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CITIZENS' INVOLVEMENT IN THE EUROPEAN UNION COMMON COMMERCIAL POLICY

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The starting point of this contribution is, first, a factual observation and, second, a normative finding. Free trade agreements today often enjoys a high degree of public attention including controversial deliberations among and within political parties and have thus obviously turned into a politicized area of law. It is recognized that traditional concepts of democratic legitimacy developed under the conditions of the nation-state alone constitute an inadequate approach for legitimizing the respective transnational steering regimes. Rather, those scholars who are sympathetic towards a conceptual change of legitimacy favor more complex approaches comprising of 'input-oriented' as well as 'output-oriented' elements; legitimizing factors that are more appropriately qualified as alternatives to, or surrogates for, democratic legitimacy and find their overarching normative basis in the republican constitutional principle. Against this background, the contribution assesses the possibilities for the involvement of the general public as well as individual non-state actors in the two main phases of EU FTAs. This includes an evaluation of the direct and indirect participatory option during the negotiations of these agreements. Moreover, the contribution attempts to identify and assess the venues for participation by interested and affected non-state actors in the implementation and continued progressive development of EU FTAs.
Keywords: *European Union, economic relations, trade agreement, law, investment.*

IMPLICAREA CETĂȚENILOR ÎN POLITICA COMERCIALĂ COMUNĂ A UNIUNII EUROPENE

Punctul de plecare al acestei contribuții este, în primul rând, o observație faptică și, în al doilea rând, o constatare normativă. Acordurile de liber schimb de astăzi se bucură adesea de un grad ridicat de atenție publică, inclusiv deliberări controversate între și în cadrul partidelor politice și, prin urmare, s-au transformat în mod evident într-un domeniu politizat al dreptului. Este recunoscut faptul că conceptele tradiționale de legitimitate democratică dezvoltate numai în condițiile statului-națiune constituie o abordare inadecvată pentru legitimarea regimurilor de direcție transnațională respective. Mai degrabă, acei savanți care sunt simpatici față de o schimbare conceptuală a legitimității favorizează abordări mai complexe care cuprind elemente 'orientate spre intrare', precum și 'orientate spre ieșire'; legitimarea factorilor care sunt calificați mai adecvat ca alternative sau surogate pentru legitimitatea democratică și își găsesc baza normativă generală în principiul constituțional republican. În acest context, contribuția evaluează posibilitățile de implicare a publicului larg, precum și a actorilor nestatali individuali în cele două faze principale ale acordurilor de liber schimb ale UE. Aceasta include o evaluare a opțiunii participative directe și indirecte în timpul negocierilor acestor acorduri. În plus, contribuția încearcă să identifice și să evalueze locurile de participare a actorilor nestatali interesați și afectați la punerea în aplicare și dezvoltarea progresivă continuă a acordurilor de liber schimb ale UE.
Cuvinte-cheie: *Uniunea Europeană, relații economice, acord comercial, drept, investitie.*

IMPLICATION DES CITOYENS DANS LA POLITIQUE COMMERCIALE COMMUNE DE L'UNION EUROPÉENNE

Le point de départ de cette contribution est, d'une part, une observation factuelle et, d'autre part, une constatation normative. Les accords de libre-échange bénéficient aujourd'hui souvent d'une grande

attention du public, y compris des délibérations controversées entre et au sein des partis politiques, et sont donc manifestement devenus un domaine de droit politisé. Il est reconnu que les concepts traditionnels de légitimité démocratique développés dans les seules conditions de l'état-nation constituent une approche inadéquate pour légitimer les régimes de gouvernance transnationaux respectifs. Au contraire, les chercheurs qui sont favorables à un changement conceptuel de la légitimité favorisent des approches plus complexes comprenant des éléments "axés sur les intrants" ainsi que des éléments "axés sur les extrants"; facteurs de légitimation qui sont plus convenablement qualifiés d'alternatives ou de substituts à la légitimité démocratique et trouvent leur base normative globale dans le principe constitutionnel républicain. Dans ce contexte, la contribution évalue les possibilités d'implication du grand public ainsi que des acteurs non étatiques individuels dans les deux principales phases des ALE de l'UE. Cela comprend une évaluation de l'option participative directe et indirecte lors des négociations de ces accords. En outre, la contribution tente d'identifier et d'évaluer les lieux de participation des acteurs non étatiques intéressés et concernés à la mise en ьuvre et au développement progressif continu des ALE de l'UE.

