EXAMINATION OF THE DISPUTE RESOLUTION MECHANISMS IN INTERNATIONAL ECONOMIC LAW

ADEDEJI JOHN OLUYINKA*

ABSTRACT

Disputes in international law are being resolved by formal tribunals, while less attention had been devoted to informal ways of settling disputes in International economic relations among nations. However, this trend poses new challenges and risks, including the risk of a loss of uniformity and consistency of jurisprudence, and a potential overlapping of jurisdiction which allows states and parties to make a forum shopping for the tribunal most likely to arrive at a favourable resolution for them. This paper, by adopting doctrinal research methodology, begins with a discussion of mechanisms for resolving dispute in international economic law and the need for a robust framework of effective international adjudication and then examines why compulsory international adjudication is widely accepted in international trade law. The paper compares the relevant dispute settlement mechanisms and offers reasons why legal remedies and international dispute resolution need to adopt the use of non-formal dispute settlement mechanisms such as arbitration and negotiation in international trade law. Lessons are drawn from the international economic law revolution, and recommendations are made for strengthening international dispute settlement mechanisms in the areas of international trade.

Key words: Dispute, International, Economic Law, Resolution, Trade Law.

1.0 INTRODUCTION

International economic law is the branch of public international law that governs international economic relations.[1] International Economic Law (IEL) refers to the body of laws and regulations that govern economic relations and transactions between countries. It encompasses a variety of legal instruments and frameworks that facilitate international trade, investment, finance, and the functioning of international economic organizations. Although the regulation of international economic relations has always been a central aspect of international law, it has become a distinct field of the international legal system since the end of World War II (WW II). In its aftermath, states representatives met at Bretton Woods, New Hampshire, United States, motivated by the belief that a closer economic integration among states could prevent economic warfare, enhance international peace, and promote global welfare. The creation of international institutions dealing with international trade, foreign direct investment (FDI), and foreign exchange was seen as a means to avoid protectionism and foster peaceful and prosperous relations among nations.[2]

* PhD (IB), LL.M (IB), M.A. (IB), B.A (IB), LL.B (IB), B.L (NLS) ADV.DIP (MOSCOW), Lecturer, Lead City University, Ibadan, Nigeria. E-mail: Oluyinkaadedeji500@yahoo.com Tel. No.: 08055919215.

[1] Georg Schwarzenberger, 'The Principles and Standards of International Economic Law' (1966) 117.

[2] Leon Trotsky, 'Nationalism and Economic Life' (1934) 12 Foreign as hermetic a Affairs 395, at 395.

During the negotiations, three international institutions were imagined to form the pillars of the international economic order: the International Trade Organization (ITO), the International Bank for Reconstruction and Development (World Bank), and the International Monetary Fund (IMF). The ITO was to govern both trade and investment; the IMF was to provide short - term finance to countries in balance of payment difficulties; and the World Bank was meant to provide long - term capital to support development. Of the three institutions, only the IMF and the World Bank were established. The ITO never saw the light of the day: its founding instrument was adopted in Havana in 1948 but it failed to enter into force since the United States Congress did not approve it, and other states could not establish an international trade system without the largest economy in the world.[3]

Instead, the parties signed the much less ambitious, but perhaps more pragmatic General Agreement on Tariffs and Trade (GATT 1947).[4] The GATT was not an international organization nor did it have an international personality. Rather, it was a multilateral treaty with an agile structure. Although the GATT was meant to have a provisional application, over time, it became extremely successful, probably because of its practical and diplomatic nature. It gradually developed some institutional and dispute settlement features, and after almost five decades, an agreement was reached to establish the World Trade Organization (WTO).[5]

In recent times, international economic law is a well - developed area of law that includes international monetary law, international investment law, and international trade law, as well as elements of international financial law Paper and international development law. This paper provides some sense of the various trends in international economic law focusing on two of its subfields, namely international trade law and international investment law.[6]

It should be noted that international economic law cannot be isolated from general international law. On the one hand, international economic law can influence the development of general international law. The jurisprudence of international economic courts can be informally considered by other international courts and tribunals. Moreover, state practice and *opinio juris* developed under the aegis of international economic law can contribute to the coalescence of customary law or general principles of international law. On the other hand, as mentioned, international economic law is rooted in general international law. Its sources are treaties, customs, and general principles of law - the same sources of general international law. Moreover, international economic law is gradually becoming permeable to the influence of other subfields of international law, such as international cultural heritage law, albeit to a varying extent. Therefore, general international law and its

---

[3] Gerhard Loibl, 'International Economic Law', in Malcom Evans (ed.), *International Law* (Oxford: OUP 2010) 722-751, 732.

