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Politics of Dispute Settlement Design: Explaining Legalism in Regional Trade Pacts

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ABSTRACT:

The methods for resolving disputes in international commerce differ greatly across agreements. Some systems are quite legalistic, with standing tribunals that have powers and practices similar to those of national courts. Others are diplomatic, just demanding that the opposing nations make a sincere attempt to work things out via talks. In this work, I try to explain the enormous difference in institutional form among the more than sixty regional trade agreements signed after 1957. I find that the degree of legalism in each agreement is strongly correlated with the degree of economic asymmetry, in interaction with the proposed depth of liberalization, among member countries, in contrast to accounts that place emphasis on the transaction costs of collective action or the functional requirements of deep integration.

KEYWORDS:

Agreements, Disputes, International, Resolution, Trade.

I. INTRODUCTION

In recent years, the way that international commerce is organized has seen the emergence of two parallel developments. The first change is the increase in regionalism, which has led to a number of new integration projects that are organized along geographic lines. The second is a clear, though less significant, shift in favor of legalism in the execution of trade agreements. Trading nations have unusually assigned to neutral third bodies, often based on complaints made by nonstate or supranational entities, the power to evaluate and provide binding decisions on alleged treaty infringement. The two tendencies have attracted academic interest on their own. But there hasn't been much research done on the point where these two patterns converge. There haven't been many comparative studies of institutional structure across various trade agreements. This is puzzling since the governing arrangements of regional trade agreements vary widely. Furthermore, issues with institutional architecture have come up in recent trade talks, emphasizing their political importance.

These issues are a dimension of negotiating apart from the actual conditions of liberalization. Academic discussions on sovereignty, globalization, and interdependence are directly impacted by the establishment of supranational institutions under regional trade agreements. However, there is still a dearth of study on this specific topic. To close this gap, I concentrate on a particular facet of international trade governance: the formulation of dispute resolution processes. I specifically look on the circumstances in which member states use legalistic dispute resolution and compliance monitoring procedures for regional trade agreements. Others endow established judicial tribunals with the power to provide swift, impartial, and enforceable third-party judgements on any and all claimed treaty breaches. Some agreements are diplomatic, calling solely for consultations between opposing parties [1], [2]. I provide a theory of trade dispute resolution based on the domestic political trade-off between treaty compliance and policy discretion to explain these varying degrees of legalism. The main conclusion of this theory is the significance of economic asymmetry as a reliable predictor of conflict settlement design when combined with the suggested level of integration. This theory links variations in institutional design to domestic political considerations often neglected by classic systemic theories of international relations, which helps to explain otherwise perplexing delegations of power by sovereign nations to supranational judiciaries [3], [4].

The nature of exante institutional construction, not the history of ex post state activity, is the focus of this research. Governments partially conceal their ignorance about the future implementation of the pact and potential problems during trade talks. The issue I look at is what kind of dispute resolution process the signatory governments agree to set up in light of this uncertainty. It is challenging to separate true promises from symbolic ones prior to actual integration. Even the most prosperous regional project, the European Union, has had crises of

faith in its erratic progress toward a unified market. I attempt to illustrate the structure of the institutions within which that process takes place without assessing how far integration has come. I focus on the institutional makeup of the overall game rather than the resolution of particular conflicts, which are influenced by tactical considerations and highly contextualized international and domestic political factors [5], [6].

However, I do contend that by raising the costs of opportunism, legalism tends to increase compliance. By enhancing the likelihood of detection, clarifying ambiguities in interpretation, and supporting appropriate punishments or making decisions immediately relevant under domestic law, legalistic processes change the cost-benefit analysis of cheating. Even the most formal of systems may not be able to ensure treaty adherence by independent nations prepared to disobey its decisions. The least legalistic agreements may result in quite effective integration, too. Legislation, although neither a necessary nor sufficient condition for complete compliance, does impact compliance by delivering verdicts of infringement that are accepted by the community of member states as credible and legitimate. This information, at the very least, raises the price of noncompliance in terms of reputation, perhaps endangering possibilities for future international collaboration on matters important to the local economy.

