The Dejudicialization of International Dispute Settlement: A Paradigm Shift in International Economic Law?

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The objective of this article is to reflect on the rise and decline of judicialization in international trade and investment regimes and explore the future of international economic dispute settlement. It makes three key arguments. First, the severe disjuncture between anticipated benefits of international dispute settlement and the actual costs imposed on states explains the emerging trend of dejudicialization in international economic law. Second, at least to some extent, dejudicialization is likely to be a staple feature of international economic law in the new era of deglobalization, climate crisis, and great power rivalry. Third, judicialization of international dispute settlement will not demise but substantial transformation is necessary to meet contemporary challenges.

Keywords: WTO dispute settlement, WTO Appellate Body, MPIA, investor-state arbitration, legitimacy crisis, dejudicialization

1. Introduction

Judicialization refers to the process through which third-party dispute resolution emerges in a community and develops authority over its institutional evolution.[1] The concept was widely used to describe one of the defining phenomena of the 20th century in world politics – namely in many issue areas, the world was witnessing a move to law, in particular the strengthening of delegation to increasingly independent and powerful third-party judicial and quasi-judicial arbitral tribunals after the end of the Cold War.[2] At the international level, the number of international courts and tribunals has proliferated, as has litigation before them.[3] Indeed, the judicial settlement of international disputes has spread into virtually all areas of common concern, although it affects various policy areas, institutions, and regions differently.[4] That judicialization has become a key feature of many different international governance systems was generally applauded by international lawyers who saw law as a "Gentle Civilizer of Nations" in the sense that it provides a mechanism for channelling conflict into courtrooms and away from battlefields.[5]

In particular, the highly judicialized dispute settlement system has been a defining attribute of international trade and investment law for the past three decades. The WTO dispute settlement system (DSS), for instance, was described as the "crown jewel" of the international trade architecture and the representation of an epochal move of international trade law from a

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[1] Alec Stone Sweet, 'Judicialization and the Construction of Governance' (1999) 32 (2) Comparative Political Studies 147, 164.
[2] Judith Goldstein et al., 'Legalization and World Politics' (2000) 54 (3) International Organizations 385, 389-390.
[3] Karen J. Alter, *The New Terrain of International Law* (Princeton University Press, 2014), 68-79.
[4] Cesare Romano, 'The Shadow Zones of International Judicialization', in Cesare Romano, Karen Alter and Yuval Shany (eds), *Oxford Handbook of International Adjudication* (OUP, 2014) 90, 91.
[5] See generally Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (CUP, 2004).

diplomacy-based to a rule-based system.[6] Different from most international courts, the WTO DSS has exclusive and compulsory jurisdiction over international trade disputes. Further, the losing party bears an international legal obligation to comply with the adopted panel and Appellate Body (AB) reports.[7] The failure to comply with an adopted WTO ruling may result in the suspension of market access concessions authorized by the WTO dispute settlement body (DSB). As of 31 December 2023, WTO Members had referred 621 disputes to the DSS, leading to 290 panel reports and 169 Appellate Body reports adopted since the entry into force of the WTO on 1 January 1995.[8]

The arbitral system of investor-state dispute settlement (ISDS) is another example of judicialization of international economic relations. Allowing foreign investors to bring claims against host states without the need for home state espousal, the ISDS mechanism was designed to "de-politicize" international investment disputes and create a forum that would offer investors a fair hearing before an independent, neutral, and qualified tribunal.[9] In the process, international arbitration has become more judicialized, acquiring some of the trappings of judicial procedures.[10] Although the first case was not registered before 1972, there has been a dramatic increase in ISDS activity since the mid-1990s. As of 31 December 2022, the total number of publicly known ISDS claims had reached 1,257.[11]

In stark contrast to judicialization, "de-judicialization" is defined broadly in this article as a *reduction* in the influence of third-party judicial and quasi-judicial arbitral tribunals over the outcome of policy choices, for instance, the removal from judicial cognizance of a policy issue that had previously been subject to judicialization.[12] Similar to judicialization, dejudicialization should be conceptualized in degrees along a continuum. Complete dejudicialization, in the sense that a well-established international tribunal ceased to operate entirely, may happen only in extreme cases. Nevertheless, the scope and depth of judicial governance in international trade and investment are much less than they used to be. The WTO AB has ceased functioning since December 2019 because the United States has been blocking a consensus on appointments of AB members. Losing WTO Members have nevertheless appealed panel reports into the void, leaving many disputes in a state of limbo.[13] As of December 2023, appeals in 30 proceedings were pending before the AB and cannot be further advanced until new members are appointed.[14] Likewise, the ISDS is currently undergoing a legitimacy crisis.[15] A growing

[6] JHH. Weiler, 'The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement' (2001) 35 (2) Journal of World Trade 191, 192-193; Cosette D. Creamer, 'Can International Trade Law Recover? From the WTO's Crown Jewel to Its Crown of Thorns' (2019) 113 American JIL Unbound 51.
[7] John H. Jackson, 'International Law Status of WTO Dispute Settlement Reports: Obligation to Comply or Option to "Buy Out"?' (2004) 98 (1) American JIL 109, 123.
[8] WTO, 'Dispute Settlement Activity – Some Figures', <https://www.wto.org/english/tratop_e/dispu_e/dispustats_e.htm>.
[9] Ursula Kriebaum, 'Evaluating Social Benefits and Costs of Investment Treaties: Depoliticization of Investment Disputes' (2018) 33 (1) ICSID Review 14, 16-17.
[10] Remy Gerbay, 'Is the End Nigh Again? An Empirical Assessment of the "Judicialization" of International Arbitration' (2014) 25 American Review of International Arbitration 223, 249.
[11] UNCTAD, *World Investment Report 2023: Investing in Sustainable Energy for All* (2023), at 77.
[12] Daniel Abebe & Tom Ginsburg, 'The Dejudicialization of International Politics?' (2019) 63 International Studies Quarterly 521; Emily Zackin & Mila Versteeg, 'De-judicialization Strategies', The Yale Law Journal Forum (28 November 2023) 228, 229.
[13] Jean Galbraith, 'U.S Refusal to Appoint Members Renders WTO Appellate Body Unable to Hear new Appeals' (2020) 114 (3) American JIL 518, 519-520.
[14] WTO, *supra* n. 8.
[15] Daniel Behn, Ole Kristian Fauchald and Malcolm Langford (eds), *The Legitimacy of Investment Arbitration: Empirical Perspectives* (CUP, 2022), at 7.

number of states have terminated bilateral investment treaties (BITs) with ISDS clauses, withdrew from the International Center for the Settlement of Investment Disputes (ICSID), or created new constraints on resorting to ISDS.[16] In response to this backlash against ISDS, competing proposals were advanced to restructure the system at the United Nations Commission on International Trade Law (UNCITRAL) Working Group III (WGIII).[17]

The objective of this article is to reflect on the rise and decline of judicialization in international trade and investment regimes and explore the future of international economic dispute settlement. It makes three key arguments. First, the severe disjuncture between anticipated benefits of international dispute settlement and the actual costs imposed on states explains the emerging trend of dejudicialization in international economic law. Second, dejudicialization, at least to some extent, is likely to be a staple feature of international economic law in the new era of deglobalization, climate crisis, and great power rivalry. Third, judicialization of international dispute settlement will not demise but substantial transformation is necessary to meet contemporary challenges. The rest of the article proceeds as follows. Part 2 maps the recent decline of judicialization in settling international trade and investment disputes. Part 3 explores the key factors underlying the recent dejudicialization in international dispute settlement. Part 4 explains why judicialization of international economic disputes will not demise but substantial transformation is inevitable. Part 5 concludes the article.