[4] General Agreement on Tariffs and Trade, 30 October 1947, 55 UNTS 194.

[5] Marrakesh Agreement Establishing the World Trade Organization (Marrakesh Agreement or WTO Agreement), 15 April 1994, 1867 UNTS 154, 33 ILM 1144 (1994).

[6] See Antonia Zervaki, ' The Cultural Heritage of Mankind Beyond UNESCO: The Case for International Financial Institutions ', in Photini Pazartzis and Maria Gavouneli (eds), *Reconceptualizing the Rule of Law in Global Governance - Resources, Investment, and Trade* (Oxford: Hart 2016) 169-184.

subfields should not be read in clinical isolation from each other. It investigates the settlement of international economic disputes and critically assesses the current legitimacy crisis of international economic law.

This paper for the sake of clarity, adopts the term 'international economic courts' to refer to arbitral tribunals, panels, and the Appellate Body because they all present elements of growing judicialization. Nonetheless, the term courts is not used in the WTO agreements. Panels and the appellate body are usually referred to in literature as 'quasi-judicial bodies' since adjudication in the WTO contains both diplomatic and judicial elements: bilateral consultations must precede the referral of a dispute to a panel. Once a dispute has been referred to a panel, however, the procedure is quintessentially judicial.

2.0 THE SOURCES OF INTERNATIONAL ECONOMIC LAW

International economic law is mainly governed by a number of bilateral, regional, and multilateral agreements and is composed of detailed rules. Examples of bilateral treaties are BITS. As there is no single comprehensive multilateral investment agreement, more than 3,000 international investment agreements (IIAS) define investors ' rights. The first BIT was concluded between West Germany and Pakistan in 1959; the number of BITS has grown steadily since then.[7] Such IIAS generally require states to grant foreign investors fair and equitable treatment full protection and security, and non - discrimination, in addition to prohibiting unlawful expropriation and other forms of state misconduct. Regional agreements include FTAs and agreements establishing customs unions.[8]

Historically, customary law principles of the freedom of communication (*jus communicationis*) and freedom of the sea (*mare liberum*) played a significant role in promoting freedom of commerce in the past centuries.[9] Customary international law has developed in the area of international economic law. Despite its historic importance, customary law now plays a residual and limited role in international economic relations because of the abundance of treaties and their detailed provisions. Nonetheless, customary law remains the bedrock of international economic law, and the norms of the former still constitute fundamental threads of the fabric of the latter. Important rules of customary law pertain to treaty interpretation, the treatment of aliens, diplomatic protection, and the principle that agreements must be kept (*pacta sunt servanda*).[10] Despite the existence of many international treaties, recourse to customary law enables the system to be flexible, and to adapt to changing circumstances and the evolving needs of states. Nonetheless, customary law presents distinct challenges due to the possible lack of consensus among states as to the customary law nature and extent of given norms.

[7] Ibid
[8] Ibid
[9] Valentina Vadi, *War and Peace, Alberico Gentill and the Early Modern Law of Nations* (Leiden: Brill 2020).
[10] *Qureshi and Ziegler, International Economic Law*, 27.

General principles of law Such as universality, justice and fairness, legal certainty and proportionality also play an important role in international economic relations.[11] As is known, these can have a domestic or international origin. Because international law has promoted standardization in domestic law, in turn such harmonization can foster the emergence of general principles of law.[12] As for customary law, the identification of general principles of international law can be challenging. While universal consensus is not needed, a careful scrutiny of various legal systems is required.[13]

The decisions of international economic courts and the teachings of the most highly qualified jurists constitute subsidiary means for the determination of international economic law.[14] Although there is no binding precedent in international law,[15] the decisions of international courts and tribunals have played an important role in clarifying, interpreting, and even developing international economic law.[16] The teachings of jurists also significantly appear in the jurisprudence of international economic courts. While this can contribute to the development of international economic law, commentators have called for more diversity within the field in order to enable different perspectives to emerge and contribute to the evolution of international economic law.[17]