I introduce the dependent variable, degrees of legalism, in the first section by defining certain institutional characteristics that make one conflict resolution method more or less legalistic than another. I then outline the components of a theory of conflict resolution design while describing the fundamental trade-off and its variations. The next sections define the boundaries of the dataset of regional trade agreements, list the key characteristics of their dispute resolution procedures, and assess the explanatory power of my analytical methodology [7], [8].

Defining the spectrum: from diplomacy to legalism

The universe of institutional choices is presented as a standard set in discussions of dispute resolution in literature on international and comparative law, with direct negotiation at one extreme and third-party adjudication at the other. Which aspects of institutional design affect where on this spectrum legalism is present? The first issue is whether concerns about treaty implementation and interpretation explicitly have a right to be reviewed by a third party. Only talks, mediation, or conciliation are included in a small number of agreements, which suggests a very low degree of legality since the opposing parties maintain the power to formally reject any proposed resolution, which is the characteristic of a diplomatic system. These agreements have the same legal effect as those that provide for arbitration but demand express consent from all disputing parties, including the defendant, before the arbitration can begin, as well as those that allow member nations who are not directly involved in the dispute to control access to the arbitration process. The second question relates to the standing of decisions that come through the dispute resolution procedure under international law when there is an automatic right to third-party review. The issue is whether decisions made by arbitrators or courts are officially enforceable in terms of international law. The system is less legalistic than procedures whose third-party decisions immediately and irrevocably generate an international legal obligation if the disputants may legitimately disregard panel recommendations or undermine panel findings by lobbying political supporters [9], [10].

The following question relates to third parties, specifically the number, duration, and procedure for choosing arbitrators or judges in each treaty. Mechanisms that need the appointment of ad hoc arbitrators to handle a specific dispute are on the diplomatic end of the range. Treaties that establish a permanent tribunal of justices to resolve all issues over lengthy periods of service are at the legalistic extreme of the spectrum. A standing tribunal's judgments are expected to be more consistent over time and hence more legalistic than those produced by ad hoc panels whose membership changes with each case, even in the absence of express stare decisis. Between these two extremes, agreements tend to fall. The ability of disputants to strategically slant judges in favor of sympathetic or biased judges varies. With a standing tribunal, the parties have little to no control over the court's makeup after it has been established.

Ad hoc arbitration, however, allows for the selection of roughly half the panel members by each side. Innovative practices are included into several arbitration methods, which serve to improve the panel's objectivity. Which actors are eligible to register complaints and request decisions is a fourth concern. Only sovereign nations have complete international legal identity, according to a long-standing tradition in international law, giving them an almost exclusive ability to sign international treaties and file lawsuits for treaty breaches. This custom is reflected in the majority of trade agreements, which restrict dispute initiating to member governments solely. However, standing is sometimes defined more broadly to enable treaty institutions, such a secretariat or commission, who may have a bureaucratic interest in the treaty's successful implementation, to officially protest against member nations for some failure to comply. In other accords, even private people or companies, whose financial interests are most directly impacted by trade policy, have the right to protest and ask for a decision.

When a person has standing, they may launch a case either directly by submitting a complaint to the tribunal or indirectly by asking a domestic court to ask the tribunal for a preliminary judgement on any matter related to the treaty. The dispute resolution process tends to be more legalistic the broader the concept of standing is. Alleged breaches are likely to occur more often when treaty organizations and private parties have the ability to bring complaints than if standing is given exclusively to governments, who many diplomatic concerns makes them hesitant to pursue certain instances. The issue of remedies in situations of treaty infringement is the last one. Giving immediate effect to international court decisions about dispute resolution in domestic law is the legalistic alternative. Governmental bodies and courts are obligated by national law to adhere by and uphold judgments when they are immediately relevant. In most cases, direct effect gives rise to a right of action in national courts, enabling private parties or independent organizations to claim the treaty and sue the government for failing to uphold its international obligations.