2. Mapping the Decline of Judicialization in International Dispute Settlement

2.1 The Demise of the WTO Appellate Body

The WTO DSS established in 1995 is often praised as one of the most important innovations of the Uruguay Round. It has built upon and brought important modifications and elaborations to the dispute settlement system under GATT 1947 that evolved quite remarkably over nearly 50 years. The GATT DSS achieved an impressive record in dispute resolution.[18] Yet it suffered from several notable deficiencies that adversely affected its performance. [19] The most significant defect was the positive consensus requirement which granted GATT contracting parties the virtual right to block the establishment of panels, the adoption of their reports, and the authorization of sanctions for noncompliance. The defect became more acute as the number, visibility, and importance of cases increased during the 1980s.[20] This veto power led in turn the United States to impose regularly unilateral trade restrictions, termed "Section 301 actions" on states that violated the GATT or had, in the US view, unreasonable trade policies.[21] Further difficulties associated with the GATT DSS included delays in decision-making absent binding

[16] Sergio Puig and Gregory Shaffer, 'Imperfect Alternatives: Institutional Choice and the Reform of Investment Law' (2018) 112 American JIL 361, 366.
[17] Anthea Roberts, 'Incremental, Systemic, and Paradigmatic Reform of Investor-State Arbitration' (2018) 112 (3) American JIL 410.
[18] Robert E. Hudec, *Enforcing International Trade Law: The Evolution of the Modern GATT Legal System* (Butterworth Legal Publishers, 1993), 361-362.
[19] John H. Jackson, *Sovereignty, the WTO, and Changing Fundamentals of International Law* (CUP 2006), at 137.
[20] Judith L. Goldstein and Richard H. Steinberg, 'Regulatory Shift: The Rise of Judicial Liberalization at the WTO' in Walter Mattli and Ngaire Woods (eds), *The Politics of Global Regulation* (Princeton University Press 2009), at 224.
[21] Monica Hakimi, 'Unfriendly Unilateralism' (2014) 55 (1) Harvard ILJ 105, 134.

timelines, the sporadic participation of developing countries, and fragmentation in dispute settlement procedures between the GATT and various Tokyo Round Codes.[22]

The WTO addressed many of these shortcomings and introduced a significantly strengthened DSS during the Uruguay Round.[23] It is an integrated framework with exclusive jurisdiction over all disputes arising under the various WTO Agreements between WTO Members with only minor variations. It set specific timeframes for every stage of the dispute settlement process to ensure prompt settlement of disputes and explicitly outlawed unilateral trade sanctions. It instituted a permanent AB to review panel reports in addition to a formal surveillance of implementation of DSS rulings. Most importantly, in lieu of the problematic GATT consensus requirement, the WTO DSS applies a negative consensus rule to all stages of the DSS. Since chances of reaching such a consensus is only a theoretical possibility as the prevailing party would most likely go along with the decision, progress along the multistage DSS process has all become virtually automatic. [24] As many observed, the WTO DSS is, for all intents and purposes, highly judicialized. Its style, methodology and arguments are those of a court.[25]

How to assess the performance of the WTO DSS depends on the benchmark one applies. The consensus among most WTO commentators is that overall, it has performed well.[26] WTO Members have made extensive use of it and generally complied with the adopted reports.[27] It is also one of the most actively used and most authoritative state-to-state dispute settlement mechanism at the multilateral level in the world.[28] Granted, the WTO DSS has a number of weaknesses, such as lack of timeliness in settling trade disputes; no interim relief to protect the economic and trade interests of the successful complainant during the dispute settlement procedure; no compensation for the harm suffered by the complainant; not all WTO members have the same practical ability to resort to authorized retaliation in the event of non-implementation; and a suspension of concessions has been ineffective in bringing about implementation in a few cases.[29]

The most serious problem of the WTO DSS, in the view of the United States, is that the AB has engaged in persistent judicial overreach on a range of procedural and substantive matters, thereby disregarding for the rules set by WTO Members and impermissibly adding to or diminishing rights or obligations under the WTO Agreement.[30] The US allegations about the

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[22] Sivan Shlomo Agon, *International Adjudication on Trial: The Effectiveness of the WTO Dispute Settlement System* (OUP, 2019), 53-54.
[23] Joost Pauwelyn, 'The Transformation of World Trade' (2005) 104 Michigan Law Review 1, 25.
[24] Agon, *supra* n. 22, at 55-57.
[25] Holger Hestermeyer, 'International Human Rights Law and Dispute Settlement in the World Trade Organization' in Martin Scheinin (eds), *Human Rights Norms in 'Other' International Courts* 199 (CUP, 2019), at 203-204.
[26] William J. Davey, 'The WTO and Rules-Based Dispute Settlement: Historical Evolution, Operational Success, and Future Challenges' (2014) 17 Journal of International Economic Law 679, 686-687; Sivan Shlomo-Agon and Yuval Shany, 'The WTO Dispute Settlement System' in Yuval Shany (ed), Assessing the Effectiveness of International Courts 189 (OUP, 2014), at 222; Arie Reich, 'The Effectiveness of the WTO Dispute Settlement System: A Statistical Analysis', EUI Working Paper Law 2017/11, at 30 <https://cadmus.eui.eu/bitstream/handle/1814/47045/LAW_2017_11.pdf>.
[27] Alasdair R. Young, *Supplying Compliance with Trade Rules: Explaining the EU's Responses to Adverse WTO Ruling* (OUP, 2021), at 43-44.
[28] WTO, Ministerial Conference (MC) 11 Briefing Note on Dispute Settlement <https://www.wto.org/english/thewto_e/minist_e/mc11_e/briefing_notes_e/bfdispu_e.htm>.
[29] Gregory Shaffer, Manfred Elsig and Sergio Puig, 'The Extensive (but Fragile) Authority of the WTO Appellate Body' (2016) 79 (1) Law and Contemporary Problems 237, 267-270.
[30] USTR, *Report on the Appellate Body of the World Trade Organization* (February 2020), 1-2.

WTO AB might be distilled into two categories: those where the AB exceeded its limited mandate, and those where the AB erroneously interpreted the WTO Agreements.[31] For the first category, the United States claim that the AB exceeded its mandate by (1) exceeding the mandatory 90-day time limit for appellate review; (2) allowing outgoing A members to complete work on appeals to which they had been assigned before the end of their term; (3) making findings on issues of fact although its mandate is to address only legal issues; (4) issuing "advisory opinions" on issues not necessary to resolve the dispute; (4) treating its reports as binding precedent; (5) ignoring the explicit mandate of the WTO Dispute Settlement Understanding (DSU) that it recommend a WTO Member to bring a WTO-inconsistent measure into compliance with WTO rules; and (6) opining on matters within the authority of WTO Members acting through the Ministerial Conference, General Council, and WTO DSB.[32] For the second category, the United States mainly alleged that the AB's erroneous interpretations of the trade remedy provisions, such as public body, out-of-country benchmarks, and double remedies, have prejudiced the ability of market economy countries to take measures to address economic distortions caused by non-market economies such as China.[33]

The validity of the US criticisms of AB is difficult to assess. Many WTO Members and commentators share at least some of the concerns outed by the United States on the performance of the AB even though they do not necessarily support the US's blockage of the new AB appointment.[34] Others have defended the AB from different perspectives. For example, some commentators note the practical constraints of international dispute settlement. They argue that the criticisms levelled at the AB mostly reflect the failures of the WTO membership as a whole and the operation of the WTO as an organization. Decision-making by consensus and a collective failure of WTO Members to agree on the most pressing DSS reforms meant that a greater responsibility was placed with the judicial branch of the WTO for ensuring that the system could continue to operate.[35] Others highlight that there is inherent flexibility in principles of treaty interpretation that may reasonably lead interpreters to reach different conclusions about the meaning of a WTO rule.[36] The interpretation of WTO Agreement is particularly challenging because the relevant texts may have resulted from political compromises between a large number of WTO Members with competing interests and perspectives.[37] And others pointed out that the AB members, despite their strong incentive to uphold prior rulings, modify precedent regularly and they are more adaptive than critics suggest.[38] Additional complicating factors include the AB's lack of resource to meet the time frame for appellate review.[39] Most WTO