The incidence of each type of source inevitably varies in each subfield of international economic law, depending on the development of the same. For instance, in international monetary law, soft law in the form of nonbinding instruments still prevails. Instead, both international trade law and international investment law are characterized by a significant number of treaties, expressing a clear preference for a rule-based system.[18] More importantly, 'the manner in which these sources are elucidated, for example with or without a positivist or natural orientation, serves the goals of certain interest groups better than others.[19]

3.0 THE DISPUTE RESOLUTION MECHANISMS OF INTERNATIONAL ECONOMIC LAW

International economic law has sophisticated dispute settlement mechanisms. While the World Trade Organization. Dispute Settlement Mechanism (DSM) was until recently defined

[11] Georges Abi - Saab, ' General Principles of Law in International Economic Law ', in Thomas Cottier and Krista Nadakavukaren Schefer (eds), *Encyclopedia of International Economic Law* (Cheltenham: Elgar 2017) 42-43.
[12] Qureshi and Ziegler, *International Economic Law*, 28.
[13] (Valentia Vadi, bid at 99).
[14] ICJ Statute, Article 38 (1) (d).
[15] ICJ Statute, Article 59.
[16] Joanna Jemielniak, Laura Nielsen, and Henrik Olsen (Eds), *Establishing Judicial Authority in International Economic Law* (Cambridge: CUP 2016) 139-212; Giorgio Sacerdoti, 'Prece- dent In the Settlement of International Economic Disputes: The WTO And Investment Arbitration Models', in *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers* (Leiden: Brill 2010) 225-246.
[17] Valentina Vadi, ibid.
[18] Ibid
[19] Ibid.

as the 'jewel in the crown' of this organization,[20] investor-state arbitration has become the most successful mechanism for settling investment-related disputes.[21]

While the original GATT 1947 provided for informal, pragmatic, and flexible dispute settlement tools, during the Uruguay Round negotiations leading to the establishment of the WTO, 'the United States agreed to refrain from unilateral actions in exchange for making the newly negotiated rules more credible through a stronger dispute settlement system.[22] As a result, the WTO dispute settlement system has become highly legalized. The rule - based architecture of the dispute settlement mechanism was designed to strengthen the multilateral trade system.[23] While under the GATT 1947 only two provisions dealt with dispute settlement, under the WTO, an entire treaty, the DSU, governs the matter.

Alternatively, investment treaties provide investors with direct access to an international arbitral tribunal. The use of the arbitration model is aimed at depoliticizing disputes, avoiding potential national court bias, and ensuring the advantages of confidentiality and effectiveness.[24] By allowing foreign investors to directly sue governments, states intended to credibly commit themselves and, as a consequence, encourage FDI. Whether the inclusion of investor - state dispute settlement in IIAS and the ratification of BITS more generally has contributed to attract foreign direct investments[25] remains contested. Undoubtedly, negotiators of the relevant agreements could not foresee the increasingly common use of the WTO dispute settlement mechanism and investment arbitration. They likely assumed that the establishment of such dispute settlement mechanisms would lead states to follow agreed international rules. However, as international economic courts have been used beyond initial expectations, attention has moved to the consequences of legal proceedings.[26]

As a result of the ever - expanding nature of international economic law and international law more generally, conflicts between economic values and other values have increasingly arisen. Given the structural imbalance between the vague and non-binding dispute - settlement mechanisms pro- vided by international cultural heritage law on the one hand, and the effective, sophisticated, and binding dispute - settlement mechanisms available under international economic law on the other hand, cultural disputes involving investors 'or traders' rights have often been brought before inter- national economic courts.[27] This raises

[20] Amrita Narlikar, *The WTO: A Very Short Introduction* (Oxford: OUP 2005); See also Valantria vadi, ibid at 103.

[21] Susan Franck 'Development and Outcomes of Investor-State Arbitration' (2009) 9 *Harvard Journal of International Law* 435-489.

[22]. Manfred Elsig, Rodrigo Polanco, and Peter Van den Bossche, 'Introduction - International Economic Dispute Settlement: Demise or Transformation? 'in Manfred Elsig, Rodrigo Polanco, and Peter Van den Bossche (eds), *International Economic Dispute Settlement- Demise or Tranformation*? (Cambridge: CUP 2021) 1-10, 2

[23] Croley and Jackson, 'WTO Dispute Procedures, Standard of Review, and Deference to National Governments, 193.

