Exit from International Tribunals
Joost Pauwelyn* and Rebecca J. Hamilton**

ABSTRACT
This Commentary marks the first effort to provide a comprehensive overview of the attempts that states have made to exit international tribunals over the past decade. We identify the recurring drivers (and deterrents) of exit as well as the different outcomes that may result from exit pressure. In a time of growing populism, and its associated backlash against international law and courts in general, it is easy to lay the blame for tribunal exit at the feet of parochial national leaders. We conclude, however, that this represents an oversimplification of the exit story. As this Commentary suggests, changes at both the state and tribunal levels are fuelling the push towards exit. State-centred drivers of populist ideology and the weight of sovereignty costs undoubtedly play a role. But tribunals need to take some share of the responsibility too.

1. INTRODUCTION
The late nineties and early 2000s was a heady time for international law. State after state granted adjudication rights to an ever-growing number of international courts and tribunals. In this euphoric period, the fragmentation of international law was a key concern. Today, the pendulum has swung in the other direction. In different corners of the international legal system, international adjudication is under attack, and states are seeking exit options.

Criminal lawyers ponder the long-term viability of the International Criminal Court; the trade community fears the slow death of the World Trade Organization (WTO) Appellate Body (AB); human rights advocates witnessed the destruction of

* Professor of International Law, Graduate Institute of International and Development Studies, Geneva and the Murase Visiting Professor of Law, Georgetown Law. Email: Joost.Pauwelyn@graduateinstitute.ch.
** Assistant Professor of Law, Washington College of Law, American University. Email: Hamilton@wcl.american.edu.

© The Author(s) 2018. Published by Oxford University Press. All rights reserved.
For permissions, please e-mail: journals.permissions@oup.com
the Southern African Development Community (SADC) Tribunal and watched the UK and Brexit campaign attack both the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR); investment experts first observed Latin American countries denounce the International Centre for Investment Disputes (ICSID) and now see the USA wanting to drop investor–state arbitration from the North America Free Trade Agreement (NAFTA).

Not only is backlash against international adjudication widespread, but there are now numerous examples of states making good on their threats to exit the courts and tribunals that previously had jurisdiction over them. Of course, such exits are not unprecedented; the International Court of Justice (ICJ) has seen several states withdraw from its jurisdiction over the past 50 years. But today, exit is underway (or threatened) across disparate areas of international law.

Scholars have recently begun to write about resistance to individual tribunals or sets of tribunals from a particular region or within a particular subfield of international law. A recent effort has tried to look at backlash across a number of courts. But, as far as we are aware, no one has yet tried to address the phenomenon of tribunal exit at a system-wide level.

In this Commentary, we aim to catalyze a conversation between scholars and practitioners across different subfields of international law, about the growing phenomenon of threatened or actual exit by states from international adjudicatory fora. (Such fora include arbitral panels, tribunals and courts; for simplicity, we proceed using the term ‘tribunal.’) Our hope is that such a conversation will help us identify common drivers (and inhibitors) of exit and understand the degree to which the overall picture of exit may be greater than the sum of its parts.

6 South Africa withdrew its declaration accepting the compulsory jurisdiction of the ICJ (pursuant to art 36.2 of the ICJ Statute) as far back as 1967, France did so in 1974, and Israel and the USA did so in the 1980s. And in 1998, Trinidad and Tobago left the IACtHR.
9 See Mikael Madsen and others, ‘Resistance to International Courts’ (2018) 14(2) Int’l J L Context 197. This Special Issue, published in June 2018, is the first effort we have seen to look beyond a regional or subject-area set of tribunals and instead try to survey resistance at a system-wide level. That said, the authors acknowledge their focus is on ‘regional international courts in the areas of trade and human rights’.
10 In 2017, AJIL Unbound held a symposium on treaty exit, which is distinct from, but in certain instances may overlap with, tribunal exit. See Laurence Helfer, ‘Introduction to Symposium on Treaty Exit at the Interface of Domestic and International Law’ (2017) 111 AJIL Unbound 425. The European Consortium for Political Research has recently put out a call for papers for a 2019 workshop to consider backlash against both domestic and international tribunals. This is a worthy endeavour, and we hope that whatever discussion we can spur will feed into that initiative.
Section 2 provides the first comprehensive overview of the efforts that states have made to exit different tribunals in the past decade. Section 3 presents a first-cut at a typology of drivers that lead states to exit. Section 4 surveys actual outcomes from the efforts to exit identified in Section 1. Section 5 suggests factors that facilitate or inhibit a given outcome. Section 6 concludes.