Mots-clés: *Union européenne, relations économiques, accord commercial, droit, investissement.*

УЧАСТИЕ ГРАЖДАН В ОБЩЕЙ ТОРГОВОЙ ПОЛИТИКЕ ЕВРОПЕЙСКОГО СОЮЗА

Результатом представленного исследования является фактический мониторинг ситуации, а также анализ нормативного материала. Сегодня соглашения о свободной торговле часто привлекают к себе большое внимание общественности, включая спорные дискуссии между политическими партиями, тем самым превращаясь в политизированную область права. Признано, что традиционные концепции демократической легитимности, разработанные только в условиях национального государства, представляют собой неадекватный подход к легитимации соответствующих транснациональных режимов управления. Скорее всего, те ученые, которые отдают предпочтение концептуальному изменению легитимности, предполагают более сложные подходы, включающие «ориентированные на результат» элементы. Факторы, которые более уместно квалифицировать как альтернативы или суррогаты демократической легитимности, находят свою всеобъемлющую нормативную основу в республиканском конституционном принципе. На этом фоне оцениваются возможности участия широкой общественности, а также отдельных негосударственных субъектов в двух основных фазах соглашений о свободной торговле с Евросоюзом. Это включает в себя оценку вариантов прямого и косвенного участия во время переговоров по этим соглашениям. Помимо этого, в нашем исследовании, делается попытка определить и оценить возможности участия негосударственных субъектов в реализации и дальнейшем прогрессивном развитии соглашений о свободной торговле с Евросоюзом.

Ключевые слова: *Европейский союз, экономические отношения, торговое соглашение, право, инвестиции.*

Introduction

The starting point of this contribution is, first, a factual observation and, second, a normative finding; both being concerned with changing circumstances and equally shifting perceptions thereof as well as the consequences resulting from these developments. First, to start with a primarily factual observation, the negotiation and conclusion of regional economic integration agreements, in particular also the ones signed by the European Union (EU), today often enjoy a quite high degree of public attention, thereby indicating the more recently changing character of international economic law in general – and of trade and investment agreements in particular – as an increasingly political law.

While seen from a global perspective most certainly many areas of the international economic legal order admittedly always have been – and continue to be – contested among states, in particular those adhering to different ideologies, the normative contractual design of foreign economic relations has – viewed from the domestic perspective of most countries – for a long time primarily been the concern of a comparatively small circle of experts. In particular, international negotiations aimed at concluding multilateral, regional or bilateral treaties in the realm of international economic

law have in previous decades normally not attracted a substantial attention on the side of the politically interested broader public. This finding most certainly applied also to the member states of the EU. Consequently, the fact that these negotiations were traditionally largely conducted by governmental representatives – quasi or even literally – "behind closed doors" [1, p. 681-701] usually didn't give rise to critical discussions among the citizens of the political community concerned.

The main ideas of the research

As evidenced for example by the intensive and controversial public debates in a number of EU member states with regard to the negotiations leading to the Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada which has been signed by the parties on 30 October 2016 and is provisionally applied since 21 September 2017, as well as first and foremost the Transatlantic Trade and Investment Partnership (TTIP) negotiated between the United States and the EU since July 2013 (with the negotiations being currently on hold), this situation has changed in an unprecedented way. Foreign trade and investment policy today often enjoys a high degree of public attention in many countries, among them also many EU member states, including controversial deliberations among and within political parties and has thus obviously turned into a politicised area of law in the true sense of the meaning. From a broader perspective, this finding has for example more recently quite vividly been expressed by *Michael J. Trebilcock* stating that "popular and scholarly debates over the virtues and vices of economic globalization ensure that international trade policy has forever forsaken the quiet and obscure corners of trade diplomacy that it once occupied, and become a matter of 'high politics'" [2, p. 7 et seq]. The transformation into a more politicised field of law, although occasionally viewed with suspicion and most certainly not without challenges, is in principle to be welcomed already because of the fact that it brings with it the possibility of realizing one of the central overarching objectives of – what might be characterized as – an emerging constitutionalized international economic law [3, p. 157-173], namely supporting the continued conversion of the normative framework dealing with international economic relations into a more human-oriented legal order [4, p. 37-85].