[24] Ibrahim Shihata, "Towards a Greater Depoliticization of Investment Disputes: The Role of ICSID and MIGA" (1986) 1 ICSID Review 1-25, 5.

[25]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 805-832.

[26] Valentina Vadi, ibid at 104.

[27] Ibid.

both theoretical and practical concerns. Issues arise as a result the fragmentation of international law. The first issue is whether the international cultural heritage law and international economic law are self-contained regimes or not. Is it possible for international economic courts to interpret and apply other international law? In what degree can international economic courts review domestic policies that are allegedly inconsistent with international economic law?

On the other hand, one may wonder whether the fact that cultural heritage - related disputes tend to be adjudicated before international economic courts deter- mines a sort of institutional bias. Treaty provisions can be vague, and their language encompasses a potentially wide variety of state regulation that may interfere with economic interests. Therefore, a potential tension exists when a state adopts measures interfering with foreign investments or free trade. The aggrieved investors may consider such measures to violate substantive standards of treatment under investment treaties. They may thus require compensation before arbitral tribunals. In parallel, affected traders may spur the home state to file a claim before the WTO organs.

Specifically, with regard to the WTO Dispute Settlement Body (DSB), ' it is quite uncontroversial that an adjudicatory system engaged in interpreting trade-liberalizing standards would tend to favor free trade.[28] According to John Maton and Carolyn Maton, there is a consistently high rate of complainant success in WTO dispute resolution.[29] For some scholars, 'the WTO panels and the WTO Appellate Body have interpreted the WTO agreements in a manner that consistently promotes the goal of expanding trade, often to the detriment of respondents 'negotiated and reserved regulatory competencies.'[30] In particular, given the fact that about 80 percent of the cases have been settled in favor of the claimant, scholars have highlighted the fact that 'the DSB has evolved WTO norms in a manner that consistently favors litigants whose interests are generally aligned with the unfettered expansion of trade'.[31]

However, a renowned scholar, Robin Broad argued that such a mechanism is biased in favor of corporate and economic interests, and neglects vital noneconomic concerns.[32] Undoubtedly, as a result of architecture of the arbitral process, significant concerns arise in the context of disputes involving cultural elements. While arbitration structurally constitutes a private model of adjudication, investment disputes present public law aspect.[33] Arbitral awards ultimately shape the relationship between the state on the one hand and private

---

[28] Joel P Trachtman, 'The Domain of WTO Dispute Resolution' (1999) *40 Harvard International LJ* 333-377

[29] John Maton and Carolyn Maton, *'Independence under Fire: Extra Legal Pressures and Coalition Building in WTO Dispute Settlement'* (2007) 10 JIEL 317-334.

[30] Juscelino F Colares, 'A Theory of WTO Adjudication: From Empirical Analysis to Biased Rule Development' (2009) 42 *Vanderbilt Journal of Transnational Law* 383-439, at 388.

[31] Ibid at 387.

[32] Robin Broad, 'Corporate Bias in the World Bank Group's International Centre for Settlement of Investment Disputes - A Case Study of a Global Mining Corporation Suing El Salvador' (2015) 36 University of Pennsylvania JIL 851-874, at 854.

[33] Gus Van Harten, The Public - Private Distinction in the International Arbitration of Individual Claims against the State ' (2007) 56 ICLQ 371-393, at 372.

individuals on the other.[34] Arbitrators determine matters such as the legality of governmental activity, the degree to which individuals should be protected from regulation, and the appropriate role of the state.[35]

Despite, or perhaps because of, these apparent successes, both dispute settlement mechanisms have recently come to the forefront of legal debates. Many diplomats and scholars have expressed their concern regarding the magnitude of decision power allocated to international economic courts.[36] Such tribunals are asked to determine matters such as the interplay between cultural policies and international economic governance. Investor - state arbitration is dominated by the absence of an appeal mechanism and has produced a range of inconsistent awards on cases arising out of the same or similar factual issues and this has made countries and commentators to propose various alternatives moving toward some judicialization of the system.[37] Presently, there are discussions that focus on the establishment of a multilateral investment court. In turn, and perhaps paradoxically, WTO courts have been under siege for their alleged overreach, judicialization, and judicial activism.[38]