2. OVERVIEW: STATE EFFORTS TO EXIT IN THE PAST DECADE
The effort to exit a tribunal goes beyond adverse state reactions to, or non-compliance with, a given decision. Decision-level criticisms are to be expected in any adjudication, especially from the losing party. The effort to exit, however, involves situations in which a state’s critique moves beyond a decision, or even set of decisions, to take aim at the tribunal itself.11

Increasingly, states have tried to exit tribunals across all subfields of international law. Here, we summarize state efforts to exit tribunals, listing all the examples we could find from the past decade, in which the state in question took at least one concrete step towards exit.

A. CJEU
Following its 2017 Brexit decision, the UK will leave the CJEU in March 2019 (subject to any transition arrangements). Although its withdrawal from the Court is obviously part of a much broader withdrawal from the European Union (EU) writ-large, the Court’s jurisdiction over the UK was a central rallying point in the campaign to convince Britons to leave the EU.12

B. The International Criminal Court
In 2016, South Africa, Burundi and The Gambia, each deposited formal notifications of withdrawal from the International Criminal Court (ICC).13 (The parliament in Kenya voted to lodge a withdrawal notification back in 2013, but the executive never took action.)14 In 2017, the African Union issued a non-binding resolution calling for all Member States to withdraw from the ICC en masse.15 Then in 2018, The

11 Erik Voeten usefully compiles scholarly concerns about ‘backlash’ against adjudicatory forums in different subfields of international law in ‘Liberalism, Populism and the Backlash Against International Courts’ (on file with authors). He describes backlash as a continuum, from requests for minor reforms or exceptions, through to exit. It is only the latter end of that continuum that we are concerned with here.
13 C.N.786.2016.TREATIES-XVIII.10 (South Africa); C.N.805.2016.TREATIESXVIII.10 (Burundi); C.N.862.2016.TREATIES-XVIII.10 (The Gambia).
Philippines became the first non-African country to deposit a withdrawal notification. Of the three African withdrawals, only Burundi ultimately followed through. The Philippines’ withdrawal is set to take effect in March 2019.

C. ICJ
Colombia became the latest country to withdraw from the ICJ’s jurisdiction in 2012, when it denounced the Pact of Bogatá, which granted the ICJ jurisdiction over its parties. The withdrawal came after the ICJ ruled against Colombia in a dispute with Nicaragua.

D. Inter-American Court of Human Rights
In 2012, Venezuela withdrew from the Inter-American Court of Human Rights (IACtHR), claiming the Court had singled it out ‘for reasons of a political nature’.

E. ECtHR
Both the UK and Russia have threatened to leave the ECtHR. British concerns focus on the Court’s decisions on voting rights for prisoners and the deportation of suspected terrorists, while Russia has pushed back against the Court’s decisions in Russian conflicts with Georgia and the Ukraine.

F. ICSID and Investor–State Arbitration
In the past decade, Bolivia, Ecuador and Venezuela became the first countries to withdraw from ICSID since its establishment in 1966. Meanwhile the EU, not a party to ICSID, has proposed an alternative system to settle investor–state disputes and is writing this alternative into a number of EU free trade agreements. Meanwhile, the USA is insisting on dropping binding investor–state arbitration as it seeks to renegotiate NAFTA.

G. WTO Dispute Settlement
Since 2016, the USA has used its veto to block the reappointment of members on the WTO AB. By mid-2018, this left the seven-member AB with only four members.
members. If the US veto continues, the number of AB members will fall below the minimum required by December 2019. With the AB no longer able to function, any party will be able to block the adoption of a WTO Report simply by lodging an appeal.27

H. SADC Tribunal

In 2009, Zimbabwe announced it was withdrawing from the SADC Tribunal after it lost a case filed by a white farmer against its land redistribution policies.28 Not only would it no longer appear before the tribunal, but it would also no longer consider itself ‘bound by any decisions already made or future ones emanating from there’.29 Zimbabwe subsequently blocked the reappointment of SADC Tribunal judges, effectively shutting the Tribunal down for all SADC parties until a reform effort revitalized part of the tribunal’s work some 5 years later.