[31] Nina M. Hart and Brandon J. Murrill, 'The World Trade Organization's (WTO's) Appellate Body: Key Disputes and Controversies', Congressional Research Service R46852 (July 22, 2021), at 40.
[32] USTR, *supra* n. 30, at 4-8.
[33] *Ibid*, at 8-12.
[34] Petros C. Mavroidis et al, 'WTO Dispute Settlement and the Appellate Body: Insider Perceptions and Members' Revealed Preferences' (2020) 54 (5) Journal of World Trade 667, 686; Jorge Miranda and Manuel Sanchez Miranda, 'Chronicle of a Crisis Foretold: How the WTO Appellate Body Drove itself into a Corner' (2023) 26 Journal of International Economic Law 435, 459-460.
[35] Bernard M. Hoekman and Petros C. Mavroidis, 'Preventing the Bad from Getting Worse: The End of the World Trade Organization as We Know it?' (2021) 32 European JIL743, at 746; Isabelle Van Damme, '25 Years of Law and Practice at the WTO: Did the Appellate Body Dig its Own Grave?' (2023) 26 Journal of International Economic Law 124, 129-131.
[36] Isabelle Van Damme, 'Treaty Interpretation by the WTO Appellate Body' (2010) 21 (3) European JIL 605, 636-637; Richard Gardiner, *Treaty Interpretation* (OUP, 2nd Edition, 2017), at 459.
[37] Hart and Murrill, *supra* n. 31, at 25.
[38] Jeffery Kuick and Sergio Puig, 'Do International Dispute Settlement Bodies Overreach? Reassessing World Trade Organization Dispute Ruling' (2022) 66 (4) International Studies Quarterly 1, 7.
[39] Peter Van den Bossche, 'The Demise of the WTO Appellate Body: Lessons for Governance of International Adjudication?', WTI Working Paper No. 02/2021 (October 28, 2021), at 16-18.

Members, including the European Union, China, India, and Canada, disagree with the United States's allegation that the AB has systematically engaged in judicial overreach and demonstrated consistent and malicious disregard for procedural and institutional rules.[40]

Under the DSU rules, any WTO Member has the procedural power to block the appointment of an AB member because all decisions under the DSU are made by consensus.[41] Since 2017 the United States has refused to support filling AB vacancies until other Members agree to DSS reforms. Faced with a possible collapse of the DSS, WTO Members tabled a number of proposals for AB reform to address the concerns raised by the United States. However, the United States rejected all reform proposals as insufficient. As an interim response to the current paralysis of the AB, 19 WTO Members created the Multi-Party Interim Appeal Arbitration Arrangement (MPIA) pursuant to Article 25 of the DSU in April 2020.[42] The primary objective of the MPIA is to preserve the WTO DSS's binding character and two levels of adjudication. For this purpose, MPIA participants must commit *ex ante* not to appeal a panel report to the AB that no longer functions and to use the MPIA instead.[43] The MPIA is also a testing ground for possible innovations to address some of the criticisms against the AB. For example, to fulfill the request that the arbitrators issue the award within 90 days following the filing of the Notice of Appeal, the MPIA arbitrators may make decisions on page limits, time limits as well as on the length and number of hearings required to enhance the procedural efficiency of appeal proceedings.[44] The MPIA Arbitrators may also propose the exclusion of claims based on the alleged lack of an objective assessment of the facts pursuant to Article 11 of the DSU.[45] Pursuant to Article 25.4, an MPIA award is binding on the disputing parties.

There is much uncertainty about whether the MPIA is a viable temporary mechanism that can replace the WTO AB and preserve WTO Members' right to appeal. The evidence up to date is promising.[46] Considering the first MPIA award in *Colombia – Frozen Fries* dispute, it ensured both the right of parties to appeal panel reports and to obtain a final, binding ruling. Colombia informed the DSB that "while it disagreed with some of the findings, it intended to comply with the arbitrators' award in a manner that respects Colombia's WTO obligations."[47] In addition, bilateral appeal arbitration agreements have been concluded within the set 60-day time limit in eight ongoing disputes under the MPIA.[48] It was also suggested that the mere existence of the MPIA, and its commitment not to appeal into the void, may have contributed

[40] *Ibid*, at 5.
[41] DSU, Article 2.4. Some WTO commentators argued that Article IX:1 of the Marrakesh Agreement makes it clear that the WTO Ministerial Conference is not subject to the DSU's consensus decision-making rule. The Ministerial conference has the authority to take a decision on appointing AB members by majority vote. Since not a single WTO Member has formally proposed that the decision to appoint AB members be made by voting, this view has not gained much traction beyond academic circles. See Henry Gao, 'Finding a Rules-Based Solution to the Appellate Body Crisis: Looking Beyond the Multiparty Interim Appeal Arbitration Arrangement' (2021) 24 Journal of International Economic Law 534, 545-546.
[42] WTO, 'Multi-Party Interim Appeal Arbitration Arrangement Pursuant to Article 25 of the DSU', JOB/DSB/1/Add.12 (30 April 2020). Article 25 allows for "expeditious arbitration" as an alternative means of dispute settlement to usual panel and AB processes on issues "that are clearly defined by both parties". Article 25 also permits disputing parties to develop their own rules and procedures.
[43] *Ibid*, Annex 1, para 2.
[44] *Ibid*, para 12.
[45] *Ibid*, para 13.
[46] Joost Pauwelyn, 'The WTO's Multi-Party Interim Appeal Arbitration Arrangement (MPIA): What's New?' (2023) 22 (5) World Trade Review 693, 695.
[47] WTO, 'Panels Established to Review EU Complaints Regarding Chinese Trade Measures', Summary of the DSB Meeting of 27 January 2023 <https://www.wto.org/english/news_e/news23_e/dsb_27jan23_e.htm>
[48] See https://wtoplurilaterals.info/plural_initiative/the-mpia/.

to WTO Members reaching a settlement or agreeing to the adoption of the panel report without appeal.[49]

Nevertheless, it is widely acknowledged that the MPIA does not offer a long-term solution for WTO dispute settlement crisis. To begin with, with its limited membership of 26 members as of May 2024, the majority of the WTO Members, including some major trading countries such as the United States, have not yet agreed to participate in the MPIA.[50] The arbitral award in *Colombia – Frozen Fries* dispute remains the only MPIA award up to date.[51] Previously an award was issued in an *ad hoc* appeal-arbitration in *Turkey – Pharmaceutical Products* (EU). That award was not formally an MPIA award because Turkey is not an MPIA member, although the arbitration agreement between Turkey and EU included several elements of the MPIA.[52] Because of its limited membership, the number of disputes among MPIA participants is so far insignificant.

