

Why de-judicialize? Explaining state preferences on judicialization in World Trade Organization Dispute Settlement Body and Investor-to-State Dispute Settlement reforms

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Abstract

Judicialization scholarship suggests that states must seek the de-judicialization of international dispute settlement mechanisms to regain regulatory space. Why then do some states seek a de-judicialization yet others increased judicialization of dispute settlement mechanisms in their pursuit of regulatory space? This article advances a twofold argument. First, the concept of judicialization has been erroneously conflated with state perceptions of regulatory space under dispute settlement mechanisms. States aspiring to consolidate regulatory space may pursue de-judicialization and increased judicialization alike. Second, states' preferences for de-judicialization or increased judicialization to regain regulatory space should largely depend on conceptions of legitimate international law as either intergovernmental contracts or cosmopolitan quasi-constitutional order. The article illustrates these arguments at the example of US and EU efforts to reform the Dispute Settlement Body of the World Trade Organization and investor-to-state dispute settlement. Both seek to increase regulatory space. Yet, the USA pursues de-judicialization while the EU promotes judicialization.

Keywords: investor-to-state dispute settlement, judicialization, legitimacy, regulatory space, World Trade Organization.

1. Introduction

States have established thousands of international dispute settlement mechanisms (DSMs) in the last decades, which play a central role in modern global governance (Alter 2014; Koremenos 2016). They complement and replace classic intergovernmental bargaining through dispute resolution procedures (Keohane *et al.* 2000). DSM design, however, considerably varies in terms of judicialization (Alter *et al.* 2019). Some DSMs take the form of ad hoc intergovernmental committees that resolve disputes in view of political considerations. Other DSMs take the form of permanent courts with secretariats and vetted judges that are tasked to resolve conflicts exclusively on the basis of international treaties and law. Variation in DSM judicialization matters in that it affects state preferences, conduct, and compliance with international treaties and DSM rulings (Zangl 2008; Alter 2009; De Bièvre *et al.* 2014; Abebe & Ginsburg 2019; Alter *et al.* 2019). Scholars have advanced manifold explanations for variation in judicialization yet all explanations – implicitly or explicitly – build on the assumption that high judicialization limits whereas low judicialization maintains states' regulatory space (McCall Smith 2000; Helfer & Slaughter 2005; Posner & Yoo 2005; Alter 2014; Allee & Elsig 2016). State efforts to regain regulatory space under DSMs should thus result in de-judicialization attempts.

Recent state efforts to reform the DSMs of the international trade and investment regimes cast doubts over this assumption. The USA currently seeks to consolidate its regulatory space under the Dispute Settlement Body (DSB) of the World Trade Organization (WTO). It criticizes that notably the jurisprudence of the WTO's Appellate Body (AB) unduly interferes with its regulatory space and has thus been blocking for years the appointment of new AB judges. In December 2019, this “high court” of the WTO has lost its quorum to adjudicate, which

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forces WTO members to resort to less judicialized dispute resolution arrangements. The EU, on the other hand, seeks to consolidate its regulatory space under investor-to-state dispute settlement (ISDS). It replaces conventional ad hoc arbitration through a semi-permanent Investment Court System (ICS) and pursues in the long run the creation of a multilateral investment court (MIC) under the umbrella of the United Nations (UN). These observations are noteworthy in that the USA and the EU both seek to consolidate their regulatory space under DSMs. Yet, they opt, on the one hand, for a partial de-judicialization and, on the other, further judicialization of relevant DSMs.

An intuitive explanation for diverging US and EU reform preferences to regain regulatory space may lie in the stark institutional differences between the WTO DSB and conventional ISDS. The DSB qualifies as highly judicialized permanent international court resolving disputes between states, whereas ISDS amounts to less judicialized ad hoc arbitration resolving disputes between states and private investors. Hence, the US preference for de-judicialization to regain regulatory space may reflect the WTO's high degree of initial judicialization, while EU preferences for increased judicialization may reflect the initially low degree of judicialization of ISDS. Although this explanation is intuitive, it is misguided. If differences in pre-reform judicialization were to account for US and EU reform choices, then the USA and EU should hold similar preferences on DSM reforms in both regimes. In reality, however, the USA favors the de-judicialization of both the WTO DSB and ISDS, while the EU favors increased judicialization of both ISDS and the WTO DSB. In short, variation in reform preferences does not occur across institutionally heterogeneous regimes and DSMs but across states. Taken together, these observations imply that state preferences on DSM judicialization are more complex than assumed and require further investigation.

This article sets out to analyze the determinants of DSM judicialization in greater detail. It develops a twofold argument. First, DSM judicialization and state perceptions of its effect on regulatory space do not stand in a negative relationship and are not conceptual flipsides as widely assumed. States may aspire to enjoy significant policy flexibility under highly judicialized DSMs yet expect to see their regulatory space limited under less judicialized DSMs. Manifold formal and informal ex ante and ex post checks can indeed curtail the autonomy of highly judicialized DSMs and protect state interests (Alter 2008; Helfer & Slaughter 2005, p. 844). Second, states' choice to seek the consolidation of their regulatory space through a reduction or increase in DSM judicialization depends to a large extent on states' conceptions of legitimate international law and institutions. Some states see international law and institutions as interstate contracts, whose legitimacy primarily flows from state consent and satisfaction. When seeking to consolidate regulatory space, these states should naturally focus on strengthening direct state control through the re-politicization and de-judicialization of DSMs. Other states understand international law as quasi-constitutional cosmopolitan order. International law is not merely a state-serving instrument but a governance system, whose legitimacy flows from broad societal consent, satisfaction, transparent, and accountable institutions. State efforts to consolidate their regulatory space should rather focus on strengthening transparency and accountability mechanisms of DSMs resulting in an increase in judicialization. In the language of principal-agent theory, states with a contractual conception of international law should consolidate their regulatory space and curtail judicial autonomy through control over delegation per se whereas states with a quasi-constitutional vision should seek greater formal and informal, institutional and procedural ex ante and ex post checks on judicial autonomy (Pollack 2003).

The article illustrates these arguments at the example of recent US and EU efforts to reform the WTO DSB and ISDS. It contributes to research on dispute settlement design in emphasizing the importance of ideational factors, sharpens our understanding of the judicialization of international affairs, and sheds a light on two highly salient domains of global economic governance. The first section defines and discusses judicialization and its relationship with state perceptions of regulatory space. The following section conceptualizes how diverging conceptions of legitimate international law influence state preferences on DSM design and reform strategies. The last sections operationalize the argument and develop the case studies.

2. Judicialization and regulatory space: An underspecified relationship

The concept of judicialization was developed to describe one of the defining phenomena of the 20th century in international affairs – namely the growing role of international tribunals in global governance. Judicialization refers to the process by which international judicial bodies and judicial decisionmaking come to shape and even

dominate international politics and political decisionmaking thereby limiting state sovereignty and the powers of national executives and legislators (Alter *et al.* 2019, p. 49). Judicialization is neither static nor uniform but varies across policy domains, regions, and time. To measure variation, scholars focus on five judicialization dimensions (McCall Smith 2000; Zangl 2008; Chase *et al.* 2013): (i) scope and permanency of delegation; (ii) state control over access to dispute resolution; (iii) legal/diplomatic nature of operational procedures; (iv) state control over operational procedures; and (v) state control over decisionmaking. Chase *et al.* (2013) merge these judicialization dimensions into a parsimonious threefold categorization of DSMs:

- Diplomatic DSMs – like intergovernmental committees – function predominantly according to a political logic. They come with no or limited and narrow delegation of dispute resolution to third parties and states retain control over access to dispute resolution, working procedures, and decisionmaking of DSMs.
- Quasi-judicial DSMs – like ISDS tribunals or General Agreement on Tariffs and Trade (GATT) panels – function according to a predominantly legal logic. They offer largely unconditional access to ad hoc third-party adjudication for state or nonstate actors. They operate according to legal predefined working procedures and states retain limited control over decisionmaking mostly in the form of annulment procedures.
- Judicial DSMs – like the DSB or European Court of Justice – also function according to a legal logic. They enjoy compulsory jurisdiction with automatic access to institutionalized third-party adjudication and a high degree of permanency, administrative and resource autonomy in the form of multiannual budgets, and long-term mandates for adjudicators. States have no say over working procedures and decisionmaking apart from collective management and reforms in concertation with other states.