3.1 The Investor-State Arbitration Mechanism

The international economic or investment law which had once been regarded has an 'exotic and highly specialised' domain, now gained greater attention,[39] Due to economic globalization and the rise of foreign direct investments, the regulation of the field has become a key area of international economic law and a well - developed field of study in its own right. Investors 'rights are defined by an array of international investment agreements (IIAs), customary international law, and general principles of law as well as subsidiary means for the determination of rules of law, namely, awards of arbitral tribunals and the teachings of the most highly qualified jurists.[40] This is because there is no single comprehensive global investment treaty. However, the substantive level, international investment law provides extensive protection to investors 'rights in order to encourage FDI and to foster economic development. Since the inception of Bilateral Investment Treaties (BITs) in the late 1950s, countries have signed on to BITs with the distinct aims of protecting their investors overseas, attracting FDI, and fostering economic development.[41] Under IIAs, states parties agree to provide a certain degree of protection to investors who are nationals of contracting states, or their investments. Such protection generally includes compensation in case of expropriation,

---

[34] Gus Van Harten, Investment Treaty Arbitration and Public Law (Oxford: OUP 2007) 70.
[35] M Sornarajah, "The Clash of Globalizations and the International Law on Foreign Investment (2003) 10 Canadian Foreign Policy 1-20.
[36] Valentina Vadin, ibid.
[37] Anthea Roberts, 'Incremental, Systemic, and Paradigmatic Reform of Investor - State Arbitration' (2018) 112 AJIL 410-32.
[38] Gregory Shaffer, 'A Tragedy in the Making?: The Decline of Law and the Return of Power in International Trade Relations' (2018) 44 Yale Journal of International Law 37-53.
[39] Stephan W. Schill, W(h)ither Fragmentation? On the Literature and Sociology of International Investment Law' (2011) 22 EJIL 875-908.
[40] M. Sornarajah, The International Law on Foreign Investment, 3rd ed. (Cambridge: CUP 2010) 79, 87.
[41] Genevieve Fox, 'A Future for International Investment? Modifying BITS to Drive Economic Development' (2014) 46 Georgetown JIL 229-260, 229.

fair and equitable treatment, non - discrimination, full protection and security, and repatriation of profits among others.[42]

It is pertinent to state that the procedural level, international investment law is dominated by sophisticated dispute settlement mechanisms. Most investment treaties contain two dispute resolution clauses: one permitting investor-state arbitration for investment disputes, and the other permitting state-to-state arbitration for disputes concerning the treaty's interpretation and/or application. While state-to-state arbitration has become rare, investor-state arbitration has become the most successful mechanism for settling investment - related disputes.[43]

Arbitral tribunals are typically composed of an uneven number of members, most frequently three: one arbitrator selected by the claimant, another selected by the respondent, and a third appointed by a method that attempts to ensure neutrality.[44] Arbitrators should be independent and impartial in the proceedings. Once proceedings are initiated by an investor, arbitral tribunals review state acts in light of the relevant investment treaty provisions.

3.2 World Trade Organization Dispute Settlement Mechanism

International trade law is characterized by a sophisticated dispute - settlement mechanism. The creation of the World Trade Organization dispute settlement mechanism determined a paradigm shift from the political consensus - based dispute settlement system of the GATT 1947 to a rule - based architecture designed to strengthen the multilateral trade system.[45] Under the original GATT 1947, only two provisions were dedicated to dispute settlement. Articles XXII and XXIII of GATT 1947 provided for bilateral consultations between disputing parties; if no settlement could be reached, states could resort to good offices, mediation, or conciliation, before requesting a GATT panel of experts.[46] The Council of Contracting Parties would then adopt the panel's report by consensus, that is, if any Contracting Party did not oppose it. Although quite successful, this informal, flexible, and pragmatic dispute settlement mechanism had several shortcomings.[47] The losing party could delay or even block the adoption of panel report by the Contracting Parties. This led some parties to adopt unilateral measures. The ad hoc nature of the panels meant that reports could be inconsistent. Furthermore, there was no time frame for the decision-making process. The dispute settlement experience of the GATT 1947 gave way to a more formalized dispute settlement mechanism since the inception of the WTO.