Secondly, the MPIA is not a legally binding treaty but only a voluntary political commitment to sign appeal arbitration agreements in the future in specific cases. In case a WTO Member refuses to enter into an arbitration agreement or accept the final arbitral award, the MPIA cannot be enforced. [53] Different from a WTO AB report, an MPIA award will only be notified to the DSB but not formally adopted by it.[54] Without formal adoption by the WTO membership, the precedential value of MPIA awards is uncertain.[55] Consequently, the MPIA may evolve into a DSS where different interpretations are adopted for the rights and obligations of different WTO Members, resulting in the fragmentation of WTO law.[56]

Finally, it is questionable to what extent can the MPIA address the US concerns with respect to the WTO AB. It is clear that many of the innovations made in the MPIA are conductive to address the US concerns.[57] For example, it is much more likely for MPIA arbitrators to comply with the binding ninety-day period to consider the appeals provided for in the DSU. This is because the MPIA allows the arbitrators to take the necessary organizational measures to streamline procedures and there are ten standing appeal arbitrators in the MPIA, compared to only seven AB members in the DSU.[58] However, it remains unsettled how the MPIA may respond to other US concerns about an appellate mechanism. Take the US's criticism of the AB's view that a panel must follow a prior AB interpretation unless the panel has "cogent reasons"

[49] Pauwelyn, *supra* n. 46, at 695.
[50] William J. Davey, 'WTO Dispute Settlement: Crown Jewel or Costume Jewellery' (2022) 21 World Trade Review 291, 294.
[51] WTO, *Colombia– Anti-Dumping Duties on Frozen Fries from Belgium, Germany and The Netherlands*, Award of the Arbitrators, WT/DS591/ARB25 (21 December 2022).
[52] Award of the Arbitrators, *Turkey – Certain Measures Concerning the Production, Importation and Marketing of Pharmaceutical Products Arbitration under Article 25 of the DSU*, WT/DS583/ARB25 (25 July 2022).
[53] Gao, *supra* n. 41, at 543.
[54] DSU Article 25.3.
[55] Simon Lester, 'Can Interim Appeal Arbitration Preserve the WTO Dispute System?', Cato Institute (September 1, 2020) <https://www.cato.org/free-trade-bulletin/can-interim-appeal-arbitration-preserve-wto-dispute-system>.
[56] Kholofelo Kugler, 'Operationalizing MPIA Appeal Arbitrations: Opportunities and Challenges' in Manfred Elsig, Rodrigo Polanco, and Peter van den Bossche (eds), *International Economic Dispute Settlement: Demise or Transformation*? (CUP, 2021), at 87-88.
[57] Mariana de Andrade, 'Procedural Innovations in the MPIA: A way to Strengthen the WTO Dispute Settlement Mechanism?' (2019) 63 Questions of International Law 121, 133-144.
[58] Olga Starshinova, 'Is the MPIA a Solution to the WTO Appellate Body Crisis?' (2021) 55 (5) Journal of World Trade 787, 804.

for departure as an example. The MPIA affirms the importance of consistency and predictability in the interpretation of rights and obligations to WTO Members. In *Colombia – Frozen Fries*, the arbitrators referred to prior AB reports as authorities to interpret the DSU and GATT provisions.[59] Moreover, the MPIA promotes the principle of collegiality and allows all ten arbitrators to receive documents relating to a specific dispute and to discuss matters of interpretation, practice, and procedure.[60] The deeper level of cooperation among arbitrators provided by the MPIA is likely to promote the precedential nature of awards strongly criticized by the United States. In fact, it is difficult to imagine any real difference between the AB's approach of "absent cogent reasons" and the alternative approach of "persuasiveness" preferred by the United States.[61]

More broadly, what approach will the MPIA take regarding the interpretation of core WTO disciplines such as the non-discrimination obligation, public policy exceptions, and trade remedy laws? How much deference will the MPIA show toward politically sensitive domestic laws and regulations? These issues lie at the heart of the allegation that the WTO AB has engaged in judicial overreach. At first sight, it is encouraging to see that the arbitrators are not bound by the WTO AB's prior decisions. In *Colombia – Frozen Fries*, the arbitrators disagreed with the AB's interpretative approach to Article 17.6 (ii) of the Antidumping Agreement (AD). Article 17.6 (ii) provides:

> (ii) the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.

In *US – Continued Zeroing*, the AB ruled that Article 17.6 (ii) contemplates a sequential analysis. A panel should *first* interpret the relevant provisions under treaty interpretation rules codified in the Vienna Convention. The second sentence of Article 17.6 (ii) applies if more than one permissible interpretation emerges *after* the panel engages the exercise in the first step.[62] Following this approach, in no WTO dispute did the AB ever find that there was a permissible interpretation of the AD Agreement other than the interpretation favoured by the AB.[63]

The MPIA arbitrators flatly rejected the AB's sequential analysis, viewing such an approach pays insufficient regard to the fact that the second sentence of Article 17.6 (ii) grants special deference to investigating authorities. Instead, the MPIA arbitrators adopted an "integrative" approach which begins by asking whether a proposed interpretation is a "permissible" one under the customary rules of treaty interpretation. Rather than engaging in *de novo* interpretation to find the "final" or "correct" interpretation, as the AB did, the new approach assumes that different treaty interpreters applying the same tools of the Vienna Convention may reach different conclusions on the "correct" interpretation of a treaty provision. [64] Clearly, the MPIA

[59] Robert Howse, 'Unappealable but not Unappealing: WTO Dispute Settlement without the Appellate Body', IISD Policy Analysis (July 17, 2023) <https://www.iisd.org/articles/policy-analysis/wto-dispute-settlement-without-appellate-body>.
[60] MPIA, *supra* n. 42, para 5.
[61] James Bacchus & Simon Lester, 'The Rule of Precedent and the Role of the Appellate Body' (2020) 54 Journal of World Trade 183, 194.
[62] WTO Appellate Body Report, *United States – Continued Existence and Application of Zeroing Methodology*, WTO/DS350/AB/R (4 February 2009), para 271.
[63] Philippe De Baere, Clotilde du Parc and Isabelle Van Damme, *The WTO Anti-dumping Agreement: A Detailed Commentary* (CUP, 2021), at 477.
[64] *Colombia – Frozen Fries* Award, *supra* n. 51, paras 4.12-4.15.

arbitrators purported to establish a more deferential standard of review under Article 17.6 of the AD.

Nevertheless, it is not entirely clear whether the MPIA arbitrators' integrative approach would actually entail kind of deference that some domestic authorities have hoped for. Following the new approach, the ultimate question that MPIA arbitrators need to answer is whether a proposed interpretation is "permissible" under the Vienna Convention. In *Colombia – Frozen Fries*, the MPIA arbitrators showed little deference to Colombia's interpretations and dismissed them as impermissible. As a result, it is not evident that the new integrative approach to Article 17.6 (ii) of the AD articulated by the MPIA arbitrators actually made a practical difference.[65] In short, it is too early to issue the verdict on the long-term value of the MPIA for improving the WTO jurisprudence.

2.2 The Backlash against Investor − State Arbitration

The ISDS provides a depoliticized international dispute settlement mechanism that carries significant advantages for both the foreign investor and the host state. It not only offers foreign investors access to an effective international remedy but also shields a host state from other processes, notably diplomatic protection, and improves its investment climate.[66] However, the ISDS is currently undergoing a legitimacy crisis. Criticisms levelled at the ISDS are manifold: lack of an appeal process; lack of stability and predictability in arbitral awards; questionable independence and impartiality of arbitrators; lack of gender and geographical diversity among arbitrators; the regulatory chill effect; and lengthy and costly ISDS proceedings.[67] Given these challenges, a growing number of states have taken steps to minimize their exposure to ISDS. Some states have terminated BITs with ISDS clauses (such as Ecuador, Indonesia, and South Africa) or withdrawn from the ICSID Convention (such as Bolivia, Ecuador, and Venezuela).[68] Others have reviewed their BITs and created new constraints on accessing ISDS. For example, in the wake of an arbitration brought by Philip Morris against its tobacco plain packaging regulation, the Australian Government declared on 12 April 2011 that it would no longer include ISDS provision in its future investment treaties or trade agreements.[69] Likewise, deeply sceptical that ISDS promotes offshoring and undermines its regulatory space, the Unites States has significantly curtailed the degree to which foreign investors can resort to ISDS in the United States-Mexico-Canada Agreement (USMCA).[70]

In response to the backlash, competing proposals were advanced to restructure the ISDS system. Roberts has identified three main camps, i.e., incrementalists, systemic reformers and