Why do states at times create diplomatic, quasi-judicial, or judicial DSMs? A sizable literature engages with this question. Most studies tie in with the rational design school (Koremenos 2016) and suggest that states select a degree of judicialization in view of the collective action problems, anticipated sovereignty costs, and cooperative gains in a given situation (McCall Smith 2000; Sweet 2004; Zangl 2008; Jo & Namgung 2012; Chase *et al.* 2013; Davis 2015; Allee & Elsig 2016; Poulsen 2020). Other studies ignore the design stage and focus on the diverging success of DSMs to engage in judicial activism (Barfield 2001; Sweet 2004; Alter 2009, 2014). A third strand of research, in turn, adopts a bottom-up approach and argues that differences in DSM usage and “rights-claiming” cause variation in judicialization (Alter *et al.* 2019). Finally, research on feedback politics argues that variation in judicialization is the result of path dependence (Alter 2009; Abebe & Ginsburg 2019; Alter *et al.* 2019). DSM jurisprudence is seen to mobilize domestic actors at times in support but typically against DSMs demanding de-judicialization thus returning issues to domestic regulatory control.

Remarkably, these explanations share the assumption that judicialization and regulatory space are two sides of the same coin. High judicialization – as rational design choice, product of judicial activism, rights-claiming, or feedback politics – is seen to limit states’ regulatory space while low judicialization is assumed to preserve it. This claim is conceptually underspecified. The concept of judicialization should not get conflated with state perceptions of regulatory space under DSMs. This assessment becomes clear when contrasting it with the concept of agent autonomy of principal-agent models (Pollack 2003). Agent autonomy denotes the range of possible independent action available to agents like DSMs and depends on (i) the extent of powers delegated to agents and (ii) ex ante and ex post control mechanisms to monitor and sanction agents (Pollack 2003, pp. 39–47). Most judicialization research focuses on delegated powers to DSMs but ignores ex ante and ex post control mechanisms (see McCall Smith 2000; Jo & Namgung 2012; Chase *et al.* 2013; De Bièvre *et al.* 2014). Nondelegation, ad hoc delegation, or permanent delegation are modeled as key proxies for judicialization, DSM autonomy and thus states’ regulatory space. DSM autonomy and states’ regulatory space are thus seen to flow from the ease of states to “recontract” with DSMs (Posner & Yoo 2005). Some studies adopt a more nuanced approach and extend the analysis to certain ex ante and ex post control mechanisms such as appointment procedures or vetoes over dispute initiation (McCall Smith 2000; Zangl 2008; Elsig & Pollack 2014). While these studies offer a more accurate picture, they again do not fully capture DSM autonomy and regulatory space.

Manifold subtle and overlooked dynamics shape DSM autonomy and states’ regulatory space. Alter (2008) cautions in that regard that certain DSMs are trustees rather than agents. They are entrusted to protect the rights of third parties like citizens, traders, or investors against transgressions of contracting states and thus draw their authority and legitimacy from their reputation among these beneficiaries. This legitimation chain constrains

DSM autonomy yet is ignored in most studies. Helfer and Slaughter (2005, p. 844), further, identify several formal and informal, legal, and political dynamics that constrain DSM autonomy and affect states' regulatory space. They highlight that inter alia precision of substantive norms, prescribed legal interpretation techniques, reputational concerns of DSMs among peer institutions and the broader legal community, as well as informal coordination practices with stakeholders may affect DSM autonomy and states' regulatory space. Alter and Helfer (2017) indeed note that the Andean Tribunal of Justice curtails states' regulatory space less than the European Court of Justice despite their almost identical designs. Judicialization, regulatory space and state perceptions of regulatory space thus do not stand in a negative relationship. Highly judicialized DSMs may be subject to greater constraints on their autonomy than less judicialized DSMs and vice versa.

This insight helps to explain the puzzling observation that the USA and the EU, in their pursuit of increasing regulatory space in the international trade and investment regimes, favor de-judicialization, on the one hand, and judicialization of the relevant DSMs, on the other. This triggers an important follow-up question: Why do states sometimes favor de-judicialization or judicialization to consolidate their regulatory space? The following section addresses this question and makes the argument that diverging conceptions of legitimate international law and institutions play a crucial but often ignored role.

3. Diverging conceptions of legitimate international law and judicialization trajectories

Conceptions of legitimate international law and institutions are elusive yet powerful factors shaping international affairs. In Western thinking, legitimacy is understood as the acceptance of the exercise of public authority through the governed (Tallberg & Zürn 2019, pp. 285–286). In other words, legal and political regimes and institutions are legitimate, if the individuals and entities governed by these regimes and institutions perceive them as rightful and appropriate. In the absence of a global government with coercive powers, the effectiveness of international law and institutions depends on their legitimacy and states' willingness to comply (Tallberg & Zürn 2019, p. 585).

The legitimacy of international law and institutions rests on their performance and institutional design (Tallberg & Zürn 2019, p. 590). State consent (input) is traditionally the key source of legitimacy for international law and institutions. Adequate outcomes (output) for states and other stakeholders are a second important legitimacy source. Finally, transparent, accountable, and fair procedures (throughput) to govern the exercise of international law and institutions are increasingly perceived as important for legitimation. The need for “good governance” arises, as international public authority increasingly complements domestic public authority, which is subject to “good governance” standards in many societies.

States' conceptions of legitimate international law and institutions are subjective and evolve over time. Differences result from two dynamics. First, states have different understandings of what exactly constitutes legitimate consent (input), adequate outcomes (output), fair, lawful, and inclusive governance procedures (throughput). Second, states attach different importance to these distinct sources of legitimacy. Ultimately though, these differences in appreciation are socially constructed and rooted in national culture, history, and power. As Byers and Nolte (2003) suggest, state experiences with economic and geopolitical power and indeed hegemony play an important role in shaping national conceptions of legitimate international law and institutions. Hegemonic powers, which control unrivalled military capacity, access to globally dominant markets and financial systems, enjoy cultural and ideational leadership, and control critical resources and technologies, are unchallenged in their capacity to coerce and impose their preferences on the international system. State power thus determines whether states perceive international law and institutions as constraint; or as protection against coercion. Power and legitimacy notions are intertwined though not identical. The relationship between power and states' conceptions of legitimate international law and institutions is subtle. Changes in state power do not automatically and instantaneously affect states' conceptions of legitimate international law and institutions requiring the treatment of power and legitimacy as distinct factors.