The WTO DSM is compulsory, exclusive, and, at least until recently, highly effective.[48] Only WTO member states have *locus standi* in the dispute settlement mechanism, that is, individuals cannot file claims before panels and the appellate body. When trade disputes

---

[42] Valentina Vadin, ibid at 107.
[43] Susan Franck, 'Development and Outcomes of Investor - State Arbitration' (2009) 9 Harvard International Law Journal 435-489, 435.
[44] Sergio Puig, 'Social Capital in the Arbitration Market' (2014) 25 EJIL 387-424, 397.
[45] Croley and Jackson, 'WTO Dispute Procedures, Standard of Review, and Deference to National Governments', 193.
[46] GATT means General Agreement on Trade and Trading.
[47] Valentina Vadin, Bid at 109
[48] Peter Van Den Bossche, The Law and Policy of the World Trade Organization, 4th edition (Cambridge: CUP 2017).

emerge, the DSU obliges members to subject the dispute exclusively to world trade organization bodies. According to United States Trade Act, members must have a recourse to the DSU dispute mechanism to the exclusion of any other system.[49] In *Mexico - Soft Drinks,* the appellate body continued that the provision even implies that member is entitled to a ruling by a WTO panel.[50] Pursuant to WTO settled jurisprudence and Article XXIII of the GATT 1994, each WTO Member which considers any of its benefits to be prejudiced under the covered agreements can bring a case before a panel.[51] Also, in case the consultations among the disputing parties are unsuccessful, the complaining state may request the establishment of a panel of experts to hear the matter. The Dispute Settlement Body (DSB) (consisting of representatives of all WTO Members) must then establish a panel. It is now impossible for any of the parties to a dispute to block the formation of a dispute settlement panel or the adoption of a ruling by the adjudicators. After objectively assessing the matter, the panel renders a report that may be appealed to the AB. Panels and the AB interpret and apply the WTO treaties, preserving the rights and obligations of the WTO members under the covered agreements in relation with customary rules of treaty interpretation.[52]

The WTO's DSB automatically adopts the panel's report, and if the latter is appealed, the AB's report, unless there is a consensus not to adopt a report. Adopted reports are binding on the parties, and the DSU provides remedies for breach of WTO law. The DSB can authorize countermeasures including the suspension of concessions if the report is not implemented. While the system is rule - based, it is designed to reduce the use of unilateralism in international relations and ensure mutually satisfactory solutions.

It should be noted also that investor - state arbitration differs from the WTO DSM along further three key dimensions: standing (that is, the right to file grievances), the nature of the remedy, and the remedial period. First, while only states can file claims before the WTO panels and the Appellate Body, private investors also have standing before arbitral tribunals under investment agreements. This is not to say that, at a substantive level, individuals do not play any role at the WTO; rather, many cases have been brought by states to protect the interests of given industrial sectors. Yet, at a procedural level, companies cannot enforce their rights against a foreign state at the WTO; rather, they 'depend on their state of nationality taking up a WTO case on their behalf. The various factors which influence the choice of a WTO member to bring a case against another member state include the magnitude of the impact of the measure in question, political considerations, and the lobbying efforts of the relevant industry sectors.

Second, the trade and investment regimes offer different remedies to the aggrieved actors. In order to encourage trade liberalization and prevent protectionism, the WTO DSM can authorize trade retaliation by the injured state. However, this is possible only after a state fails to withdraw or modify an offending measure within a 'reasonable period of time? The investment regime, on the other hand, provides a monetary remedy or, in some cases, even

[49] Section 301 of US Trade Act, 1974
[50] WTO Appellate Body Report, *Mexico - Tax Measures on Soft Drinks and Other Beverages*, WT / DS308 / AB / R, adopted 24 March 2006, para. 52.
[51] Valentina vadi, ibid at 110.
[52] DSU Article 3.2.

restoration (*restitutio in integrum*) to foreign investors whose investments have been affected because of government action. Third, while trade agreements typically provide for only prospective remedies covering harm done subsequent to a ruling (*ex nunc*), the damages awarded in investment disputes routinely cover past as well as future harms (*ex tunc)*. Furthermore, arbitral tribunals can award damages to the foreign investors, while remedies at the WTO involve states only.