[65] Alan Yanovich, 'WTO Issues First Award under MPIA and Tackles Standard of Review in Anti-Dumping Disputes', Akin Trade Law (January 17, 2023) <https://www.akingump.com/en/insights/blogs/ag-trade-law/wto-issues-first-award-under-mpia-and-tackles-standard-of-review-in-anti-dumping-disputes>.
[66] Christoph Schreuer, 'Investment Arbitration', in Cesare Romano, Karen Alter and Yuval Shany (eds), *Oxford Handbook of International Adjudication* 295 (OUP, 2014), 296-297.
[67] Puig and Shaffer, *supra* n. 16, at 366.
[68] Malcolm Langford and Daniel Behn, 'Managing Backlash: The Evolving Investment Treaty Arbitrator?' (2018) 29 (2) European JIL 551, 554-558.
[69] Leon E. Trakman, 'Investor-State Arbitration: Evaluating Australia's Evolving Position' (2014) 15 The Journal of World Investment & Trade 152, 161-162. Australia later reversed its anti-ISDS policy and signed the CPTPP which contains ISDS mechanisms.
[70] Jerry L. Lai, 'A Tale of Two Treaties: A Study of NAFTA and the USMCA's Investor-State Dispute Settlement Mechanisms' (2021) 35 (2) Emory ILR 259, 281-284.

paradigm shifters, that have emerged with distinct proposals at UNCITRAL WGIII.[71] The supporters of incremental reform of the current ISDS system, such as Japan and to some extent the United States, favor to retain the ISDS system and downplay the criticisms levelled at it as perceptions rather than reality.[72] Even though they recognize that there are some outstanding problems to be addressed, incrementalists prefer to adopt small to moderate adjustments and more targeted reforms as opposed to systematic reforms. The ISDS mechanism in the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) represents an incremental approach to ISDS reform.[73] To begin with, the CPTPP allows investors to resort to ISDS without prior recourse to domestic courts. However, the CPTPP defines more precisely the contours of contracting parties' obligations, such as fair and equitable treatment and indirect expropriation, in an attempt to eliminate the likelihood of successful challenges to non-discriminatory public welfare measures.[74] Furthermore, the CPTPP put restrictions on the types of claims that can be submitted to ISDS. These exceptions cover important policy areas such as tobacco control measures and authorisation of foreign investment to ensure that these sensitive issues are not subject to review by arbitral tribunals.[75] Lastly, largely operating under the traditional ISDS framework, the CPTPP does not even pursue the creation of an appeals facility.[76] Thus the CPTPP has addressed current concerns about the ISDS in an evolutionary rather than a revolutionary manner.

Systemic reformers move further compared to incrementalists. They see merit in retaining the ISDS based on its oft-repeated advantages. However, systemic reformers view the current ISDS as seriously flawed and push for systematic and structural reforms.[77] The most vocal advocate for this camp is the EU. In 2015, the European Commission proposed the establishment of an international court system (ICS) to replace traditional ISDS system within the context of the negotiation of the Transatlantic Trade and Investment Partnership (TTIP) with the United States. The novel ICS retains the standing of private investors to file claims directly against states, but it effectively creates a permanent tribunal of first instance and an appellate tribunal with full-time adjudicators having fixed terms, paid a regular salary, and appointed to hear the case on a random basis.[78] The new model is designed to respond to the criticisms that party-appointed, *ad hoc* arbitrators make investment arbitration insufficiently accountable to democratic institutions by moving away from appointment by the disputing parties to ensure independence and impartiality of arbitrators. Viewing a standing two-tier court mechanism as the only available option that effectively responds to all the concerns about the traditional ISDS model, the EU later incorporated the ICS in some recent free trade agreements

[71] Roberts, *supra* n. 17, at 410. The UNCITRAL WGIII has been mandated to deliberate possible structural and procedural reform of ISDS system since 2017. See Report of the Working Group III on the Work of its Forty-Sixth Session (27 October 2023), A/CN.9/1160.
[72] Anthea Roberts & Zeineb Bouraoui, 'UNCTIRAL and ISDS Reform: What are States' concerns?' EJIL:TALK! (5 June 2018) <https://www.ejiltalk.org/uncitral-and-isds-reforms-what-are-states-concerns/>.
[73] Article 9.19 (1) of the CPTPP.
[74] Article 9.6 and Annex 9-B of the CPTPP; Caroline Henckels, 'Protecting Regulatory Autonomy through Greater Precision in Investment Treaties: The TPP, CETA, and TTIP' (2016) 19 Journal of International Economic Law 27, 33-43.
[75] Australian Government Department of Foreign Affairs and Trade, 'CPTPP Outcomes: Investment', at 3 (30 November 2023), https://www.dfat.gov.au/sites/default/files/cptpp-investment.pdf
[76] Article 9.23 (11) of the CPTPP.
[77] Submission from the European Union, 'Possible Reform of Investor-State Dispute Settlement (ISDS)', A/CN.9/WG.III/WP.159/Add.1 (24 January 2019), para 2.4.
[78] See generally Marc Bungenberg and August Reinisch, *From Bilateral arbitral Tribunals and Investment Courts to a Multilateral Investment Court* (Springer, 2020), 29-115.

(FTAs) and described it as an important first step towards the European Union's ultimate goal of establishing a permanent multilateral investment court.[79]

Paradigm shifters hold the most critical view of the ISDS system, dismissing the current system as irrevocably flawed and arguing for a fundamental overhaul. In practice, they advocate going back to the past before the existence of ISDS. For example, Brazil championed in a series of Cooperation and Investment Facilitation Agreements the establishment of one 'Focal Point' or 'ombudsman' for each party and one Joint Committee composed of both parties to the IIA. Focal Points are domestic governmental institutions that are mandated to hear foreign investors' complaints, with the aim of preventing the emergence of formal disputes between investors and host states. When Focal Points are unsuccessful, the disputes will be referred to the Joint Committee, who shall examine the dispute and issue a public report with its recommendations. If the dispute persists, the aggrieved party may initiate a state-to-state arbitration.[80] South Africa terminated most of its BITs and adopted domestic legislation permitting foreign investors to sue in domestic courts or bringing mediation claims against the host government. If a dispute cannot be resolved, the government may later consent to state-to-state arbitration.[81]

Given the competing preferences to how ISDS should be reformed, it is unlikely for states to agree to a uniform ISDS mechanism applicable to all investment disputes. Instead, current reform efforts are likely to produce an ever more complex ISDS regime, governed by more diverse substantive rules and methods for interpreting ever more diverse international investment agreements (IIAs).[82] Recognizing this reality, UNCITRAL approved a workplan to move forward on ISDS reform with the ultimate objective of formulating a multilateral instrument that allows each state the choice of whether and to what extent it wished to adopt the relevant reforms in 2026.[83] In other words, the legitimacy crisis of the ISDS and ensuing controversy about the system will not end any time soon.

3. Explaining Dejudicialization in International Dispute Settlement

Judicialization initially results from delegation by states. States delegate dispute settlement authority to international courts and tribunals to further their interests. In particular, international courts can act as trustees that enhance the credibility of commitments states make to one another.[84] By interpreting those commitments and identifying behaviour that violates them, international courts increase the likelihood that states will comply with their obligations in situations where compliance generates short-term political losses but long-term political gains.[85]

[79] European Commission, 'European Commission Proposes Signature and Conclusion of EU-Canada Trade Deal' Press Release (Brussels, 5 July 2016).
[80] Geraldo Vidigal and Beatriz Stevens, 'Brazil's New Model of Dispute Settlement for Investment: Return to the Past or Alternative for the Future?' (2018) 19 Journal of World Investment and Trade 475, 487-489.
[81] Roberts, *supra* n. 17, at 417.
[82] Jose E. Alvarez, 'ISDS Reform: The Long View' (2021) 36 (2) ICSID Review 253, 254.
[83] Report of the Working Group III on the Work of its Resumed Fortieth Session (27 May 2021), A/CN.9/1054.
[84] Laurence R. Helfer and Anne-Marie Slaughter, 'Why States Create International Tribunals: A Response to Professors Posner and Yoo' (2005) 93 (3) California Law Review 899, 932-933.
[85] Arthur A. Stein, 'Coordination and Collaboration: Regimes in an Anarchic World', in Stephen D. Krasner (ed), *International Regimes* 115 (Cornell University Press, 1983), at 120.