Why has this situation more recently changed in an unprecedented way, in particular also as far as the general public in many EU member states is concerned? The underlying reasons for this shift and comparative new trend are most certainly manifold. However, prominently among them is surely the in part considerably more comprehensive policy approach towards the regulatory content of free trade agreements negotiated also by the EU in recent years with its focus on, among others, the establishment of quite comprehensive and elaborate – albeit, viewed from the perspective of the international (economic) system as a whole, neither unprecedented nor at least uncommon [5, p. 1081-1096] – institutional steering structures ("treaty bodies") [6, p. 532-566], on normatively addressing the economic relevance of so-called behind-the-border issues [7, p. 671-677], as for example manifested in the concept of regulatory cooperation as well as on substantive and procedural investment protection, including the stipulation of international investor-state dispute settlement mechanisms [8, p. 247-300]. All of these features have in common that they result in a shrinking of domestic policy space and regulatory autonomy of the contracting parties that goes well beyond traditional free trade agreements that focus primarily on border measures and do not stipulate investment protection standards.

To mention but one example, the investment provisions protecting against indirect expropri-

ation [9, p. 959-1030] as well as the guarantee of fair and equitable treatment [10, p. 700-763] have, *inter alia*, by setting certain standards for domestic administrative procedures, in particular in light of the occasionally quite far-reaching understanding of these protection standards by some investment arbitration tribunals, developed a considerable potential to codetermine the design of certain segments of the domestic legal orders of the respective host states [11, p. 953-972]. Thereby, it hardly needs to be emphasized that stipulating restrictions on the “policy space” of states on the basis of international legal obligations and thus providing conditions of legal certainty for private economic operators are among the central – and in principle indispensible – purposes of international economic agreements. In light of the enhanced effectiveness and considerably expanded scope of application of regional economic integration agreements, the possibility of disputes increasingly arises which involve impairments of economic interests of private business actors such as foreign investors covered by respective protection standards of international investment agreements that are justified by the host state in question based on a recourse to (non-economic) public interest concerns like the protection of public health or the environment [12, p. 532-566]. Against the backround of these regulatory features and their potential normative consequences, modern and more comprehensive free trade agreements, most certainly including those negotiated and concluded by the EU, are perceived by an increasing number of politically interested persons and groups as a category of transnational regulatory design worth taking a closer (and not infrequently more critical) look at.

Second, and this leads us to a normative finding concerning these changing steering structures and perceptions thereof, it is precisely these more “intrusive” regulatory features of modern comprehensive free trade agreements – as well as, for example, the increasing prevalence and regulatory importance of transnational governance regimes in general – that have first and foremost also given rise to certain legitimacy challenges. And indeed, these legitimacy challenges that arise in connection with the normatively relevant steering activities of modern governance structures in the transnational realm have already been qualified as “emerging as one of the central questions – perhaps *the* central question – in contemporary world politics” [13, p. 212-239]. As already evidenced by an ever-growing literature dealing with this topic in general or at least with some of its aspects, this most certainly also applies to the regulatory features of recent EU free trade agreements [14, p. 29-43]. Thereby, taking into account the complexity of this issue, it hardly needs to be emphasized that it will neither be feasible to elaborate, nor is this comparatively short contribution aimed at elaborating, on all of the manifold implications of the possible “legitimacy deficits” in something even close to a comprehensive way.

Rather, and in order to make a long and complex story short, let it initially suffice here to recall that it is ever more recognized that traditional concepts of democratic legitimacy developed under the conditions of the nation-state – some of which finding their normative manifestations also for example in Article 10 (1) and (2) of the Treaty on European Union (TEU) – alone provide an increasingly inadequate and insufficient basis for legitimizing the respective transnational steering regimes, already because of the fact that the diversity and complexity of regulatory mechanisms in the international realm does in general not allow for the establishment of comparable allocative structures [15, p. 89-118]. There are obviously a number of different conclusions and consequences potentially to be drawn from this finding. However, in case one accepts, together with what probably amounts by now to a majority of legal scholars, as the most

appropriate consequence a resulting need for a conceptual modification of our understanding of legitimacy, it seems possible – by taking recourse to the distinction between "input-oriented" and "output-oriented" models of legitimacy as developed by *Fritz W. Scharpf* [16, p.705-741] and in order to reduce the existing (factual and scholarly) complexities by way of systemization [17] – to broadly distinguish between three main lines of argumentation in the literature.