How do diverging conceptions of legitimate international law and institutions acquire causal effect and shape DSM judicialization? From the perspective of social sciences, states' conceptions of legitimate international law and institutions are in essence “ideas” about the consensual exercise of international public authority. Ideas are inter-subjective beliefs and norms embedded in society, markets, state bureaucracies, political, legal, and

regulatory systems. They acquire causal effect as “cognitive instruction sheets” (Blyth 2003) through which individuals and groups interpret materialist structures around them and develop preferences, strategies, and actions to navigate and shape them to their advantage. Materialist structures are indeed often insufficient to account for interests, preferences, and actions. Ideational research has pointed to various instances where social agents faced similar material constraints and options yet developed different preferences and actions due to their different ideational mindsets (see Blyth 2003, pp. 698–699). Ideas, in other words, determine what individuals, groups or even states come to perceive as their “rational” interest and how to “rationally” pursue these interests in a given context. From this perspective, states’ conceptions of legitimate international law and institutions function as normative frameworks to assess DSMs and to develop reform agendas. In a first step, states evaluate whether a DSM that has acquired political salience – typically due to controversial jurisprudence impinging on states’ regulatory space – still meets their thresholds for input, output, and throughput legitimacy and commands a “moral duty to obey” or appears illegitimate and/or in need of reforms. In a second step, states may then develop priorities on how to reform DSMs so as to consolidate their regulatory space in line with their conception of legitimate international law and DSMs.

To clarify this argument, it is helpful to discuss US and European legal philosophies and conceptions of legitimate international law and institution. It is important to note here that these conceptions are not static but evolve over time and fluctuate around baseline conceptions across political and national administrations. They implicitly contain ideal-type conceptions of DSMs that serve as normative frameworks to assess DSMs and to develop reform preferences. Legal scholars suggest that the USA sees international law and institutions as intergovernmental contracts that states jointly create and manage in line with their interests (Byers & Nolte 2003; Bradford & Posner 2011; Petersmann 2019). The legitimacy of international law and institutions predominantly flows from state consent (input) and state satisfaction (output). This conception implies that international law and institutions are “weak” in that they are state instruments and must not take on a life on their own. International law and institutions, from the US perspective, cannot evolve and expand their authority yet remain legitimate as it implies a loss in state control and consent. Scholars, furthermore, observe that the USA adheres to “legal exceptionalism.” The USA, as Bradford and Posner (2011, p. 8) suggest, sees itself as global hegemon. As hegemon, the USA claims moral and legal leadership and expects that other countries follow US interpretations of international law. The USA, in turn, cannot be expected to adjust to third country interpretations that run counter US values and interests. In case of persistent reticence of third countries to endorse US interpretations, the USA must seek exemptions or – in the eyes of third countries – at times use its power to breach international law. This “legal exceptionalism” is not unique to the USA but a common feature of hegemonic powers throughout history. In sum, the USA adheres to a highly state-centric contractual conception of legitimate international law and institutions. How pronounced this intergovernmental vision and contractual conception of international law and institutions is varies within margins over time and across presidencies.

European legal philosophy and its conceptions of legitimate international law and institutions, in turn, adopt a Kantian perspective (Weiler 1997; Petersmann 2019). International law and institutions are seen to form a novel “quasi-constitutional” order of universal acclaim based on multilateralism. This order confers rights and obligations on people and states alike. It draws its legitimacy not only from state consent (input) and satisfaction (output) but – more broadly – from societal support and satisfaction. As it thereby constitutes a source of public authority, which is in part independent of states, it may evolve and expand its reach without state consent. This normative independence implies that international law and institutions can be “strong” yet require throughput legitimation. As domestic public authority must comply with standards of “good governance” to legitimize its extensive powers in-between elections, international public authority must legitimize its powers through appropriate governance institutions and procedures in the absence of uninterrupted state consent. Nowhere does this European legal philosophy manifest itself more clearly than in the evolution of the European legal order itself. As Joseph Weiler (1997) argued, the European legal order transformed over time from a classic international law regime into an autonomous supranational constitutional order, which confers rights and obligations on European citizens and Member States alike and governs itself through novel transnational institutions and procedures. Yet, as recent developments in the EU demonstrate, the prevalence of this quasi-constitutional vision of international law and institutions changes over time and across Member States.

What do these diverging legal philosophies and conceptions of legitimate international law and institutions imply for state preferences on DSM reform and judicialization trajectories? First, the conceptions differ over the desirable strength of international law and DSMs. Whereas the US perspective best accommodates weak DSMs with limited authority over states, the European perspective accommodates strong DSMs with extensive authority over states as legitimate. States' preferences for limiting or preserving their regulatory space are thus at least partly endogenous to their legal philosophies. Second, the conceptions differ over the key sources of DSM legitimation and steer reform efforts toward different institutional properties of contested DSMs. The US perspective sees input and output legitimation through state consent and satisfaction as core property of legitimate DSM authority. The USA should thus evaluate contested DSMs and develop institutional reform strategies through these very lenses. US efforts to regain regulatory space and address legitimacy gaps of contested DSMs, in other words, should focus on regressing permanent to ad hoc or even nondelegation of dispute resolution to strengthen input and output legitimation. Similarly, the USA may seek to weaken the legal logic and working principles of contested DSMs and instead amplify the diplomatic nature of dispute resolution procedures. These efforts amount to a de-judicialization and re-politicization of DSMs in that they devolve for instance judicialized DSMs into quasi-judicialized or diplomatic DSMs. The European perspective, in turn, sees DSMs as part of a global governance system whose legitimacy flows from state and broad societal consent and satisfaction, accountable, transparent, and fair processes and institutions. Europeans evaluate the legitimacy and performance of contested DSMs with a much stronger emphasis on throughput legitimation. European reform preferences and efforts to consolidate states' regulatory space naturally focus more on strengthening the public interest by ensuring greater transparency, accountability and fairness of DSM institutions and procedures. These efforts amplify the legal logic of dispute resolution procedures, likely increase delegation and limit the role of diplomatic considerations and actors. Reforms focused on strengthening throughput legitimation are thus likely to amount to an increase in DSM judicialization.

The previous sections developed two theoretical claims in relation to existing judicialization and international institutions scholarship. These claims are summarized below in two hypotheses. Plausible alternative explanations are enshrined in corresponding counter-hypotheses.

- H_1 : Judicialization and state perceptions of regulatory space do not stand in a negative relationship. If states seek to increase their regulatory space, they can pursue this through de-judicialization and judicialization alike.
- C_1 : Judicialization and state perceptions of regulatory space stand in a negative relationship. If states seek to increase their regulatory space, they must reduce the judicialization of DSMs.
- H_2 : US and EU preferences to consolidate regulatory space in the international trade and investment regimes through either de-judicialization or judicialization largely reflect conceptions of legitimate international law and institutions.
- C_2 : References to diverging conceptions of legitimate international law and institutions are rhetorical tools to cloak material interests. US and EU preferences to consolidate their regulatory space in the international trade and investment regimes through de-judicialization or judicialization echo their satisfaction with DSM jurisprudence and/or material societal interests.

4. Research design and operationalization

How to empirically test the hypotheses and counter-hypotheses? The article focuses on US and EU efforts to reform the DSMs of the international trade and investment regime. These regimes overlap in many regards (Kurtz 2016), which limits noise and facilitates comparative analysis. Furthermore, their DSMs qualify as significant and hard cases. They resolve disputes of great political, economic, and financial salience. If legitimacy considerations come to the fore even in domains of strong materialist struggles, they should play a prominent role also in other regimes. The focus on US and EU preferences, in turn, reflects their role as global economic powers. Again, if US and EU preferences reflect legitimacy considerations despite their ability to resort to power politics, then they should also shape preferences of weaker states.