Similar to the exercise of judicial power at domestic level, judges at international level also have preferences and they may seek to advance them through judicial decision-making.[86] However, international courts and tribunals are constrained by the power of other powerful political actors. For example, when powerful states see the judicialization as severely constraining their policymaking discretion, they may seek to adjust the system through various techniques such as withdrawing from or reshaping the system to make it more compatible with their own preferences, or even replacing international law with domestic law.[87] In other words, the degree to which international courts and tribunals can exercise power will depend on the position of other actors, and the available formal and informal tools to constrain the courts.[88]

Abebe and Ginsburg argue that dejudicialization is more likely to occur when there is a severe disjuncture between benefits of the court anticipated by states *ex ante* and the costs actually imposed on the powerful states subject to its jurisdiction.[89] Such scenarios may arise, for instance, when the court decisions are producing net losses for states on a regular basis that exceed political costs of dejudicialization. Even if judges and arbitrators act as perfect agents of the states that set up the system, there will likely be little interest for states in supporting the court if the anticipated benefits of participating in the dispute settlement proceedings do not materialize or unexpected costs rise sharply.[90]

Borrowing Abebe and Ginsburg's theoretical framework for dejudicialization, this article argues that significant divergence between anticipated benefits from the WTO DSS and the actual costs imposed explains the United States' continued disenchantment with the WTO DSS. To begin with, the functioning of the WTO DSS has a disproportionate impact on the United States because more than one quarter of all disputes at the WTO have been challenges to US laws and regulations. By May 2024, 159 disputes have been filed against the United States and no other WTO Member has been a defendant in more than a hundred disputes.[91] Moreover, approximately 90 percent of the disputes pursued against the United States at the WTO have led to a report finding that the US laws were inconsistent with WTO agreements. As the USTR commented bitterly, this record means that the WTO has found US laws or measure WTO-inconsistent between five and six times every year for more than twenty years.[92]

Historically, the United States was the driving force behind the WTO's shift towards greater judicialization. Other WTO Members such as the EU and Japan favoured a less judicial DSS, but nonetheless decided to accept a more judicialized system in exchange for the US commitment to use the new multilateral system instead of taking unilateral measures under domestic laws.[93] Ironically, today it is the United States that has come to raise serious challenges to the judicialized nature of the DSS. Putting aside the issue of whether the WTO panelists interpreted WTO rules correctly, the repeated losses of the United States at the WTO demonstrated the great variance between the expectations of the United States at the moment

[86] Jeffery K. Staton and Will H. Moore, 'Judicial Power in Domestic and International Politics' (2011) 65 (3) International Organization 553, 557.
[87] Nico Krisch, 'International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order' (2005) 16 European JIL 369, 371.
[88] Tom Ginsburg, 'Bounded Discretion in International Judicial Lawmaking' (2005) 45 Virginia JIL 631, 673; Richard Steinberg, 'Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints' (2004) 98 (2) American JIL 247, 275.
[89] Abebe & Ginsburg, *supra* n. 12, at 526.
[90] *Ibid*, at 525.
[91] WTO Dispute by Members <https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm>.
[92] USTR, *supra* n. 30, at 3.
[93] Agon, *supra* n. 22, at 59.

of creating the DSS and the actual revealed payoffs. [94] When the downside of the DSS emerges and far exceeds the original cost-benefit calculations, dejudicialization has become a realistic option.

Furthermore, the United States now believes that adherence to WTO rules may not be in its best national interests because WTO rules constrain policy choices. The Biden administration has concluded that liberal international economic policy has undermined the socioeconomic foundations of strong and resilient democracies, and that it is unable to meet the challenges the United States is facing today: an industrial base being hollowed out; accelerating climate crisis and the urgent need for a just and efficient energy transition, rising income inequality and a new environment defined by geopolitical and security competition. In order to meet these challenges, it is essential to build "an international economic system fit for contemporary realities".[95]

Even assuming this diagnosis of the impact of WTO rules on US national interest is correct[96], the problem is that ambitious measures adopted to tackle some of the challenges fly in the face of fundamental WTO norms. Take the Inflation Reduction Act (IRA), the most aggressive action the United States has even taken to confront the climate crisis, as an example. The IRA offers $7500 consumer tax credit exclusively for purchasing electric cars whose final assembly takes places in North America. In addition, half of the tax credit is linked to the origin of the batteries and at least 50 percent of the value of battery components must be manufactured in North America. The other half of the tax credits are correlated to the source of critical minerals used for electric vehicle and at least 40 percent of the value of critical minerals must be extracted, processed, and/or recycled in the United States or a country the United States has a free trade agreement with.[97] Since such provisions contain clearly discriminatory local content requirements, they breach the WTO's national treatment principle which requires that imported goods are offered treatment no less favourable than similar domestic products.[98] Out of concerns of the competitive effects of the IRA, other states are compelled to follow suit and enacted their own economic plans to prioritize domestic industries over foreign competitors.[99] The implications of the industrial policy arms race are immense since these policies threaten the most fundamental rules and principles of the multilateral trading system.

Another example is that the United States has complained that the WTO rules are too permissive of China's predatory, beggar-thy-neighbour policies and too restraining of the ability of the United States to deal effectively with competition from China.[100] Accordingly, the United States has turned away from multilateralism and toward aggressive unilateralism

[94] Remarks by Ambassador Katherine Tai on the World Trade Organization and the Multilateral Trading System (22 September 2023) <https://ustr.gov/about-us/policy-offices/press-office/speeches-and-remarks/2023/september/remarks-ambassador-katherine-tai-world-trade-organization-and-multilateral-trading-system>.

[95] Remarks by National Security Advisor Jake Sullivan on Renewing American Economic Leadership at the Brooking Institution (April 27, 2023); Remarks by Secretary of the Treasury Janet L. Yellen on the U.S. – China Economic Relationship at John Hopkins School of Advanced International Studies (Apr. 20, 2023).

[96] Many economists disagree with the US government's hostile view of free trade. See Gordon H. Hanson, 'Washington's New Trade Consensus: And What It Gets Wrong?' (2024) 103 Foreign Affairs 164.

[97] Part 4 of the IRA.

[98] Andy Bounds, 'EU Accuses U.S. of Breaking WTO Rules with Green Energy Incentives', Financial Times (Nov. 6, 2022).

[99] Laura Millan and Akshat Rathi, 'Competition from the US is Forcing Europe to UP Its Green Game', Bloomberg (Mar. 13, 2013).