II. DISCUSSION

The Argument

Governments must select how legalistic a trade agreement's dispute resolution process will be before beginning negotiations. Political leaders are forced to choose between two ideals that are incompatible. On the one hand, they are concerned with adhering to the contract, the value of which relies on how well the other parties keep their promises. The greater the likelihood of compliance, the more legalistic the conflict resolution process they construct. On the other hand, they also value their own policy discretion, and the more freedom they have to make decisions that strengthen domestic support, the less legalistic the process.

1. Policy Discretion

For national political leaders determined to hold onto power, international trade accords provide a well-known conundrum. The status of the economy is one of the key factors affecting any executive's or governing party's popularity. Negotiating reciprocal trade agreements, which nearly always result in net welfare gains, is one method political leaders try to boost growth and generate employment. The allocation of expenses and benefits is the source of the political impasse. Despite the fact that benefits generally outnumber costs, for consumers and producers, benefits are diffuse, or spread among many people in modest quantities, and costs are concentrated. Concentrated costs in politics refer to organized resistance from groups that have been negatively impacted in import-competing industries. A consideration in the political calculus of dispute settlement design is the general issue of trade liberalization, which is characterized by dispersed net gains and concentrated costs. Political leaders cannot always foresee which groups would be hit most by adjustment costs. They suggest particular exclusions or side payments for industries that are obviously exposed to import competition throughout the discussions. These issues are often reflected in a treaty's substantive clauses, which determine the degree and rate of liberalization. However, political leaders are aware that liberalization would come with hidden price. They thus want to maintain the freedom to decide how to react in the future to ambiguous requests for redress from hurt groups. Political leaders who provide import protection ex post incur the danger of inciting complaints from international trading partners that might result in findings of violation, with associated reputational costs and perhaps punishment.

Legalistic dispute resolution in cases involving nontariff obstacles also poses a risk to the independence of domestic regulators in matters of general law, including environmental, antitrust, and procurement laws as well as health and safety requirements. Nontariff barriers, or domestic laws that discriminate against foreign manufacturers, have been the main impediments to free trade in recent decades and still dominate the agendas of trade discussions today. The political economics of commerce and the politics of regulation are similar in that the marginal effects of regulatory policy on small, organized organizations are often disproportionately substantial in comparison to those on the wider, unorganized public. This quality makes it more important to politicians who want to hold onto their positions of authority since they may suddenly be the target of unheard-of accusations from foreign governments accusing them of putting unfair trade regulations in place. Political leaders' ability to make policy decisions may be limited if the merits of these complaints are determined by legalistic dispute resolution processes, especially in cases where there are significant domestic political stakes as a result of active interest groups.

2. Treaty Compliance

Why would trade negotiators ever discuss, much less adopt, any binding processes if legalistic trade dispute resolution posed such a blatant domestic political threat? The advantages of dispute resolution processes that increase governmental compliance and boost corporate trust provide the solution. The identical mechanisms that

limit public officials' freedom to make policy decisions and create political risks also increase the treaty's economic worth, which favors domestic politics. Legalistic conflict resolution might become a desirable institutional choice if such advantages are significant enough to outweigh the possible costs of legislative restrictions. Legalistic dispute resolution has the potential to improve international trade agreements' level of compliance in a number of ways. Trading states deal with issues of informational and motivational barriers while adopting reciprocal liberalization. Each state is aware that sometimes its allies may be compelled to break their treaty obligations in order to defend domestic groupings. Each state is also aware that it may be difficult to gather data on each incidence of partner defection because to the ubiquity and complexity of nontariff obstacles. States could be prevented from gaining from trade via these transaction costs. Institutions at the international level are created in part to reduce these costs by disclosing breaches and, in certain cases, by enforcing agreements.