The national investment law and inter- national trade law belong to the same branch of international law, namely international economic law. Moreover, there are overlapping provisions in international investment law and international trade law. In addition, the nature of problems that both systems encounter is similar - that is, arbitral tribunals and WTO adjudicative bodies are often required to review domestic regulation pursuing certain noneconomic values against a set of obligations of a purely economic character (unlike, for instance, other international courts and tribunals). Nevertheless, the dispute settlement mechanisms reflect the cultures of the legal frameworks to which they belong and thus have distinctive identities. Due to different treaty language, actors, and procedures, the two dispute settlement mechanisms require a critical assessment that would recognize their inherent differences.

In addition to the reorganization of the world trade system, the early 1990s saw the beginning of another major legal development, namely the rise of International Investments Agreements (IIAs), mostly in the form of Bilateral Investment Treaties (BITs) also important is the fact that foreign investors became more familiar with the possibilities offered by these treaties, which led to a surge of treatments claims against host states before international arbitrator tribunals on the basis of the arbitration clauses contained in most IIAs

3.2.1 WTO Appellate Body

The establishment of the appellate body of the World Trade Organization (WTO) in 1995 is perhaps the most remarkable and effective development in international dispute resolution.[53] It has a binding and compulsory jurisdiction over its 153 members. The appellate body is made up of seven permanent members broadly representing the range of WTO membership.[54] Each appeal is heard by three members, who may then elect to uphold, modify or reverse the legal findings of the panel which was set up to resolve the particular dispute.[55] Appeals can only be initiated by parties to a dispute[56] and have to be based on points of law; there is no scope for the Appellate Body to consider new issues or to re-examine evidence.[57] Once the Appellate Body Reports are adopted by the Dispute Settlement Body (DSB), the parties are compelled to accept the findings. The ability of the Appellate Body to mandate compliance with the WTO agreement makes it one of the most powerful means of dispute resolution in the world, significantly developing the area of international trade law.[58]

[53] See also the discussion concerning international trade law in Chapter 1, section 1.5.2; Chapter 3, section 3.3.
[54] Ibid., Art. 17 (3).
[55] Ibid., Art. 17 (13).
[56] Ibid., Art. 17 (4).
[57] Ibid., Art. 17 (6).
[58] Robert Hudec, 'The New WTO Dispute Settlement Procedure: An Overview of the First Three Years' (1999) 8 Minnesota Journal of Global Trade 1, 27.

Until recently, the WTO dispute settlement was a great success; with no real executive and a weak legislative branch, the WTO jurisprudence grew rich and strong. Perhaps exactly because of its success, this mechanism has come under growing scrutiny and criticism. For instance, the United States has raised concerns over questions of delay, judicial over-reach, and precedence. Because the United States has blocked the appointment of several adjudicators to the appellate body since 2017, the organ is currently unable to hear new appeals.

Therefore, the current crisis of the appellate body not only affects the WTO Appellate review, but undermines the whole WTO dispute settlement system. It can cause escalating global trade protectionism and a return to power - based trade relations. In order to find a temporary solution to the impasse, the EU and a number of trade partners set up a Multiparty Interim Appeal Arbitration Arrangement (MPIA). The parties continue to seek resolution of the AB crisis, and agree to use the MPIA as a second instance as long as the situation continues.

3.2.2 International Tribunal for the Law of the Sea (ITLOS)

The ITLOS is a permanent intergovernmental organization established by Annex VI of the United Nations Convention on the Law of the Sea (UNCLOS).[59] It consists of twenty-one independent members of recognized competence in the field of the law of the sea.[60] ITLOS only has the power to resolve disputes between states, which includes the European Community.[61] Since its commencement in 1996, fifteen cases have been submitted to ITLOS for its review. This number is fewer than was anticipated at the time of its establishment, and is reflective of the fact that states have been hesitant in resorting to ITLOS for the more contentious issues concerning the law of the sea.[62]

4.0 CONCLUSION

The dispute settlement mechanism and investor-state arbitration are examined for legal, structural, and functional reasons. From a legal perspective, both investor - state arbitration and the World Trade Organisation Dispute Settlement Mechanism constitute legal dispute settlement mechanisms. Investor-state dispute settlement was designed to avoid politicized espousal and the oppressive diplomacy by powerful states that often accompanied it, much as the WTO was intended to displace bilateral trade leverage. From a structural perspective, as alternatives to oppressive diplomacy and power politics, both dispute settlement mechanisms are dominated by lawyers and constitute quintessentially legal dispute settlement mechanisms. In fact, although the GATT system used to be run by diplomats and economists, an increasing unification of the system has taken place since the inception of the WTO. More and more arbitrators, WTO panelists, and members of the appellate body have some legal background. Such common legal expertise can contribute to mutual influence, cross-pollination of concepts, and possible convergence between international trade law and