[100] Alan Wm. Wolff, 'WTO 2025: Restoring the Binding WTO Dispute Settlement', Peterson Institute for International Economics Working Paper 22-5 (April 2022), at 9.

and the raw use of coercive power in its dealings with China.[101] Precisely because the United States sees itself facing multiple strategic challenges and the winning tactics require it to adopt measures that disregard the fundamental trade rules, dejudicialization of international dispute settlement has started and the multilateral trading system has been thrown into crisis.[102] It is doubtful whether international economic law is capable of handling such "mega-politics" by speaking law to power.[103]

Last but not least, the practical benefit of utilizing the WTO DSS to increase exports may be limited even if a complaining WTO Member won the litigation and the WTO ruling was timely implemented.[104] The DSU is the principal tool that WTO Members use to open other countries' unfairly protected domestic markets. Both complaining states and their exporting firms assume that an effective DSS will force a respondent WTO Member to make policy adjustments and, in turn, lead to increased access to respondent's domestic market.[105] However, evidence of the impact of WTO litigation on international trade flows, i.e., whether the judicial success is matched in the economic realm by the resumption of trade between complainants and respondents, is less sanguine. The research shows that, on average, WTO dispute settlement does not result in a positive, substantively significant increase of the respondent country's imports of the products at issue.[106] Some even found that trade flows decline further between the respondent and complainant after the formal WTO dispute settlement proceedings. This is because respondents usually resort to alternative trade policy instruments, such as trade remedy investigations, that provide avenues for non-compliance with the WTO rules.[107] Even if some research argued that WTO litigation can provide positive economic spillovers, these researchers were quick to point out that a legal win at the WTO might be seen as a 'Pyrrhic victory', i.e., winning a legal battle but losing an economic war. This is because relatively lesser gains are accrued to complainants and third parties than to non-participants that benefit from new market access opportunities by free riding while avoiding the legal costs of dispute participation.[108]

Likewise, the backlash against ISDS is mainly because many capital-importing states did not fully anticipate the costs of investment arbitral awards against them and the ensuing public uproar such adverse awards might create.[109] Granted, states were aware of the potential risks

[101] Kristen Hopewell, 'Beyond U.S. – China Rivalry: Rule Breaking, Economic Coercion, and the Weaponization of Trade' (2022) 116 AJIL Unbound 58.
[102] Daniel Ikenson, 'Strategic Reglobalization: Great Power Rivalry Comes for the Multilateral Trading System', Hinrich Foundation Report (October 2022), at 5.
[103] Karen J. Alter and Mikael Rask Madsen, 'The International Adjudication of Mega-Politics' (2022) 84 Law and Contemporary Problems 1, 4.
[104] Stephen Chaudoin, Jeffery Kucik, and Krzysztof Pelc, 'Do WTO Disputes Actually Increase Trade?' (2016) 60 (2) International Studies Quarterly 294, 305-306; Soo Yeon Kim and Tobias Hofmann, 'Does Trade Comply? The Economic Effect(iveness) of the WTO Dispute Settlement Process' in Manfred Elsig, Bernard Hoekman and Joost Pauwelyn (eds), *Assessing the World Trade Organization: Fit for Purpose*? (OUP, 2017), at 195-196.
[105] Chad P. Bown & Kara M. Reynolds, 'Trade Flows and Trade Disputes' (2015) 10 Review of International Organization 145, 146.
[106] Chaudoin, Kucik, and Pelc, *supra* n. 104, at 305-306; Kim and Hofmann, *supra* n. 104, at 195-196.
[107] Kim and Hofmann, Ibid. The USTR made the same complaint that the WTO dispute settlement system is unable to address the China's allegedly predatory trade policies. See USTR, *2023 Report to Congress on China's WTO Compliance* (February 2024), 16-18.
[108] Wonkyu Shin and Dukgeun Ahn, 'Trade Gains from Legal Rulings in the WTO Dispute Settlement System' (2019) 18 (1) World Trade Review 1, 2-3; Michael M. Bechtel and Thomas Sattler, 'What is Litigation in the World Trade Organization Worth?' (2015) 69 (2) International Organization 375, 397.
[109] See generally Lauge Poulsen, *Bounded Rationality and Economic Diplomacy: The Politics of Investment Treaties in Developing Countries* (CUP, 2015).

when they accepted the ISDS mechanism in IIAs. But the real costs resulting from ISDS may only be internalized once a state is actually sued, investigated, and eventually losing a case before an arbitral tribunal, sometimes decades after IIAs were signed.[110] For instance, the first adverse arbitral award against India in the case of *White Industries* in 2011 prompted public outcry and led to a complete review of the country's BITs. India adopted a new model BIT that, while it incorporates ISDS, conditions its use on the initial pursuit of remedies before domestic courts for at least five years.[111] Similarly, after losing two ISDS proceedings, South Africa expressly stated that it needed to do "damage control" and excluded ISDS from BITs.[112]

Yet another reason is the failure of anticipated benefits from the IIAs to materialize. The traditional justification for states to afford specific standards of protection to foreign investors and bind themselves to ISDS was that IIAs help attract foreign investment and contribute to economic development.[113] But this claim has become increasingly untenable in view of empirical evidence. A rich literature has found no or only modest positive relationship between BITs and investment flows.[114] This mismatch between expectations of increased investment flows when creating the international investment regime and the real effects of IIAs may disappoint capital importing states.

4. The Future of International Economic Dispute Settlement: Demise or Transformation?

It is important to emphasize that in neither international trade law nor international investment law, the backlash against judicialization has risen to the level of complete dejudicialization. As discussed above, even though the WTO AB is in paralysis, disputes are being resolved at the panel stage, either as a result of adopting the panel report, a mutually agreed resolution, or the termination of the dispute before adoption of the panel report. Moreover, both the MPIA and ad hoc Article 25 DSU arbitration are used by WTO Members to maintain appellate review. Finally, dispute settlement mechanisms under FTAs may also be used for resolving disputes between WTO Members.[115] Similarly, even though the backlash has occurred against ISDS, states have not fully dejudicialized international investment law. Many states remain committed to ISDS, and private investors have been actively using it. For instance, claimants registered 57 new cases under IIAs with ICSID in 2023, compared to 41 in 2022.[116]

Despite all the challenges, judicialization of international economic dispute settlement will not demise for three reasons. First, judicialization plays an important function in managing international affairs. Like individuals, whenever states interact with each other, they inevitably build

[110] Joost Pauwelyn and Rebecca J. Hamilton, 'Exit from International Tribunals' (2018) 9 Journal of International Dispute Settlement 679, 684.
[111] Grant Hanessian & Kabir Duggal, 'The 2015 India Model BIT: Is This the Change the World Wishes to See?' (2017) 32(1) ICSID Review 216, 221-225.
[112] Engela C. Schlemmer, 'An Overview of South Africa's Bilateral Investment Treaties and Investment Policy' (2016) 31 (1) ICSID Review 167, 185-187.
[113] Jeswald W. Salacuse, 'Of Handcuffs and Signals: Investment Treaties and Capital Flows to Developing Countries' (2017) 58 (1) Harvard ILJ 127, 130.
[114] Jason Webb Yackee, 'Bilateral Investment Treaties, Credible Commitment, and the Rule of (International) Law: Do BITs Promote Foreign Direct Investment?' (2008) 42 Law & Society Review 805, 828; Jonathan Bonnitcha, Lauge N. Skovgaard Poulsen and Michael Waibel, *The Political Economy of the Investment Treaty Regime* (OUP, 2017), at 155-160.
[115] Jenya Grigorova and Elli Zachari, 'Dispute Settlement in Free Trade Agreements as a Suggested Alternative to WTO Dispute Settlement' in Manfred Elsig et al, above n 56, at 471.
[116] ICSID, The ICSID Case Load – Statistics, Issue 2024-1, at 3 <https://icsid.worldbank.org/sites/default/files/publications/ENG_The_ICSID_Caseload_Statistics_Issue%202024.pdf>

norm-based structures, rules of language and action considered appropriate to a given set of interactions.[117] Since dyadic social relations are sustained by the norm of reciprocity, they can be inherently unstable, and reciprocity can break down. For instance, a state may renege on promises made in order to obtain advantage or may come to different views on the legitimacy of the existing rules that govern a relationship when circumstances change. This leads to a turn to a third party for dispute resolution. The triad—comprised of two disputants and a dispute resolver—is the guarantor of reciprocity.[118] Triadic dispute resolution clarifies the nature, scope and content of relevant duties and obligations to guide future behaviour. The process is iterative, and dyadic interaction occurs under the normative structure generated by prior disputes.[119] This iterative process therefore provides states with behavioural guidance, reduce uncertainty and transaction costs, and thereby facilitate social exchange and cooperation. The gradual development of the GATT from the original "anti-legalism" attitude to a judicialized WTO DSS in the span of 50 years itself was a testament to the essential function triadic dispute resolution plays to construct trade relations.[120] Today, even though the United States deplored that "the WTO dispute settlement has become synonymous with litigation" and paralyzed the AB, it is not clear that the United States would exclude any binding legal decisions and advocate a mechanism that will count entirely on diplomatic arrangement except in few sensitive areas such as national security.[121]

Second, a disgruntled state with systemic concerns about an international tribunal have a variety of strategies to use.[122] Dejudicialization is only one of the many options that states may employ, and likely the last resort that states turn to when the payoffs from international courts are extremely low.[123] Pauwelyn has identified five different strategies that a discontented state may adopt: (i) business as usual, (ii) reform, (iii) actual exit, (iv) asphyxiation of the tribunal as a whole, i.e., stopping the tribunal functioning for all parties, and (v) the creation of an alternative mechanism.[124] In the case of the WTO, the United States could have chosen to withdraw from the WTO treaty. Instead, it has adopted the asphyxiation strategy to paralyse the WTO AB, rendering the appellate procedure inoperative for all WTO Members.

