong preference for action by national government as against state and local units, and support for a more powerful executive and bureaucracy.”<sup>13</sup> Today, the term “neoliberalism” has been turned on its head to represent “an almost doctrinaire fixation” on free trade, privatization, small government, and unfettered markets to foster economic growth and wealth generation, as opposed to government action and collective bargaining to promote social and economic equality.

This book evaluates how private firms collaborate with governmental authorities in the United States and the European Union (EU) to challenge foreign trade barriers before the WTO legal system and within its shadow.<sup>14</sup> The term “foreign trade barrier” covers any measure that directly or indirectly results in an impediment to trade. While tariffs and quotas constitute the most transparent forms of barriers, less transparent ones include internal taxes, subsidies, technical standards, licensing requirements, and other measures that result in an unequal playing field for foreign producers. Firms that rely on intellectual property assert that the failure to recognize and enforce intellectual property rights likewise constitutes a trade barrier, although many scholars contend otherwise.<sup>15</sup> Public authorities and private firms have reciprocal, though not identical, goals in challenging these trade barriers. This book assesses the challenges that their partnerships pose.

Public-private partnerships in WTO litigation merit close attention for four primary reasons. First, they reflect the dynamic effects of the WTO

13. See Dahl and Lindblom (1976, p. 516).

14. EU and EC (European Community) are used interchangeably in this book. The technical name for the entity representing European Community interests before the WTO is the European Communities, or EC. Article XI of the 1994 Agreement Establishing the WTO refers to “the European Communities” as an original member of the WTO. The Treaty of European Union (TEU) of 1992 changed the name of the EEC (European Economic Communities) to the EC to denote that the European Community had integrated beyond purely economic matters. The TEU created three pillars of activities for the regional block. The first pillar covers all traditional EC matters, including trade. The title that encompasses all three pillars is the European Union (or EU), which is often used by commentators, even though it is the EC that, technically, is a member of the WTO.

15. See, for example, Bhagwati (1994, pp. 111–14).

legal system. The United States and EC have adopted public-private partnerships to exploit the WTO system. Remarkably, either the United States or EC was a plaintiff or defendant in 75 percent of WTO complaints filed, and in 84 percent of complaints that resulted in judicial decisions.<sup>16</sup> In fact, either the United States or EC participated as a plaintiff, defendant, or third party in every WTO case that was litigated before a panel during the WTO's first eight years (see table 6-1). Hence we learn how most WTO legal disputes operate in practice, as opposed to in theory. A summary of all WTO complaints brought by the United States and EC, together with their outcomes, is set forth in appendix tables 1 to 4.

Second, divergent U.S. and European approaches to public-private partnerships in WTO litigation and bargaining exemplify contrasting U.S. and European political and economic structures, administrative cultures, and traditions of government-business relations. The U.S. approach to public-private networks tends to be more "bottom-up," with firms and trade associations playing a proactive role. The EC approach tends to be "top-down," with a public authority (the European Commission) playing the predominant, entrepreneurial role.

Third, the impact of U.S. and European public-private partnerships in WTO litigation has serious implications for the sustainability, equity, and effectiveness of the WTO system. Whichever approach one prefers—top-down or bottom-up—public-private partnerships can render the political management of U.S.-European trade disputes more difficult. Political mismanagement of trade disputes can affect the stability and solidarity of the transatlantic relationship, as well as the overall WTO system. By exposing how WTO law works in practice, the book provides the necessary groundwork for evaluating proposals to modify the WTO legal system, whether in the context of a new round of global trade negotiations, WTO members' formal review of the WTO Dispute Settlement Understanding, or otherwise. Proposals for amending the WTO system are of little value if they are not grounded in a clear understanding of how the system

16. As of January 17, 2003, the United States or EC was a plaintiff or defendant in 210 of the 279 complaints brought before the WTO, constituting 75 percent of the total. The United States or EC was involved in 57 of 68 (or 84 percent) of fully litigated cases. These figures are comparable to those calculated as of May 2, 2001, when the United States or EC was a plaintiff or defendant in 149 of the first 194 complaints brought before the WTO (around 77 percent) and was involved in 34 of 41 (or 85 percent) of fully litigated WTO cases. See WTO Secretariat, "Update of WTO Dispute Settlement Cases," WTO Document WT/DS/OV/10 (updated as of January 17, 2003, issued January 22, 2003).

operates. As the legal realist Karl Llewellyn maintained in the 1930s, "The argument is simply that no judgment of what Ought to be done in the future with respect to any part of law can be intelligently made without knowing objectively, as far as possible, what that part of law is now doing." Llewellyn called for "the temporary divorce of Is and Ought for purposes of study," a wise counsel that much policy analysis, in the rush to advocate normative goals, ignores.<sup>17</sup>