These purposes are precisely served by formal conflict resolution processes. Dispute resolution systems are crucial for monitoring treaty breaches because they provide as formal venues for complaints to be made and adjudicated, which helps to overcome informational gaps. In addition to helping enforce treaty obligations and reducing motivational issues, dispute resolution processes serve as impartial organizations with the capacity to support penalties against violators. Trading nations understand that contracts only have value if they are highly adhered to. The greater the likelihood of government cooperation, the more legalistic the process, or, in other words, the more successfully and impartially it detects infractions and upholds arbitral decisions. Procedures for resolving disputes about the interpretation of a treaty's provisions also help to define compliance in addition to monitoring and enforcing compliance. In this way, dispute resolution functions as a particular kind of relational contract. It is very difficult for parties to a trade agreement to define compliance ex ante since they are unable to predict every potential contingency. Naturally, the agreement they reach isn't full; it doesn't spell out how the parties are to act in every situation. Conflicts of interpretation may develop when conditions change. Relational contracts stipulate that parties will allocate rights and obligations to specify compliance in order to prevent such disputes; in this capacity, trade agreements often appoint unbiased third parties.

Finally, by its influence on the conduct of private merchants and investors, legalistic dispute resolution also enhances the anticipated value of reciprocal trade agreements. Private sector players must feel they will not be denied entry to a market after dedicating certain assets to production for (or sales in) foreign markets for political leaders to fully understand the advantages of liberalization. When making choices concerning the production, distribution, and investment of highly specialized assets i.e., assets that are expensive to put to other uses traders and investors are risk-averse. When everything else is equal, they want the least amount of uncertainty and value a stable political climate for evaluating potential business initiatives. Legalistic dispute resolution reduces one source of risk by supporting trade liberalization institutionally and boosting private sector trust. Thus, the private sector boosts trade and investment between the parties, magnifying the macroeconomic advantages of liberalization, which in turn have an impact on politics.

3. Assessing the Trade-off

This issue between policy discretion and treaty compliance is one that political leaders always deal with when considering the architecture of dispute resolution. The trade-off between these goals is constant but not constant. Different countries place varying amounts of value on it. And in various contexts, a particular government's weighting of each purpose and the likelihood that its favored method would be used fluctuate. It is useful to make a distinction between the two phases of the dispute resolution design process when defining the dimensions of variance. National preference formation comes first, followed by international bargaining. The degree of legalism that a given government prefers in a particular trade agreement varies on a number of variables. The first is how much its economy relies on trade with other pact members. The government would often prefer a legalistic dispute resolution process the more trade-dependent the economy is, as shown by the ratio of intrapact exports to GDP. Politically, legalistic conflict resolution is more advantageous when commerce with potential partner nations makes up a bigger portion of the national economy.

Relative economic power is a second factor that influences conflict resolution choices. The government will choose a less legalistic dispute resolution process the stronger the nation is compared to other nations. The difference between rule-oriented and power-oriented conflict resolution is where this theory gets its inspiration. Rule-oriented systems enable less powerful parties to gain independent legal judgements that may be expensive for more powerful parties to disregard. Conflicts are resolved by the development and application of consistent rules to analogous issues. The advantages of such decisions may exceed the drawbacks of less policy choices for small nations. In power-oriented systems, parties settle disagreements by conventional diplomatic hostage-taking, issue-linking, and, specifically, the threat of retaliatory penalties. These tactics routinely benefit more powerful nations, which lean toward pragmatism over legalism. The percentage of each nation's GDP that is included in

regional trade agreements is a revealing indicator of economic dominance within such agreements. The greater the proportional size of the country's economy, the more sway it is expected to have as the location of imports from other signatories. Additionally, larger economies often rely less on exports, providing their leaders diplomatic clout in trade conflicts.

The suggested level of liberalization is a third element influencing choices for conflict resolution. Trade agreements may take many different forms, and the sort of agreement in question affects the kind of dispute resolution mechanism that member states want. Particularly, political leaders should be more eager to support juridical conflict resolution the more ambitious the degree of envisaged integration. One justification is the possibility of greater net economic advantages from further integration. A second point to examine is that, from a functional standpoint, legalism would be the best institutional architecture for settling disputes in the context of deep integration, which involves dealing with intricate nontariff trade barriers and uniform regulatory frameworks.