To underpin the validity of hypothesis H_1 and refute corresponding counter-hypothesis C_1 , it is necessary to identify an instance where states seek to regain regulatory space yet push for judicialization. The article produces this evidence at the example of EU efforts to reform ISDS. It is important to note that H_1 and C_1 focus on states' anticipated reform impacts on their regulatory space rather than actual variation in regulatory space pre- and post-reform. This approach is standard in research on institutional and DSM design and reform.

Testing hypothesis H_2 and counter-hypothesis C_2 poses greater challenges. Conceptions of international law and institutions – as all “ideas” – pose the epistemological problem that their effects on preferences and actions are not directly observable. The article carries out four tests to overcome this challenge: First, it seeks to assess the prevalence of legitimacy considerations in policy narratives on reform efforts. If legitimacy considerations are prevalent in narratives, it is more likely that they shape policy. The analysis focuses inter alia on communications in the WTO and UN Commission on International Trade Law (UNCITRAL) working groups during the last decade from the Office of the United States Trade Representative (USTR) and the Directorate-General (DG) for Trade of the European Commission, which are responsible for trade and investment policies. Second, it briefly evaluates consistency of state preferences and narratives across policy domains. If they are consistent, it increases confidence in their causal significance. Third – to scrutinize the validity of C_2 – it evaluates the performance of the USA and EU under the WTO DSB and ISDS. The judicialization literature stipulates that states pursue the de-judicialization of DSMs, if DSM jurisprudence is biased against them and frustrates state interests. If, however, states perform on or above average under DSMs in comparison to third countries, DSM jurisprudence can be seen to advance state interests. Hence, other factors including legitimacy considerations are more likely to fuel reform efforts. Logistic regressions based on WTO DSB statistics (WTO 2021) and UNCTAD (2021) ISDS statistics are run to evaluate whether the USA and the EU won, lost or settled statistically significantly more or less disputes than third countries. The purpose of these regressions is to assess whether it is possible to reject the null hypotheses as implied in the judicialization literature or whether variation in descriptive statistics amounts to noise. Last, it builds on research on the impact of DSM judicialization on societal preferences and mobilization (Goldstein & Martin 2000; Poletti & De Bièvre 2016) to evaluate the role of societal interests and lobbying in US and EU reform efforts. If powerful societal interest groups push for reform efforts to advance private material interests, it supports C_2 and decreases confidence in H_2 . It needs mentioning that the two tests of C_2 also echo the widely held assumption enshrined in C_1 that judicialization and state perceptions of regulatory space stand in a negative relationship. Rejecting C_2 should thus increase the explanatory leverage of both H_2 and H_1 .

5. WTO reform and legitimacy

The WTO – and its predecessor the GATT – has been the cornerstone of the international trade regime since 1948. The GATT/WTO provides a forum for multilateral negotiations on market access and trade rules as well as a mechanism to resolve disputes among its 164 members. The DSM of the GATT/WTO has been playing a key role in managing the rules-based international trade regime. It dealt with 136 disputes during the GATT era (1947–1994) and almost 600 disputes during the WTO era (1995–today).

5.1. Pre-reform judicialization

The WTO DSB qualifies as judicial DSM. It is a permanent DSM with compulsory jurisdiction, clearly defined legalistic operational procedures and minimal state influence on decisionmaking. As laid out in the Dispute Settlement Understanding (DSU), it has a permanent institutional setup, its own staff and resources and draws on detailed operational procedures, which govern access and decisionmaking. In a first step, states can after compulsory mediation request the constitution of a panel of three adjudicators – selected from a roster of experienced diplomats and academics – to rule on a matter within six months. Unless WTO members unanimously reject the panel report, the DSB automatically adopts it within 60 days. If a disputing party appeals, the report is sent to the AB. The AB is a standing international court that counts seven full-time judges and assesses panel reports in the light of legal consistency. AB judges are vetted and appointed by WTO members for a four-year term renewable once. To take decisions, the AB must count at least three judges. The AB is meant to decide appeals within 60 days yet not more than 90 days. The AB report is automatically adopted unless WTO member unanimously

reject it. Following the adoption of a panel or AB report, states found in breach of WTO commitments have time to bring contested measures into compliance before the WTO can authorize retaliation tariffs.

5.2. US de-judicialization efforts

The USA has grown highly critical of the WTO DSB and notably the AB in recent years. Initially, however, the USA was the main proponent of a limited judicialization of its precursor the GATT DSM (De Bièvre 2017). During the Uruguay Round negotiations (1986–1994), it pushed for the elimination of the veto of defendant states to block the initiation of dispute resolution procedures (Elsig & Eckhardt 2015, pp. 25–26). Other states – including Canada, Japan, and the EU – were hesitant but agreed to compulsory jurisdiction under the condition to establish a permanent AB to rectify potentially flawed panel reports. The USA unwillingly accepted this compromise. In the early 2000s, the Bush and Obama administrations started calling for a DSB reform voicing frustration with the jurisprudence of the AB (USTR 2018, p. 23). The Obama administration repeatedly vetoed re-appointments of AB judges, who it deemed responsible for misjudgments. In 2016, the Trump administration then intensified US complaints and started vetoing the appointment of any new AB judge. On 11 December 2019, as the term of several AB judges came to an end, the AB lost its minimum quorum to hear new appeals. The new Biden administration has so far only signaled that it shares the concerns of previous US administrations, will not agree to the nomination of new AB judges and demands AB reforms. While the USA has not presented concrete reform proposals, its actions have immediate implications for WTO dispute resolution and can be considered as *de facto* reform. They paralyze the AB and DSB and force WTO members to resort to less judicialized dispute resolution mechanisms (see Pauwelyn 2019).

- Disputing states might use “floating” panel reports to diplomatically resolve their disagreements. After a panel has released its report, states may request the suspension of the proceedings, which prevents the formal adoption, appeals, and implementation of a report. Like under the GATT, WTO dispute resolution would transform from a judicial into a diplomatic or quasi-judicial DSM. States would use a panel report as an expert opinion to inform diplomatic negotiations. Former US Trade Representative Lightizer suggested that this was his preferred option (Pauwelyn 2019, p. 315).
- Disputing states unsatisfied with first-instance panel reports may appeal “into the void” knowing that the AB must not hear the case. The panel report would disappear in a procedural “black hole.” WTO dispute resolution would again regress to a diplomatic DSM.
- Disputing states might formally agree that first-instance panel reports are final. The DSB would get diminished to ad hoc panels with no permanent second instance and tenured judges turning it into a quasi-judicial DSM.
- Disputing states can agree to use ad hoc arbitration under Art. 25 DSU to resolve appeals. In case first-instance panel reports are not satisfactory, parties could agree to “appeal” to arbitration tribunals. Appellate decisions of these arbitration tribunals are only notified to the DSB but fully enforceable *inter alia* through retaliation (Pauwelyn 2019, p. 313). The EU in particular champions this solution and has been promoting a Multi-Party Interims Appeal Arrangement (MPIA), which counts 24 signatories as of April 2021 and emulates the AB in terms of procedures and adjudicators. While this solution maintains judicial dispute resolution, it hinges on state consent.
- Disputing states can resort to bilateral DSMs under FTAs where possible. These DSMs exhibit lower levels of judicialization than the WTO DSB (see Chase *et al.* 2013). In this scenario, dispute resolution would *de facto* regress to a quasi-judicial or diplomatic DSM depending on the FTA.