Some scholars have developed – on the basis of exclusively "input-oriented" legitimizing strategies – transnational concepts of democracy such as for example the model of a "cosmopolitan democracy" by *David Held* [18, p. 240-267], even though the implementation of such an "enormously ambitious agenda for reconfigurating the constitution of global governance and world order" [19, p. 681-702] in practice appears for the time being rather unrealistic [20, p. 596-624]. On the other end of the spectrum are those academics that argue for entirely "output-oriented" models of transnational legitimacy [21].

However, the majority of those legal scholars who are currently sympathetic towards a conceptual change of the understanding of legitimacy, favor more complex approaches comprising of "input-oriented" as well as "output-oriented" elements. According to these pluralistic models, it is necessary to determine with regard to every individual regulatory regime whether a sufficient number of legitimizing factors exist that substitute or mutually reinforce each other. Although there is no *numerus clausus* with regard to the potential aspects to be taken into account, it is nevertheless possible to identify a number of factors to which particular importance is frequently attributed to in the legal literature. Among them is from an "output-oriented" perspective the effective realization of the common good, generally regarded as one of the most important legitimizing factors for the respective regulatory structures. In order to facilitate this optimal orientation towards the realization of the common good, a prominent position is – in the realm of "input-oriented" factors – occupied, *inter alia*, by the requirements of transparency in the decision- and rule-making processes as well as in particular also of opportunities for a more direct and more sustained participation by interested and affected societal actors [22]. Specifically with regard to the governance realm of the EU, some of these last-mentioned approaches and concepts indeed find their normative recognition for example in Article 10 (3) and Article 11 TEU as well as in Article 15 and Article 24 of the Treaty on the Functioning of the European Union (TFEU).

Republican Legitimacy in Disguise: On the Normative Foundations of Pluralistic Legitimation Strategies

Although the respective mechanisms and means as normatively enshrined in particular in Article 10 (3) and Article 11 TEU are stipulated in this EU treaty in its title II under the heading "provisions on democratic principles", it has already rightly been emphasized that a closer look at their quasi-constitutional foundations reveals that not all of the factors considered to be of relevance in these more complex and pluralistic legitimation approaches are in fact manifestations of democratic legitimacy in the narrower sense of the concept [23]. This applies in particular, to mention but one example, to the orientation towards an effective realization of the common good; considered to be one of the central elements in pluralistic legitimation models, but nevertheless not among the factors that are easily attributable to the ordering idea of democratic legitimacy.

Rather, some of these elements, among them first and foremost the orientation towards the common good, but also for example the idea of a sustained public participation by interested societal actors in the governance processes of

a political community, are more appropriately qualified as alternatives to, or surrogates for, democratic legitimacy that find their overarching normative basis in the principle of republicanism [24, p. 443-490]; a constitutional ordering concept whose relevance in the context of the transnational realm [25, p. 45-64], and especially also in the process of European integration in general as well as the EU legal order in particular [26, p. 913-941], has only more recently received increasing attention in the (legal) literature. Viewed through this quite useful and enlightening prism of republicanism, the more complex, pluralistic legitimation approaches comprising of "input-oriented" as well as "output-oriented" elements, intended also to provide a more solid level of legitimacy for comprehensive transnational regulatory regimes such as modern EU free trade agreements, thus actually have their normative foundation in the concept of democratic legitimacy as complemented by republican strands of legitimation.

Involvement of the General Public in the Negotiation of EU Regional Economic Integration Regimes

These republican supplements – among them especially the possibilities for the involvement of the general public as well as of individual non-state actors – have in particular more recently also been taken recourse to by EU institutions – and citizens – in the first phase of EU regional economic integration treaties, namely the negotiation of these agreements. Despite the challenges posed by what could be labelled the primarily executive approach to international (treaty) negotiations and the inherent limits to publicity and inclusiveness resulting from it [27, p. 61-87], the constitutional treaty framework of the EU provides now for in principle comparatively far-reaching stipulations in this regard; stipulations that have also inspired EU institutions to adopt in the present context a policy approach that is increasingly characterized by the fostering of transparency and the solicitation of stakeholders' input [28, p. 681-702].