Together, the amount of liberalization, relative economic strength, and intrapact trade reliance give a mechanism to ex ante describe conflict resolution preferences. Given several ideal points on the Pareto frontier of trade cooperation, it is necessary to determine which country's preferences should take precedence throughout the negotiation process in order to define results. Consensus is necessary in trade discussions, as it is in other international treaty negotiations. If there is a need for unanimity, the design of dispute resolution will probably only be as legalistic as the signatory that values policy discretion the most and treaty compliance the least will permit. When all parties have a unit veto, the institutional conclusion is determined by the lowest common denominator.

Intrapact economic asymmetry serves as a stand-in for law's lowest common denominator in trade talks. Its value comes from the fact that regional liberalization benefits smaller countries more proportionately than it does bigger ones. The biggest economies, as measured by total GDP, within a specific agreement often represent the most lucrative prospective customers for intrapact exports. Larger economies are also less reliant on and open to trade than smaller ones, with openness evaluated by policy measures or by the proportion of trade to GDP. As aggregate GDP rises, advantages of trade openness measured in terms of the effect on per capita GDP growth rates decline. The proportional worth of liberalization—and, by extension, of legalistic conflict settlement is, thus, often lower for bigger than for smaller economies. Therefore, the unit veto that decides the degree of legalism in a particular agreement is most likely to be exercised by the signatory state with the greatest GDP.

According to this research, agreements between parties whose relative economic size and negotiating power are substantially uneven should result in a less legalistic approach to resolving disputes. The regional hegemon, whose economy stands to gain the least from trade liberalization, has little incentive to risk its policy discretion in favor of improved treaty compliance in pacts where one-member country is significantly larger than its partners, or in other words, where intrapact economic asymmetry is high. Furthermore, this hegemon has the negotiating strength to enforce its desire for a system that is pragmatic and power-oriented so that it may deploy unilateral trade measures more successfully. In other words, size counts, and wide differences in relative economic status portend badly for legitimization. Legalistic conflict resolution is only anticipated in agreements between parties whose relative size and negotiating power are more symmetrical. All member nations have an incentive to increase treaty compliance via the employment of unbiased third parties in environments with minimal economic asymmetry, provided the planned liberalization is sufficiently profound. No signatory stands to lose negotiating power ex post from the switch to a juridical system given their similar economic strength ex ante. However, if political leaders are to cede their ability to make policy decisions, the expected benefits of liberalization must be substantial. Officials may very well reject legalism even in situations with minimal asymmetry if the amount of integration is not ambitious or if the accord exempts important export industries.

4. The data set

Regional trade integration has been a recurring aspect of the global economy in recent decades, both among developed and developing nations. Counts vary, but at least sixty official treaties establishing regional trade agreements have been signed since 1957. Despite the overall trend toward formal economic integration, there are numerous aspects of these trade agreements that vary, including size, the economic development of the members, the extent or depth of liberalization, levels of compliance, and longevity. Applying certain criteria to verify comparability has been essential due to the wide range of potential scenarios. Although I do omit GATT and the World Trade Organization since they stand alone as the only multilateral trade organizations in the world, there are no restrictions on the number of signatories in this research. The sort of agreement is also not categorically limited; free trade zones, customs unions, common markets, and economic unions are all included. Finally, the

data set contains both successful and unsuccessful pacts to reduce selection bias. Despite these broad guidelines, trade agreements that didn't satisfy one or more of the following conditions were ineligible for this analysis.

Liberalization must first be mutually beneficial. It's not necessary for concessions to be precisely identical or concurrent. However, reciprocal market access must be the standard, at least among certain key signatories. Second, liberalization must have a rather broad reach. It is not necessary to have sectoral exemptions and universal free trade. However, in theory, coverage of at least the commercial trade must be extensive. The third requirement is that the trade agreements have to be made between January 1957 and December 1995. Excluded from the analysis are negotiations that did not result in concrete liberalization pledges by the end of 1995. Incorporated are agreements whose implementation was not yet complete but its liberalization had already started. Additionally, each treaty's signing year is shown, as well as the names of all member nations. Nations who were not among the initial signatories are denoted by their accession years in parenthesis.