5.3. Prevalence and consistency in US legitimacy considerations

The USA justifies its actions on the basis of several concerns (USTR 2018, pp. 22–28). With regard to substance, the USA is concerned about AB jurisprudence on trade remedies. The USA holds that the AB has a flawed understanding of WTO law and unduly limits states’ ability to apply trade remedies (USTR 2018, pp. 23–24). The USA is particularly concerned with AB rulings against its practice of “zeroing” to calculate anti-dumping duties. With regard to process, the USA is concerned that the AB disrespects its mandate and procedural rules laid down in the DSU (USTR 2018, pp. 24–28). The USA criticizes that the AB regularly exceeds the time limit of 90 days. In

a similar vein, the USA laments that AB judges prolong their own terms by weeks or months to finalize appeals procedures. Further, the USA is concerned that the AB seeks to establish a doctrine of precedence and gives advisory opinions on the interpretation and application of WTO law not pertinent to concrete appeals. Finally, the USA criticizes that the AB regularly engages in *de novo* reviews of facts and domestic laws of WTO members despite the fact that the DSU merely tasks the AB to correct legal mistakes in panel reports.

These substantive and procedural issues reflect deep-rooted US legitimacy concerns regarding the WTO regime. The USA sees the WTO as an intergovernmental regime and contract that is meant to serve states. Petersmann (2019, p. 510) notes that this contractual conception precludes a dynamic evolution of WTO law and principles through argumentative and judicial practice. The WTO's authority and legitimacy are seen to flow exclusively from state consent (input). Hence, WTO law and jurisprudence must not acquire autonomy and develop without state consent. US concerns regarding substance and process of AB jurisprudence are thus fundamentally objections to the growing autonomy of the AB in particular and WTO regime in general. It curtails state control and sovereignty and arguably distorts the intergovernmental nature of the WTO regime. US actions aim to redress this problem through augmented state control and de-judicialization. Countless official US statements on the DSB published since the early 2000s and all statements published after 2016 emphasize this fundamental US concern about the legitimacy gap and constitutional "mutation" of the WTO regime. The following quote of the US representative to the WTO summarizes the US position: "...for more than 15 years and across multiple US Administrations, the United States had been raising serious concerns with the Appellate Body's disregard for the rules set by WTO Members. Through persistent overreaching, the WTO Appellate Body had been adding obligations that had never been agreed by the United States ... when the Appellate Body abused the authority it had been given..., it undermined the legitimacy of the system and damaged the interests of all WTO Members who cared about having the agreements respected as they had been negotiated and agreed..." (WTO 2019, p. 17).

These concerns, moreover, are bipartisan. Prominent republicans and democrats – including incoming USTR Tai, former USTR Lightizer (CFR 2007), interim USTR Stephen Vaughn (Keynes & Bown 2019, pp. 12–13), and past USTRs Ron Kirk and Mikey Kantor (Alter 2008, p. 49) – have persistently criticized the AB for illegitimate judicial overreach whilst in government and opposition. US critique of the WTO AB is, furthermore, consistent with US positions in other international regimes. The USA has a difficult relationship with judicialized DSMs. The USA has been promoting the international rule of law yet has been opposing judicialized DSMs including the International Court of Justice, the International Criminal Court, the Inter-American Court of Human Rights or the International Tribunal of the Law of the Sea. In short, US legitimacy concerns about the DSB and WTO regime are vocal, long-standing, bipartisan and consistent with US attitudes in other regimes.

5.4. Assessing alternative explanations

US statements justifying its actions through legitimacy considerations may cloak material interests. Judicialization scholarship suggests that US actions could be a response to adverse DSB rulings (Elsig & Eckhardt 2015; Abebe & Ginsburg 2019; Alter *et al.* 2019). Adverse DSB rulings could have frustrated US interests and thus eroded political support. It is a challenging task to assess whether the DSB has overall ruled in favor or against the USA. One approach – employed for instance by Elsig and Eckhardt (2015) – is to take stock of how often the DSB ruled in favor of the USA as claimant and how often it fully exonerated the USA as defendant in comparison to the other WTO members. Table 1 presents descriptive statistics for the USA, the EU and other WTO members (grouped together). It draws on WTO classifications of dispute outcomes in conjunction with substantive analyses of panel reports to classify disputes as won, settled or lost. It points to some variation in DSB performances. But are these differences statistically significant? Logistical regressions on the basis of 333 concluded WTO DSB proceedings (WTO 2021) using defendant/complainant states as independent variable and winning/nonwinning as dependent variables help to scrutinize the null hypothesis. They suggest that the USA acting as complainant does not statistically significantly win fewer cases than other WTO members (Table 2, model 1). The USA acting as defendant, however, does statistically significantly win more cases (Table 2, model 4) and is furthermore less likely to settle than other WTO members (see Appendix S1: Table S1, model 4) pointing to power preponderance effects (Sattler & Bernauer 2011). The marginal effects on predicted probabilities suggest that the USA as defendant is 13% more likely to win and 17% less likely to settle than other WTO members. Overall, these findings go against

Table 1 Dispute Settlement Body (DSB) performance of US, EU, and World Trade Organization (WTO) average (1995–2021)

| | | Number of cases | Number of DSB decisions | Won disputes | Settled disputes | Lost disputes |
|-------------|-------------------|-----------------|-------------------------|--------------|------------------|---------------|
| Defendant | USA | 155 | 89 | 17 (19%) | 16 (18%) | 56 (63%) |
| | EU | 102 | 62 | 4 (6%) | 26 (42%) | 32 (52%) |
| | Other WTO members | 339 | 182 | 11 (6%) | 60 (33%) | 111 (61%) |
| Complainant | USA | 118 | 73 | 40 (55%) | 27 (37%) | 6 (8%) |
| | EU | 105 | 58 | 38 (66%) | 14 (24%) | 6 (10%) |
| | Other WTO members | 373 | 202 | 121 (60%) | 61 (30%) | 20 (10%) |

Source: WTO (2021), author's own calculation.

claims of an anti-US bias. Johanneson and Mavroidis (2017, p. 37) offer a more fine-grained legal analysis. They disaggregate panel and AB reports in view of distinct legal claims made by parties. They find that panels and the AB ruled in favor of almost 70% of the claims made by the USA and EU as complainants and almost 40% of their claims as defendants. Other WTO members were less successful in defending legal claims.

These evaluations, nonetheless, overlook differences in the political salience and economic value of disputes. Certain disputes are more important than others, which implies that dispute settlement statistics may not fully capture states' perceptions of their DSB performances. Scholars, however, suspect the DSB to benefit the interests of major economic powers – such as the USA – rather than developing and least developed countries. A vast literature reports that the DSB does not erode but preserves and even amplifies power asymmetries among WTO members (see Sattler & Bernauer 2011). Schott and Jung (2019) for instance argue that the DSB generally ruled in favor of the USA in salient disputes with China. Davis (2016), further, finds that the USA was more successful in removing trade hurdles in third countries through the DSB than through alternative political channels. In sum, one cannot substantiate the alternative explanation that DSB jurisprudence is manifestly biased against the USA thus fuelling de-judicialization efforts.