Among these stipulations is the European citizens' initiative in accordance with Article 11 (4) TEU and Article 24 TFEU [29, p. 61-81]; an instrument allowing for the possibility of political standard-setting by EU citizens, whose given relevance in the context of the common commercial policy in general and of EU free trade agreements in particular has more recently been subject to an important clarification by the General Court in the case of *Efler et al. v. European Commission* [30, p. 61-81] dealing with the legality of a Commission's refusal to register the proposed European cititzens' intiative "Stop TTIP" [31]. In addition, we witness in recent years a number of notable measures by EU institutions aimed at fostering transparency in the present context; an indispensable prerequisite for public participation as for example enshrined in Article 1 (2) and Article 10 (3) TEU as well as Article 15 TFEU. They include the (subsequent) publication of negotiating mandates by the Council as well as the more recent practice of the Commission to publish certain documents related to ongoing treaty talks, among them in particular also original EU text proposals used in the respective negotiations [32]. Examples of the last-mentioned approach concern a number of EU text proposals related to, among others, the negotiations on a free trade agreement with Indonesia [33], the negotiations on a respective treaty with New Zealand [34], the negotiations of a free trade agreement with MERCOSUR (Argentina, Brazil, Paraguay and Uruguay) [35], the negotiations of a free trade agreement with Australia [36], the negotiations of a modernized association agreement with Chile [37], the negotiations of a free trade agreement with the Philippines [38], as well as the negotiations of a Deep and Comprehensive Free Trade Area (DCFTA) with Tunisia [39].

Finally, in the realm of participation by means of dialogues and consultations as envisioned in the paragraphs one to three of Article 11 TEU, it seems worth recalling that in recent years the Commission has initiated an increasing number of public consultations in the present context of international trade and investment relations, in particular also in connection with, or in preparations of, negotiations on the conclusion of free trade agreement with third countries. The oldest important example in this regard was the online public consultation process, in the period from 27 March 2014 until 13 July 2014, on investment protection and investor-to-state dispute settlement in the envisioned Transatlantic Trade and Investment Partnership Agreement with the United States of America [40]. In this comparatively short period of time, the Commission received a total of nearly 150.000 replies [41]; a fact that clearly underlines again the changing character of international economic law as an increasingly political law. Subsequent topics of public consultations initiated by the Commission included the future of EU-Mexico trade and economic relations (2 July to 31 August 2015), the future of EU-Australia and EU-New Zealand trade and economic relations (11 March to 3 June 2016), a possible modernization of the trade part of the EU-Chile association agreement (9 June to 31 August 2016), the negotiations on a deep and comprehensive free trade agreement between the EU and Tunisia (21 November 2016 to 22 February 2017), the implementation of the EU-Korea free trade agreement (8 December 2016 to 3 March 2017) as well as a multilateral reform of investment dispute resolution (21 December 2016 to 15 March 2017) [42].

Public Participation in the Implementation Phase of EU Free Trade Agreements

Although occasionally overlooked or underestimated, the possibilities for public participation are currently not confined to the negotiation phase of regional economic integration agreements concluded by this supranational organization. Rather, more recent EU free trade agreements also increasingly foresee venues and mechanisms for the active involvement of interested and affected individuals and other private actors in the subsequent implementation as well as progressive development of these steering regimes; thereby also acknowledging the character of these trade and investment treaties as "living instruments" that benefit from continued, and again in particular also republican, means of legitimation.

In order to illustrate this more participatory and inclusive approach agreed upon by the contracting parties of modern EU free trade agreements, attention might be drawn here to three different regulatory concepts and frameworks that have more recently become increasingly common features of regional economic integration agreements concluded by this supranational organization and its member states. The first of these steering approaches concerns the possibilities for public participation in the field of trade and sustainable development as well as, quite closely related, with regard to covered trade-related labor and environmental issues [43, p. 493-511]. To mention initially but one example, Article 373 of the EU Association Agreement with Moldova, signed on 27 June 2014 and entering into force on 1 July 2016 [13], stipulates in this regard that each contracting party "hall ensure that any measure aimed at protecting the environment or labour conditions that may affect trade or investment is developed, introduced and implemented in a transparent manner, with due notice and public consultation, and with appropriate and timely communication to, and consultation of, non-state actors".

Furthermore, with regard to the institutional dimension of public participation, Article 376 (4) of the EU-Moldova Association Agreement requires the parties to "convene new or consult

existing domestic advisory group(s) on sustainable development with the task of advising on issues relating to this Chapter. Such group(s) may submit views or recommendations on the implementation of this Chapter, including on its (their) own initiative.” These domestic advisory groups “shall comprise independent representative organisations of civil society in a balanced representation of economic, social, and environmental stakeholders, including, among others, employers’ and workers’ organisations, non-governmental organisations, business groups, as well as other relevant stakeholders” (Article 376 (5) EU-Moldova Association Agreement). In addition, a joint civil society dialogue forum is created on the basis of Article 377 of this agreement that shall be convened once a year in order to conduct a dialogue between the contracting parties and relevant non-state actors on sustainability aspects including environmental concerns [44]. With regard to the composition of the forum, the parties have committed themselves to promote – in the words of Article 377 (1) – “a balanced representation of relevant interests” and stakeholders by inviting, inter alia, representative organizations of employers, workers, environmental interests and business groups to participate in the dialogue forum.