[59] United Nations Convention on the Law of the Sea, 1833 UNTS 3, Annex VI, ('UNCLOS'). See also discussion regarding the international law of the sea in Chapter 1, section 1.5.1.
[60] UNCLOS, Art. 2 (1).
[61] The European Community is a single member of ITLOS. It is an 'international organization' within the meaning of UNCLOS, Art. 305 (f) and Annex IX.
[62] Donald Rothwell and Tim Stephens, the International Law of the Sea (Oxford: Hart, 2010) 459.

international investment law. Moreover, several appellate body members and albeit to a lesser extent - panelists have served as investment arbitrators. From a functional perspective, investment treaty arbitration and the WTO dispute settlement mechanism do share the same function, settling international disputes in accordance with a specific set of international economic law rules and ensuring the proper administration of justice in this area. Both foreign investments and international trade are domains where conflict is latent between market freedom and free flow of capitals on the one hand, and the state regulatory autonomy on the other. Like WTO panels and the appellate body, arbitral tribunals may be asked to strike a balance between economic and noneconomic concerns. Moreover, certain international trade treaties present an articulated regime that the investment treaties presuppose. For instance, there is some coincidence in the subject matter of investment treaties and several WTO covered agreements.

However, investor - state arbitration and the WTO DSM present a number of notable differences. Although the present investment treaty network has been characterized as multilateral in nature due to the similarities among different treaties and dispute settlement mechanisms, it is still structurally based on a myriad of bilateral investment treaties. There is no world investment organization charged with governing foreign investments, nor is there analyzing known as 'World Investment Court'. By contrast, since its inception in 1995, the WTO has emerged as the world forum for multilateral trade negotiations, and the appellate body has been frequently related to a World Trade Court. While ad hoc arbitral tribunals set the investment disputes without an appellate review by a permanent body, at least until recently WTO panel reports could be appealed before the appellate body.

5.0 RECOMMENDATIONS

It is seen that international economic law is at a crossroads, hence, there is urgent need to rethink its aims and objectives. While economic activities can be conceived as innate in human nature and as useful growth engines, their regulation has become more problematic than ever under current international economic law. The field is thus under unprecedented pressure from governments, scholars, and public opinion. Like other specialized international courts tribunals, international economic courts may have some forms of bias or sentiments. Their mandate is to adjudicate on the eventual violation of relevant international economic law provisions.

International economic law should not be perceived as a self- contained system; rather, it should be conceived as a part of general international law. The boundary drawn between the economic and other international values is analytically untenable and yet, this argument has often been made to insulate trade and investment law from the demands of justice. Instead of employing the path of functionalism and addressing demands of justice in rather fragmented ways, international law should address such demands in a robust manner.

Trade and investment should not be considered as ends in themselves, but as tools to promote human development. At the legal level, development can be conceived as a fundamental dimension of sustainable development which is one of the objectives of the WTO. Thus, international economic law, being part of public international law, needs to be rethought according to the new evolving kaleidoscope of international governance. The linkage

between trade, investment, and non - economic concerns such as cultural heritage needs to be explored and coordinated.

The internationalization of investment disputes should be conceived as an important valve for guaranteeing a neutral forum and depoliticizing investment disputes. Investor-state arbitration shields investment disputes from power politics and insulates them from the diplomatic relations between states. The depoliticization of investment disputes benefits: foreign investors, the host state, and the home state. First, foreign investors no longer have to rely on the vagaries of diplomatic protection; rather, they can bring direct claims and make strategic choices in the conduct of the arbitral proceedings. In this regard, investor-state arbitration can facilitate access to justice for foreign investors and provide a neutral forum for the settlement of investment disputes. Such access is perceived to be necessary to render meaningful the substantive investment treaty provisions. Second, the depoliticization of investment disputes protects the host state by reducing the home country's interference in its domestic affairs.' Third, the depoliticization of investment disputes also protects the home state in that it no longer has to become involved in investor - state disputes.