A second alternative explanation is that powerful domestic interest groups have captured US policymaking and account for US actions. Scholars theorize that high degrees of judicialization may trigger societal backlashes against international regimes and DSMs (Alter 2014; Abebe & Ginsburg 2019). Judicialized DSMs are seen to provide more and better information on the redistributive effects of regimes and to reconfigure redistributive conflicts in society (Goldstein & Martin 2000; Poletti & De Bièvre 2016). With regard to the WTO, Poletti and De Bièvre (2016, pp. 99–109) observe that judicialization encourages narrow sectorial or product-based societal mobilization in that the redistributive effects of DSB jurisprudence are highly concentrated. In line with these assumptions, it has been suggested that notably the US steel industry drives US policy. Historically, the US steel industry has been the main beneficiary of US trade remedies to curb import competition and maintain price levels (Congressional Research Service 2020). Since 1995, these trade remedies – and notably the use of “zeroing” – moreover account for 65% of all WTO disputes brought against the USA (Bown & Keynes 2020, p. 12) and the DSB frequently ruled against the USA calling for their termination. The US steel industry thus criticized the DSB for “illegitimate judicial overreach” unfounded in the WTO Agreements and has been demanding DSB reforms for many years. The question then is whether US efforts to de-judicialize the DSB reflect government concerns about legitimate international law; or whether the interests of the US steel industry and its de-legitimation discourse shape US policy. Evidence is mixed and in all likelihood both – genuine legitimacy concerns and protectionist interests – are at play. US steel interests were strongly represented in the Trump administration in that the careers of many top officials were closely tied to the US steel industry (Politi 2018). The position of the Trump administration, however, does not markedly differ from the positions of the Biden administration and previous administrations with weaker ties to the US steel industry. The Clinton, Bush, and Obama administrations repeatedly flouted US steel interests through the conclusion of trade agreements resulting in employment in the US steel sector to more than half since the 1990s (Bloomberg 2018). Nonetheless, these administrations

Table 2 Logistic regression of US, EU, and World Trade Organization (WTO) average performance under WTO Dispute Settlement Body (DSB)

| | Dependent variable: | | | | | |
|--|---------------------|------------------|------------------|-------------------|-------------------|-------------------|
| | Complainant won | | | Defendant won | | |
| | (1) | (2) | (3) | (4) | (5) | (6) |
| USA complainant | −0.261 (0.267) | | | | | |
| EU complainant | | 0.297 (0.302) | | | | |
| Other complainant | | | 0.015 (0.229) | | | |
| USA defendant | | | | 1.282*** (0.379) | | |
| EU defendant | | | | | −0.513 (0.554) | |
| Other defendant | | | | | | −0.921** (0.390) |
| Constant | −0.454*** (0.127) | 0.345*** (0.122) | 0.386*** (0.178) | −2.726*** (0.267) | −2.161*** (0.196) | −1.823*** (0.235) |
| Marginal effect on predicted probability | −0.06 | 0.06 | 0.00 | 0.13 | −0.03 | −0.07 |
| Observations | 333 | 333 | 333 | 333 | 333 | 333 |

* $P < 0.1$; ** $P < 0.05$; *** $P < 0.01$. Source: WTO (2021), author's own calculation.

voiced the same concerns regarding the WTO as the Trump administration. These observations suggest that US concerns about legitimate international law are long-standing and genuine yet that domestic interest groups cultivate, employ and reinforce them for their purposes.

5.5. EU re-judicialization efforts

For the sake of analytical completeness, it is important to briefly assess the EU's position in the DSB crisis. The EU plays a reactive part in the DSB crisis and behaves in accordance with hypothesis H_2 . The EU acknowledges certain US grievances yet condemns unilateral US de-judicialization efforts. It acts as leader of multilateral initiatives to temporarily replace the DSB through the MPIA and ultimately to reinstate the DSB (Pauwelyn 2019; European Commission 2020a). The EU invokes legitimacy considerations to justify its position and critique of the USA in the WTO. It emphasizes the importance of a functioning AB for the predictable and neutral interpretation of trade rules and its commitment to multilateralism and the rule of law (WTO 2019; European Commission 2020b). The EU's commitment to judicialized dispute settlement, the international rule of law and multilateralism is not unique to the WTO but cuts across international affairs (see Alter 2014) and also comes to the fore through societal support for the EU's re-judicialization efforts in the WTO. The EU's position further cannot be explained through a bias of DSB jurisprudence in its favor (Tables 1,2). The brief assessment of the EU's position and actions thus supports hypothesis H_2 and weakens counter-hypothesis C_2 (Table 3).

6. ISDS reform and legitimacy

Legitimacy consideration also plays a key role in efforts to reform ISDS. Since the 1960s, states have concluded some 3,500 international investment agreements (IIAs) with ISDS provisions to resolve investment disputes (Bonnitcha *et al.* 2017; Poulsen 2020). States commit through IIAs to treat foreign investors in accordance with

Table 3 Summary table of theoretical predictions and empirical observations on World Trade Organization (WTO) reform

| Explanation | Test | Theoretical prediction | Empirical observation | Overall fit |
|--|---|---|--|---|
| Regulatory space and judicialization stand in no relationship (H_1) | State efforts to regain regulatory space | USA and EU: efforts may result in judicialization | USA: efforts result in de-judicialization of WTO Dispute Settlement Body (DSB) | Support for C_1 but no rejection of H_1 |
| Regulatory space and judicialization stand in negative relationship (C_1) | | USA and EU: efforts must result in de-judicialization | EU: seeks to maintain high judicialization | |
| Ideational explanation for de-judicialization and judicialization efforts (H_2) | Prevalence of legitimization narrative | USA: Strong focus on input legitimization EU: Strong focus on throughput legitimization | Strong focus on input legitimization Strong focus on throughput legitimization | Support for H_2 |
| | Consistency of legitimization narrative across policy domains | USA: Consistent aversion to judicialized dispute settlement mechanisms (DSMs) EU: Consistent support for judicialized DSMs | Consistent aversion to judicialized DSMs Consistent support for judicialized DSMs | Support for H_2 |
| Materialist explanation for de-judicialization and judicialization efforts (C_2) | Jurisprudence | USA: Predominantly adverse rulings EU: Predominantly favorable rulings | Minor bias in favor of US observable No bias in favor of EU observable | Challenge to C_2 |
| | Societal demands | USA: Domestic demands for de-judicialization EU: Domestic demands for judicialization | Steel industry pushes for de-judicialization EU business supports EU re-judicialization | Support for C_2 but no challenge to H_2 |

substantive post-establishment treatment and protection standards. The ISDS provisions of IIAs, in turn, enable foreign investors to seek financial compensation in case a host state breaches these standards. ISDS provisions allow investors to by-pass potentially biased courts in host countries.

6.1. Pre-reform DSM judicialization

Conventional ISDS provisions qualify as quasi-judicial DSM and are remarkably similar across IIAs (Bonnitcha *et al.* 2017, pp. 33–59). They foresee delegation of adjudication to ad hoc third-party arbitration tribunals. Investors and states jointly appoint arbitrators for specific disputes. Access of investors to ISDS is fairly unrestricted. IIAs mostly differ in terms of the length of mandatory consultation and cooling-off periods before investors can force the constitution of a tribunal. Most IIAs, moreover, allow the disputing parties to choose from different arbitration frameworks including the rules of International Centre for Settlement of Investment Disputes or the UNCITRAL. Finally, arbitrators enjoy considerable judicial autonomy in that the vague wording of traditional IIAs provides for extensive interpretative leeway (Helfer & Slaughter 2005, p. 945). In sum, ISDS is a quasi-judicial DSM. It functions according to a legal logic, constitutes compulsory jurisdiction with limited state control over access, operational procedures, and decisionmaking. Yet, unlike judicial DSMs, ISDS builds on ad hoc delegation and lacks independent institutional resources and memory.