Moreover, Article 23.8 (5) of CETA even stipulates with regard to covered labor issues that each contracting party “shall be open to receive and shall give due consideration to submissions from the public on matters related to this Chapter, including communications on implementation concerns. Each Party shall inform its respective domestic labour or sustainable development advisory groups of those communications” [45]. Quite similar procedural and institutional frameworks aimed at facilitating the participation of citizens and of other non-state actors are stipulated, among others, in the Articles 13.9 *et seq.* of the free trade agreement between the EU and its member states, of the one part, and the Republic of Korea, of the other part, signed on 6 October 2010 and in force since 13 December 2015 [46], in Article 299 of the EU-Ukraine Association Agreement that entered into force on 1 September 2017 [47], in the Articles 12.13 *et seq.* of the free trade agreement between the EU and the Republic of Singapore as signed on 19 October 2018 and entered into force on 21 November 2019 [48], in the Articles 237 *et seq.* of the EU Association Agreement with Georgia, signed on 27 June 2014 and entering into force on 1 July 2016 [49], in the Articles 16.10 *et seq.* of the Economic Partnership Agreement signed by the EU and Japan on 17 July 2018 that entered into force on 1 February 2019 [50] as well as, albeit with certain modifications, in the Articles 13.12 *et seq.* of the free trade agreement between the EU and Vietnam, signed on 30 June 2019 and entering into force on 1 August 2020 [51].

A second steering approach of relevance in the present context concerns the possibilities for private actor participation in the field of regulatory cooperation. Article 21.8 of CETA stipulates in this regard that in order to “gain non-governmental perspectives on matters that relate to the implementation of this Chapter [on regulatory cooperation], each Party or the Parties may consult, as appropriate, with stakeholders and interested parties, including representatives from academia, think-tanks, non-governmental organisations, businesses, consumer and other organisations. These consultations may be conducted by any means the Party or Parties deem appropriate.” Implementing this stipulation, the European Commission initiated, among others, a public consultation on proposals for regulatory cooperation activities in the Regulatory Cooperation Forum under CETA in February 2018 [52]. Comparable participatory approaches are for example enshrined in the Articles 18.7 and 18.10 of the EU-Japan Economic Partnership Agreement.

Finally, a third participatory option worth at least briefly drawing attention to relates to the

involvement of representatives of the general public and other non-state actors in the dispute settlement mechanisms established under EU free trade agreements. Article 14.15 of the EU-Korea Free Trade Agreement together with Article 11 of Annex 14-B (Rules of Procedure for Arbitration) of this treaty foresees in principle, albeit subject to certain qualifications [53], the competence of the arbitration panel to receive "unsolicited written submissions from interested natural or legal persons of the Parties, provided that they are made within 10 days of the date of the establishment of the arbitration panel, that they are concise and in no case longer than 15 typed pages, including any annexes, and that they are directly relevant to the factual and legal issues under consideration by the arbitration panel" (Article 11 (1) of Annex 14-B). This possibility for non-state actors to submit *amicus curiae* briefs [54, p. 694-721] to the arbitration panel in dispute settlement proceedings between the contracting parties of the regional economic integration agreement at issue – an approach that has been already for a number of years time quite controversially debated in the realm of WTO dispute settlement [55, p. 496-510] as well as in the area of investor-state arbitration proceedings [56, p. 510-564] – is for example also enshrined in Article 400 in connection with Annex XXXIII, paras. 37 *et seq.* of the EU-Moldova Association Agreement, in Article 264 in connection with Annex XX, paras. 37 *et seq.* of the EU-Georgia Association Agreement, in Article 14.17 (2) in connection with Annex 14-A, paras. 42 *et seq.* EU-Singapore Free Trade Agreement, in Article 3.41 (2) in connection with Annex 9, paras. 42 *et seq.* of the Investment Protection Agreement between the EU and its member states, of the one part, and the Republic of Singapore, of the other part, signed on 19 October 2018 [57], in Annex 29-A, paras. 43 *et seq.* of CETA, in Article 319 in connection with Annex XXIV, paras. 37 *et seq.* EU-Ukraine Association Agreement as well as in Article 21.17 of the EU-Japan Economic Partnership Agreement.