Third, it is difficult to dejudicialize an established international court unilaterally as it requires cooperation with other states.[125] After all, for every losing party in an international judicial decision, there is usually some winning party who supports the decision and will defend the international dispute settlement mechanism. Due to the significant collective action problem, complete dejudicialization may happen only in extreme cases. At present, there is near universal agreement among WTO Members that addressing legitimate concerns about the WTO DSS and proceeding with the selection of new AB members should not be linked. At a DSB meeting in March 2024, 130 WTO members introduced a joint proposal to start the

[117] Wayne Sandholtz and Alec Stone Sweet, 'Law, Politics, and International Governance' in Christian Reus-Smit (eds), *The Politics of International Law* 238 (CUP, 2009), at 243.
[118] Alec Stone Sweet and Florian Grisel, *The Evolution of International Arbitration: Judicialization, Governance, Legitimacy* (OUP, 2017), at 12.
[119] Abebe & Ginsburg, *supra* n. 12, at 522.
[120] Sweet, *supra* n. 1, at 165-172.
[121] Marc L. Busch, 'The US Doubles Down on National Security at the World Trade Organization', The Hill (2 March 2023).
[122] Albert O. Hirschman, *Exit, Voice, and Loyalty* (Harvard University Press, 1970); Zackin & Versteeg, *supra* n. 12, at 229.
[123] Abebe & Ginsburg, *supra* n. 12, at 525.
[124] Pauwelyn and Hamilton, *supra* n. 110, at 686.
[125] Karen Alter, 'Delegation to International Courts and the Limits of Re-Contracting Power' in Darrell Hawkins et al (eds), *Delegation and Agency in International Organizations* 312 (CUP, 2006), at 338.

selection process for filling vacancies on the AB immediately.[126] The extensive number of WTO Members submitting the proposal reflects a common interest in restoring the function of the WTO DSS.

Marco Molina, Guatemala's Deputy Permanent Representative to the WTO, began convening an informal negotiating process in February 2023 to identify the areas of the DSS that WTO Members seek to reform. The Molina Report that had emerged from the informal process was part of the DSB Chair's report to the General Council issued before the 13th Ministerial Conference (MC13) held in Abu Dubai in February 2024.[127] The Molina report contains some innovative recommendations, including a focus on alternative dispute resolution such as simplified arbitration other than adjudication; strict deadlines for panels to complete their work; clear criteria and appointment procedures for dispute settlement panellists; a push to dilute the precedential value of previous reports; and the establishment of two review mechanism: an advisory working group which at the request of a WTO Member can discuss prior interpretations of the WTO rules and an "accountability mechanism" to report on and review in detail the reforms every two years.[128] If these suggestions were adopted, the WTO DSS would be substantially transformed.

However, issues related to appellate review are still being worked on and are not yet complete in Molina report.[129] Although most of the WTO Members could accept the suggestions put forward in the Molina report, objections to specific elements of the text exist.[130] The Biden administration has also reiterated recently its refusal to launch the process to fill vacancies on the AB.[131] WTO Members adopted a Ministerial Decision at MC13 recognizing the progress made with the view to having a fully and well-functioning DSS accessible to all WTO Members by 2024.[132]

How will the future of international economic dispute settlement evolve remains to be seen. So far as the trade law is concerned, it is highly likely that the WTO will retreat from a highly judicialized DSS and move back to an increasingly power-based system for the foreseeable future.[133] A wide range of thorny issues concerning the WTO, including its inability to negotiate new trade rules in critical sectors such as digital trade and tackle the AB crisis; the perception that WTO rules constrain domestic policy options; the need of WTO Members to respond to alleged breaches of WTO rules unilaterally; the global rise of populism and backlash against globalization; the debate on the impact of free trade on national interests and the rising geopolitical risks, all have drastically undermined states' expectation that the WTO will return to a rule-of-law system.[134] The WTO's ability to be an important constraint on states will be

[126] WTO, 'Chair Briefs Members on Consultations regarding Post-MC13 Dispute Settlement Reform Work' (19 March 2024) <https://www.wto.org/english/news_e/news24_e/dsb_19mar24_e.htm>.
[127] WTO, '13th Ministerial Conference Briefing Note on WTO Reform' <https://www.wto.org/english/thewto_e/minist_e/mc13_e/briefing_notes_e/reform_e.htm>
[128] WTO, 'Consolidated Text Referred to in Mr. Molina's Report', JOB/GC/385 (16 February 2024).
[129] *Ibid*.
[130] Keith M. Rockwell, 'WTO Dispute Settlement Reform Hinges on Washington' (February 2024) <https://ecipe.org/blog/wto-dispute-settlement-reform-hinges-on-washington/>.
[131] USTR, *2024 Trade Policy Agenda & 2023 Annual Report of the President of the United States on the Trade Agreements Program* (March 2024), at 210.
[132] WTO, 'Ministerial Decision on Dispute Settlement Reform', WT/MIN (24)/37 (4 March 2024).
[133] Rachel Brewster, 'WTO Dispute Settlement: Can We Go Back Again?' (2019) 113 AJIL Unbound 61, 65-66.
[134] Peter Van den Bossche, 'Can the WTO Dispute Settlement Be Revived? Options for Addressing a Major Governance Failure of the World Trade Organization' (2023) WTO Working Paper No. 03/23, at 27-28.

substantially weakened and the turn to power and unilateralism will be a normal feature in the multilateral trading system, even though the WTO DSS will continue to operate.[135]

5. Conclusion

Instances of backlash against judicialization in international economic law, in particular the paralysis of the WTO AB and the severe legitimacy crisis of ISDS, shows that judicialization is not a teleological process. Continued judicialization and endless expansion of international courts and tribunals in global governance is neither guaranteed nor normatively desirable. Instead, judicialization can ebb and flow. Complete dejudicialization is highly unlikely on most occasions because judicialization plays an important function in managing international relations and states may utilize a variety of strategies to deal with the concerns about international tribunals. However, in extreme cases when judicialization no longer serves the interests of powerful states and anticipated benefits failed to materialize, even complete dejudicialization is possible. At any rate, as this article describes, dejudicialization of international dispute settlement has emerged as a key feature of global economic governance in the era of de-globalization, climate crisis, and great power rivalry.

If judicialization of international politics diminishes state sovereignty and involves a shift of power toward international court, dejudicialization removes legal oversight from the remit of international courts and arbitral tribunals. It represents the reacquisition of power by nation states and regains their legitimate policy space.[136] The move from judicialization to dejudication represents a paradigm shift of international economic law. How far this emerging trend will go deserves to be closely watched.

[135] See generally Ming Du, 'International Economic Law in the Era of Great Power Rivalry' (2024) 57 (3) Vanderbilt Journal of Transnational Law (forthcoming) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4701265>.

[136] Karen J. Alter, Emilie Hafner-Burton and Laurence R. Helfer, 'Theorizing the Judicialization of International Relations' (2019) 63 International Studies Quarterly 449.

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