6.2. Post-reform DSM judicialization

The EU Member States invented IIAs with ISDS and were for decades their main proponents (Bonnitcha *et al.* 2017, pp. 33–59). In recent years though, the EU and its Member States have grown critical of conventional ISDS. In 2009, the EU Member States empowered the EU to regulate foreign direct investments and to conclude IIAs (Basedow 2021). The Member States largely ceased to exist as analytically distinct actors in investment policy and now speak through the EU with a common voice. So far, the EU has launched 12 negotiations on IIAs or FTAs with IIA-like chapters. Since 2012/2013, these negotiations have attracted public scrutiny (Dietz *et al.* 2019). Non-governmental organizations, trade unions, and politicians lament that ISDS presents a threat to democracy and states' regulatory space. The European Parliament and several Member State governments thus announced to veto the ratification of treaties with conventional ISDS while other Member States initially remained silent or committed to conventional ISDS (Basedow 2021; see also Meunier & Nicolaidis 2006). Due to the growing public contestation as well as constraint under European law to find a common line on investment policy, all Member States ultimately supported the European Commission's proposal to replace conventional ISDS through an ICS and MIC (European Commission 2016). The ICS serves as template for current negotiations on investment protection provisions in IIAs and FTAs (Basedow 2021), while the MIC proposal informs the EU's position in UNCITRAL negotiations on ISDS reform (Roberts 2018). Reformed ISDS shall ultimately resemble the WTO's DSB and AB.

- ICS: The ICS constitutes a step toward turning ISDS from a quasi-judicial into a judicial DSM. First, it foresees a higher degree of institutionalization of dispute resolution than conventional ISDS. It creates a first instance arbitration tribunal and second instance appeals mechanism. The judges of the first instance tribunal are drawn from a roster of 15 vetted judges with an expertise in public law, who serve for a four-year term renewable once. The equivalent roster of the appellate tribunal encompasses six judges with a nonrenewable nine-year term that ensure judicial continuity and institutional permanency. Second, the ICS maintains full access of investors yet introduces procedural hurdles for investors that echo equivalent rules in national legal systems. Investors for instance cannot pursue a claim in parallel before domestic courts and the ICS but must choose a forum. Third, the ICS increases the precision of operational procedures. It mandates the use of the UNCITRAL Rules on Transparency governing public access to hearings and the publication of dispute documents. It, moreover, requires judges to sign up to a code of conduct that curtails secondary employment to prevent conflicts of interest. Fourth, the ICS judicializes and alters decisionmaking dynamics. For one, the ICS comes with more precise language on substantive post-establishment and protection standards limiting the judicial autonomy of tribunals (Helfer & Slaughter 2005, p. 945). In case first instance tribunals still advance controversial interpretations, parties can hold recourse to the ICS appeals tribunal. Finally, the ICS rectifies an in-built decisionmaking bias in favor of

investors (Van Harten 2007, p. 173). Under conventional ISDS, arbitrators need investors to initiate dispute resolution and to select them as adjudicators. The remuneration of arbitrators, moreover, hinges on the amount in dispute and is paid by disputing parties. Arbitrators thus face a monetary incentive to rule in favor of investors to increase demand for adjudication services. The ICS, in turn, is set up similarly to a court. Only states appoint judges to rosters, who get automatically assigned to disputes and are paid a flat-rate fee. In sum, the ICS is an attempt to better protect states' regulatory space through judicialization.

- MIC: The EU's MIC proposal builds on the ICS in that it constitutes the corresponding long-term vision for the creation of a standing global investment court within the UN (European Commission 2016). UNCITRAL members indeed launched discussions to identify needs for ISDS reform in 2017. Since 2019, these discussions have zeroed in on reform options including the creation of a global court. The EU has outlined its conceptions for a court, which echoes the ICS yet aims for an open multilateral treaty. The MIC – like the ICS – seeks to consolidate states' regulatory space through judicialization. Observers suggest that dispute resolution in the international investment regime is likely to be bifurcated in the future with some states further relying on conventional ISDS, others joining a MIC and yet others withdrawing from investment arbitration (Roberts 2018).

6.3. Prevalence and consistency of EU legitimacy considerations

Scholarship concurs that legitimacy considerations play a preeminent role in EU judicialization efforts (see Roberts 2018; Dietz *et al.* 2019). EU policymakers from the European Commission, the European Parliament, the Council of Ministers and Member State governments persistently stress that the ICS and MIC proposals respond to civil society concerns that conventional ISDS unduly limits states' regulatory space and lacks legitimacy to scrutinize public policy measures (see UNCITRAL 2021). The European Commission (2019) for instance stated "...to ensure the highest standards of legitimacy, transparency and neutrality, the EU has been promoting since 2015 a reformed approach to investment dispute settlement both in bilateral and multilateral investment agreements..." and added that "... [the ICS] seeks to strike a balance between protecting investors in a transparent manner and safeguarding a state's right to regulate to pursue public policy objectives." Hundreds of almost identical statements have come from the European Parliament and Member State governments (European Parliament 2015; European Commission 2018; Dietz *et al.* 2019). They emphasize that EU judicialization efforts seek to increase the transparency and accountability of investment dispute resolution and thereby aim at increasing its throughput legitimacy and protecting states' regulatory space. Recent EU trade and investment agreements contain similar statements linking ICS provisions to legitimacy and regulatory space (see CETA Art. 8.9§1).

These observations confirm H_1 in that the EU promotes an increase in DSM judicialization to inter alia consolidate its regulatory space. They challenge conventional views of judicialization scholarship enshrined in C_1 that states must seek the de-judicialization of DSMs to regain regulatory space. This finding underscores the argument developed in previous sections that the concepts of judicialization and regulatory space should not get conflated.

The EU's judicialization efforts in the international investment regime are further consistent with EU preferences and narratives in other domains of international affairs. As discussed above, the EU is critical of US actions in the WTO and leads efforts to re-judicialize the WTO DSB. Beyond global trade governance, the EU and its Member States are, furthermore, keen promoters and supporters of a legalization and judicialization of international affairs and dispute resolution inter alia in Human Rights law, international criminal law, international maritime law, and alike (Alter 2014). Unlike the USA, the EU and its Member States have subjected themselves to a large number of international courts. European support for international judicialization seems anchored in the EU's political identity as transnational constitutional order (Weiler 1997). In sum, legitimacy considerations are prevalent in the EU's justifications for judicialization efforts and consistent with EU actions in other domains of international affairs, which lend support to hypothesis H_2 .

6.4. Assessing alternative explanations

Are EU legitimacy concerns eventually only a cover for material interests? Judicialization scholarship (Abebe & Ginsburg 2019; Alter *et al.* 2019) implies that the EU should seek increased judicialization of ISDS, if ISDS tribunals overall rule in its favor and advance European interests. Table 4 presents descriptive statistics for the EU

Table 4 Investor-to-state dispute settlement (ISDS) performance of USA, EU, and rest of the world (1987–2021)[†]

| | | Number of known investment disputes | Number of investment disputes with known outcomes | Won disputes | Settled disputes | Lost disputes | Neutral ruling |
|---------------------------------|-----------------------------------|--|---|-----------------|---------------------|------------------|-------------------|
| Respondent state | USA | 17 | 14 | 10 (71%) | 4 (29%) | 0 (0%) | 0 (0%) |
| | EU, Member States and UK | 238 | 127 | 67 (53%) | 16 (12%) | 39 (31%) | 5 (4%) |
| | Rest of the world | 728 | 433 | 153 (36%) | 119 (27%) | 152 (35%) | 9 (2%) |
| Home state of complainant | USA | 178 | 114 | 38 (33%) | 26 (23%) | 48 (42%) | 2 (2%) |
| | EU, Member States and UK | 533 | 327 | 110 (33%) | 83 (26%) | 125 (38%) | 9 (3%) |
| | Rest of the world | 307 | 151 | 50 (33%) | 35 (23%) | 62 (41%) | 4 (3%) |

[†]Investors may have several home states, which inflates the count of disputes per home state. *Source*: UNCTAD (2021), author's own calculations.

including its Member States and the UK, the USA, and the rest of the world. It draws on UNCTAD's official classification of dispute outcomes (UNCTAD 2021). To assess whether differences in performance across these actors are statistically significant, logistic regressions on the basis of 574 concluded ISDS proceedings (UNCTAD 2021) are carried out. The respondent/home state serves as independent variable while winning/nonwinning serves as dependent variable. The results paint a mixed picture. They suggest that ISDS advances notably the defensive interests of the USA and to a lesser degree of the EU. While third countries are statistically significantly less likely to win arbitration, the EU and notably the USA are significantly more likely to win (Table 5, models 1, 2, and 3). The marginal effects on the predicted probability to win arbitration amount to 16% for the EU but 32% for the USA. Home states, in turn, have no statistically significant effect on the likelihood of investors to win (Table 5, models 4, 5, and 8). It follows that the USA – rather than the EU – should propel ISDS judicialization thus challenging C_2 .