The countries who initially ratified the pact but subsequently withdrew are listed along with the year(s) of withdrawal. The treaties from the relevant era are given in Appendix B, along with those whose texts were unavailable for a variety of reasons and those that did not fit one of the first two requirements. There are four groups of agreements, one in the Americas and three in Europe that have a lot of similarities in terms of chronology and provisions. In order to avoid exacerbating this issue, I do not include treaties that were subsequently incorporated into or superseded by subsequent agreements. Examples include the Canada-U.S. Free Trade Agreement and various bilateral agreements between the European Union and individual European Free Trade Association (EFTA) countries, almost all of which were replaced by EC membership or EEA membership.

I provide a political theory of the design of dispute resolution in international commerce in this paper. My goal is to show and explain how the degree of legalism varies significantly across various regional agreements. I forecast the degree to which trading nations would cede judicial review power to unbiased third parties, putting equal weight on economic asymmetry and the planned degrees of integration. My main claim is that while creating governance frameworks for international commerce, political decision-makers assess the costs and advantages of reducing policy discretion against increasing treaty compliance. They evaluate their economic interest in intrapact trade, their relative economic strength in comparison to other parties to the agreement, and the scope or intensity of the planned liberalization in order to reach this conclusion. Relatively big nations often favor less legalism than their smaller counterparts due to their larger markets and lower reliance on commerce. Because treaties need for unanimous consent, bigger nations' institutional preferences often take precedence in discussions, resulting in the lowest common denominator. The consequences of this strategy hold up to empirical inspection against a significant sample of more than sixty regional trade agreements, with the main one being that juridical processes are improbable when asymmetry is great or integration is thin. Legalism is nearly never present in high asymmetry agreements, even in functional accounts when integration is strong. When asymmetry is minimal, legalism only takes place when the end goal of the policy is at least a common market and not merely free trade or a uniform external tariff.

This theory of trade dispute resolution, when seen broadly, seems to rely on a synthesis of neoliberal institutionalist logic and structural realist measures of relative economic power. However, unlike other systemic methods, it is based on a political assessment of home costs and benefits rather than anticipations of absolute or relative advantages elsewhere. Despite how important these factors may be in determining whether to seek economic integration in the first place, political leaders in this model are not mainly concerned with overcoming market failures or strengthening their defensive positions in anarchic international systems. Given a regional trade effort, domestic political considerations, in my opinion, are what driving talks are over the architecture of dispute resolution. Without diving into the specifics of comparative politics, my analytical paradigm bridges the gap between comparative and international political economy by linking general domestic political motivations to concerns with international institutional design.

III. CONCLUSION

A complicated and varied process involving a variety of people, interests, and factors is the politics of dispute resolution design. The main variables that affect the design decisions made by policymakers with regard to dispute resolution methods have been examined in this study. The importance of power dynamics, institutional setups, and normative concerns in influencing these designs has been underlined. Designing methods for conflict resolution must take into account power dynamics since strong individuals often try to influence systems in their favor. Inequalities in power and results may stem from this. In order to design procedures that promote justice and equitable representation for all parties concerned, policymakers must be aware of these dynamics. Institutional structures are yet another essential component of the architecture of conflict resolution. The legality

and efficacy of the process may be significantly impacted by the institution chosen, the decision-makers chosen, and the procedural regulations. Establishing institutions that are open, free from interference, and competent to resolve a variety of issues should be a goal for policymakers. Normative factors are also taken into account while designing a conflict resolution process. The values and concepts that underpin conflict resolution must be taken into account by policymakers. This entails advancing human rights, defending the rule of law, and making sure that all parties have access to justice.

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