Proposals vary widely concerning reform of the WTO dispute settlement system. Some argue that it should be reigned in. Supporters of this view range from Claude Barfield of the conservative American Enterprise Institute to Ralph Nader of the political left. Both maintain that the WTO system has become too legalized and should be subject to greater political checks, that WTO judicial panels should show greater political deference toward national regulatory measures, and that political bodies should assume greater control of the judicial process.<sup>18</sup> In contrast, some trade commentators of a liberal bent, such as Ernst-Ulrich Petersmann, a professor and legal consultant within the WTO's secretariat, maintain that WTO law should be expanded by granting private parties direct litigation rights so that corporations and other private actors may enforce WTO law through national courts.<sup>19</sup> Others concerned about the equity and effectiveness of the system, such as Petros Mavroidis and Joost Pauwelyn, both of whom have worked at the WTO, support modifications of remedies that could favor weaker parties.<sup>20</sup> These changes could be complemented by the creation of legal support centers to provide litigation resources for financially strapped countries to offset resource imbalances.

17. See Llewellyn (1931, pp. 1236–37).

18. Barfield is the director of trade policy studies at the American Enterprise Institute. Of course, Barfield and Nader come from opposing political perspectives, and the modalities of their recommendations vary greatly. Barfield, for one, believes in the benefits of trade liberalization. Cf. Barfield (2001, pp. 112–29); and Wallach and Sforza (1999), where Ralph Nader, in the preface (p. ix), lambasts the WTO's "autocratic system of international governance that favors corporate interests."

19. See, for example, Petersmann, (1991, pp. 243, 463), who asserts that lawyers should "recognize freedom of trade as a basic individual right." See also Brand (1992, pp. 95–102); and Symposium (1998, p. 147).

20. Mavroidis (2000, p. 763) argues that "the effectiveness of WTO remedies depends on the relative 'persuasive' power of the WTO member threatening with countermeasures." According to Pauwelyn (2000, p. 335), "a more collective and effective mechanism, one aimed at inducing compliance, is required." See also Shaffer (2003).

Fourth, information on the dynamics of public-private partnerships in litigation before the WTO (the most “legalized” of all international institutions) provides empirical grounding for broader assessment of the reciprocal relationship between international law and private behavior. We live in a world marked by increasing interdependence in which political, legal, and economic governance mechanisms clash and mesh at multiple levels. International economic law matters because of its impact on the behavior not only of states but also of their corporations and other constituents. Understanding the *law-in-action* of the WTO is essential for those assessing international economic relations from the perspective of any academic discipline and for the pursuit of any normative goal. Policymakers, lawyers, economists, political scientists, and sociologists increasingly recognize how international law implicates international economic relations, national regulatory behavior, and private conduct.<sup>21</sup>

Chapter 2 offers a theoretical framework for examining the growing role of public-private networks in international governance. It addresses three central questions: Why do public-private networks play an increasing role in international governance in a world of growing numbers and complexity? Who are the primary participants in these networks? What explains their participation? The chapter elucidates the importance of resource interdependencies among public and private actors and relative stakes in outcomes.

The U.S. and European approaches to the public-private relationship are the subject of chapters 3 and 4, respectively. In the United States, on the one hand, private firms adopt various strategies to spur the Office of the United States Trade Representative (USTR) to challenge foreign trade barriers under WTO law and in its shadow. Through a meshing of law and politics, the USTR, in coordination with private actors, identifies, investigates, and takes action against foreign trade barriers, steadily ratcheting up pressure on foreign countries to expand private access to their markets. Channels for deploying public-private trade networks in Europe, on the other hand, include an interstate process and a private petition procedure. The European Commission, which plays a predominant role in these processes, has shifted resources toward challenging

21. See, for example, Goldstein and others, writing in a special issue of *International Organization* (2000). Cf. Finnemore and Toope (2001, p. 743), who criticize Goldstein and others for their positivist conception of law and for their failure to address law's impact from a sociological perspective, including the perspectives of custom, legitimacy, and legal process.



foreign trade barriers and developing public-private networks. As explained in chapter 5, there are historical, political, economic, and cultural reasons for the more proactive and aggressive role that U.S. businesses—and U.S. private lawyers—take in international trade disputes, as well as for some trends in the EC toward U.S.-style practice. Despite their own rivalries, as noted in chapter 6, U.S. and European private firms at times coordinate transatlantic efforts to more effectively challenge third-country trade barriers, including domestic regulations within the United States and Europe themselves.

U.S. and EC public-private networks offer a useful framework for assessing the impact of a more legalized international trading system. WTO law incites private actors and their lawyers, and these actors spur the creation of more public international law. Chapter 7 assesses the implications of these public-private networks for the ability of governments to amicably resolve trade conflicts, the stability and solidarity of U.S.-European relations, and the effectiveness and equity of the international trade dispute settlement system.