Conclusions

In light of these in principle quite remarkable, possibilities for the involvement of the general public as well as individual non-state actors during the negotiation phase of regional economic integration agreements concluded by the EU as well as in particular also during the subsequent implementation phase of this new generation of treaties, we finally turn to what amounts probably to be the most challenging issue: Do these republican elements of legitimation, most certainly viewed together with the main pillars of democratic legitimacy of the EU common commercial policy provided by the European Parliament [58, p. 67-85], the governments of the EU member states acting in the Council as well as the parliaments at the national level, establish as a whole a sufficient level of legitimacy for the modern type of EU free trade agreements and the regulatory features stipulated therein? There seems to be no easy answer available, already in light of the incontrovertible finding that attributing and measuring legitimacy is very far from a mathematical operation. Much has already been – and much more could surely be – said about this issue. Nevertheless, for the purposes of this comparatively short contribution, I intend to confine myself here to two remarks.

First, there appears to be an increasing awareness among EU institutions and member states that the participatory opportunities for private actors, including the general public, specifically also during the implementation phases of regional economic integration agreements can be, and in fact should be, further enhanced. This is for example evidenced by the findings made in the non-paper "Feedback and Way Forward on Improving the Implementation and Enforcement of Trade and Sustainable Development Chapters in EU Free Trade Agreements"

published by the Commission services on 26 February 2018 [59-60]. Among the issues, identified and discussed in a respective consultation process involving, *inter alia*, the European Parliament, EU member states, the European Economic and Social Committee, civil society groups, businesses as well as academics, and being of relevance in the present context are the exchange of best practices between the domestic advisory groups established under the different free trade agreements as well as the creation of clear and transparent rules as well as procedures for respective civil society structures [61, p. 8].

Other innovations, intended to improve public participation in the enforcement of free trade agreements, include a considerable broadening of the material scope of competences of the domestic advisory groups as well as the joint civil society fora by covering not merely the issue of trade and sustainability but potentially the implementation of the whole free trade agreements [62, p. 6]; an approach envisioned by the EU to be put into treaty practice beginning with the EU-Mexico free trade treaty on which an agreement in principle has been announced by the parties in April 2018 [63]. Finally, to mention but one further example, the document foresees – aside from a more general commitment of the Commission to improved transparency and communications in trade policy and negotiations – a more efficient system to respond to submissions received from citizens and other stakeholders. In this regard, the non-paper states, *inter alia*, that the “Commission services are committed to responding to written submissions from citizens on TSD [trade and sustainable development] in a structured, transparent and time-bound way. In particular, the Commission will acknowledge receipt within 15 working days, indicating the responsible services, and presenting opportunities for submitting additional information. It will respond within two months from the date of receipt providing information about any follow up, and including justification of any action taken. Should an additional period of time for analysis be needed, because of the complexity of the matters raised, the Commission will inform the author as soon as possible and within the above mentioned time-limit, indicating the necessary extra time needed” [64, p. 12]. Viewed from an overarching perspective of legal theory, these ongoing attempts aimed at improving the participation of citizens and other non-state actors in the implementation of EU free trade agreements clearly correspond to the normative character of the republican legitimation factors as principles and thus as “optimization requirements relative to what is legally *and* factually possible” at a given time [65, p. 67; 66 p. 505 et seq.].

Second, and with regard to the respective allocation of decision-making competences in the present context, it seems worth recalling that the determination whether a sufficiently high level of legitimacy for the modern type of EU free trade agreements has been achieved is most certainly not made by (legal) scholars with any legitimate claim to ultimate authority but, first, by those political actors that have the competence and decide to sign as well as ratify the international agreements at issue and, second, by those supranational and domestic judicial bodies entrusted with the task of assessing these treaties in light of respective constitutional requirements, as well as, third and ultimately, by the peoples of Europe themselves by, among others, participating in elections at the regional, national and supranational level. This last-mentioned finding does not only hint at another very fundamental element of public participation in connection with EU regional economic integration agreements but also seems, and in fact should be perceived as being, quite reassuring from the perspective of democratic and republican self-government as a whole.

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