A second alternative explanation points to domestic interest groups lobbying for judicialization to advance their material interests. Poletti and De Bièvre (2016, pp. 33–37) indeed demonstrate that judicialization may mobilize liberal interest groups and fuel lobbying for additional integration and judicialization. Their work implies that European multinational corporations and associations could have lobbied for the ICS and MIC projects to improve the protection of their investments abroad. While a detailed assessment of lobbying in EU international investment policy exceeds the scope of this study, a brief stocktaking of lobbying patterns in the EU casts doubts over this explanation. Studies suggests that European multinational corporations and associations generally showed limited interest in EU IIAs and ISDS and only got involved in the policymaking debate once civil society started successfully mobilizing notably against the Transatlantic Trade and Investment Partnership and its ISDS provisions in 2013/2014 (Basedow 2021). Civil society raised legitimacy concerns and warned of detrimental impacts on democracy and rule of law (see European Commission 2015). The European Commission developed its ICS and MIC proposals indeed largely in response to mounting opposition from civil society, the European Parliament and certain Member States to conventional ISDS (Dietz *et al.* 2019). It was in this context that European multinational corporations and associations saw the need to publicly endorse EU judicialization efforts to safeguard some form of investment protection. European business thus did not propel EU judicialization efforts, but legitimacy concerns in civil society triggered ISDS reforms.

Table 5 Logistic regression of EU, US, and rest of the world performance under Investor-to-state dispute settlement

| | Dependent variable: State won dispute | | | | | |
|--|---------------------------------------|-------------------|-------------------|-------------------|-------------------|-------------------|
| | (1) | (2) | (3) | (4) | (5) | (6) |
| US respondent | 1.352*** (0.598) | | | | | |
| EU/UK respondent | | 0.666*** (0.203) | | | | |
| Other respondent | | | −0.789*** (0.197) | | | |
| US home state | | | | 0.105 (0.212) | | |
| EU/UK home state | | | | | −0.178 (0.172) | |
| Other home state | | | | | | 0.056 (0.193) |
| Constant | −0.435*** (0.087) | −0.555*** (0.098) | 0.185 (0.169) | −0.424*** (0.095) | −0.302*** (0.129) | −0.417*** (0.099) |
| Marginal effect on predicted probability | 0.32 | 0.16 | −0.19 | 0.02 | −0.04 | 0.01 |
| Observations | 574 | 574 | 574 | 574 | 574 | 574 |

* $P < 0.1$; ** $P < 0.05$; *** $P < 0.01$. Source: UNCTAD (2021), author's own calculation.

Table 6 Summary table of theoretical predictions and empirical observations on Investor-to-state dispute settlement reform

| Hypotheses | Test | Theoretical prediction | Empirical observation | Overall fit |
|--|---|---|---|--|
| Regulatory space and judicialization stand in no relationship (H_1) | State efforts to regain regulatory space | USA and EU: efforts may result in judicialization | USA: efforts result in de-judicialization | Support for H_1 and rejection of C_1 |
| Regulatory space and judicialization stand in negative relationship (C_1) | | USA and EU: efforts must result in de-judicialization | EU: efforts aim at judicialization | |
| Ideational explanation for de-judicialization and judicialization efforts (H_2) | Prevalence of legitimization narrative | USA: Strong focus on input legitimization | Strong focus on input legitimization | Support for H_2 |
| | | EU: Strong focus on throughput legitimization | Strong focus on throughput legitimization | |
| | Consistency of legitimization narrative across policy domains | USA: Consistent aversion to judicialized dispute settlement mechanisms (DSMs) | Consistent aversion to judicialized DSMs | Support for H_2 |
| | | EU: Consistent support for judicialized DSMs | Consistent support for judicialized DSMs | |
| Materialist explanation for de-judicialization and judicialization efforts (C_2) | Jurisprudence | USA: Predominantly adverse rulings | Strong bias in favor of US observable | Challenge to C_2 |
| | | EU: Predominantly favorable rulings | Minor bias in favor of EU observable | |
| | Societal demands | USA: Domestic demands for de-judicialization | Marginal domestic mobilization | Challenge to C_2 |
| | | EU: Domestic demands for judicialization | Civil society demands de-judicialization | |

6.5. US de-judicialization efforts

The USA behaves in line with expectations enshrined in H_2 . It opposes the EU's judicialization efforts in UNCITRAL. Its position recently hardened by advocating a de-judicialization of ISDS and return to diplomatic dispute resolution (USTR 2018) and significantly scaled back ISDS in the United States Mexico Canada Agreement. As assessed above (Tables 4,5), the performance of the USA under conventional ISDS cannot explain its de-judicialization efforts in that the USA performed better than others. The USA justifies its position through protectionist considerations and its skepticism vis-à-vis judicial dispute resolution and legalization of global governance. Former USTR Lightizer explained in congressional hearings that ISDS promoted off-shoring hurting parts of the US economy and undermined US sovereignty and regulatory space (Lester 2018). These justifications suggest that the US position reflects both materialist interests and long-standing genuine legitimacy considerations (Table 6).

7. Conclusion

This article contributes to judicialization research in two regards. First, it cautions that judicialization and state perceptions of regulatory space are not conceptual flip sides as often assumed in judicialization research. States

may pursue the consolidation of their regulatory space by pushing for de-judicialization and judicialization of DSMs alike (H_1). Second, it cautions that states' choice of de-judicialization or judicialization of DSMs to consolidate regulatory space depends to a large extent on their conception of legitimate international law and institutions (H_2). Depending on their legal philosophies, they are likely to pursue the consolidation of their regulatory space either through greater control over delegation or the strengthening of throughput legitimation through notably transparency and accountability mechanisms.

What are the broader implications of this study? It sharpens our understanding of the phenomenon of judicialization and highlights the importance of ideational factors – in addition to materialist factors – behind states' choices of international institutional and DSM designs. While legitimacy considerations and legal philosophies play an important role in debates on domestic legal systems, comparatively little attention has been afforded to these questions in research on international law and DSMs. It further improves our empirical understanding of US actions in the WTO and EU efforts to build a MIC. Media and policy commentary mostly focuses on daily quibbles and overlooks structural forces and long-term tendencies. Finally, the article follows in the footsteps of legal scholarship in that it studies the international trade and investment regime from a comparative perspective (Kurtz 2016). Trade and investment are inextricably linked economic phenomena and their regimes interact, overlap, and converge in regulatory scope, actors, and disputes. Political science research stands to gain new insights from studying commonalities and differences of these twin regimes.

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Data availability statement

The data that support the findings of this study are available from the corresponding author upon reasonable request.

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Supporting information

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Appendix S1. Supporting Information.