3. DRIVERS: WHY DO STATES SEEK TO EXIT?

We find it useful to draw an initial distinction between tribunal-centred and state-centred drivers of exit. In practice, of course, the distinction is somewhat artificial; there is often didactic and/or rhetorical relationship between actual or perceived changes at the tribunal and state levels. But for the purposes of structuring the discussion, the following table provides a suitable starting point:

<table>
<thead>
<tr>
<th>Tribunal-centred change</th>
<th>State-centred change</th>
</tr>
</thead>
<tbody>
<tr>
<td>Exit drivers</td>
<td>Judicial activism</td>
</tr>
<tr>
<td></td>
<td>Tribunal bias</td>
</tr>
<tr>
<td></td>
<td>Sovereignty costs</td>
</tr>
<tr>
<td></td>
<td>Political change</td>
</tr>
</tbody>
</table>

A. Tribunal-centred Change

Critics of the CJEU often lament the judicial activism of the Court, claiming that it ‘makes law’.30 The core US complaint about the WTO AB is also one of judicial activism, with critics charging that the AB has engaged in ‘gap-filling’ and ‘overreach’.31 And at least some of the backlash against the SADC Tribunal can also be blamed on judges taking on human rights issues without states having explicitly granted them such jurisdiction.32

27 Indeed, once appealed ‘the report by the panel shall not be considered for adoption by the [WTO’s Dispute Settlement Body] until after completion of the appeal’ (art 16:4 of the DSU, emphasis added).
29 Zimbabwean Justice Minister, Patrick Chinamasa, quoted in ibid.
30 See eg Hjalte Rasmussen, On Law and Policy in the European Court of Justice (Brill, 1986).
32 See Alter and others (n 4) 307 (labelling the SADC Tribunal’s finding in the Campbell case as ‘audacious”; the SADC Treaty refers to ‘human rights, democracy and the rule of law’ and non-discrimination only in the SADC Treaty’s Principles and General Undertakings clauses).
Allegations of tribunal bias, in turn, are at the heart of the backlash against the ICC in African countries. Indeed, in 2013, the Chairperson of the African Union charged the Court with ‘race-hunting’ Africans. And the USA accuses the WTO AB of being biased against it. In both scenarios, those making the case for exit have facts they can marshal. In 2017, 9 of the 10 ICC formal investigations concerned Africa; between 1996 and 2017, the USA was a defendant in 42% of AB disputes.

At the same time, these outcomes can be explained without invoking any intentional bias on the part of the tribunals. The ICC has a line-up of African defendants because, as a new court, it relied heavily on states to invite it to investigate crimes on their territories, and all of these so-called ‘self-referrals’ came from countries in Africa. And the USA is a target of trade disputes not on the initiative of the WTO secretariat but because, as a large trading partner, it has been an attractive target for other states in the WTO. Nonetheless, the mere appearance of bias makes tribunals vulnerable.

**B. State-centred Change**

Tribunal membership entails sovereignty costs. States know this when they join tribunals. But, these costs may only be properly internalized once a state is actually sued, investigated and/or loses a case before the tribunal.

Recent denunciations of ICSID or terminations of bilateral investment treaties (BITs) may have been triggered by such buyer’s remorse. Many countries signed BITs without fully realizing the costs. It may take an actual case, filed decades after signing the first BIT, to fully grasp its sovereignty reducing potential. Likewise, all signatories to the ICC understood that the Court’s statute gave it authority to prosecute government officials. But in the first years of the Court, prosecutions focused exclusively on rebel groups who were disfavoured by sitting governments. Only once the Court started to investigate high-level government officials did states fully appreciate the sovereignty costs their membership entailed.

35 See Moore (n 17).
36 See the statistics provided at <worldtradelaw.net> accessed 31 July 2018.
37 See David Bosco, Rough Justice: The International Criminal Court in a World of Power Politics (OUP, 2014).
40 See Bosco (n 37) 185 (describing how the first ICC prosecutor cultivated a perception that he would use his discretion to target non-state actors while working with national governments).
Sovereignty costs vary as a function of both tribunal design and subject matter. Ex-post revealed sovereignty costs tend to be especially high where private actors have standing to sue the state, or an independent prosecutor can initiate proceedings against state officials. Moreover, certain subject matters—for instance, customs valuation—tend to trigger less sovereignty concerns than others—for example, voting rights.

Quite apart from an actual increase in sovereignty costs, states may become uncomfortable with tribunal membership following a change in the state’s political or ideological position. Erik Voeten has identified an uptick in populism as an ideological shift that drives states away from international tribunals.\textsuperscript{42} If one defines ‘populism’ as the claim by a democratically elected government that ‘they and they alone represent the people and their true interests’,\textsuperscript{43} the tension between populism and international tribunals is palpable. Often the task of an international tribunal is exactly to impose ‘liberal limits’ on majoritarianism: human rights courts protect minority rights; ICSID tribunals protect private property against public taking; the ICC makes judgments on whether sitting presidents committed criminal offenses and the WTO AB strikes down democratically adopted trade restrictions based on the cost they impose on foreigners. Political change in such ‘populist’ direction at least partly explains Brexit, The Philippines’ withdrawal from the ICC, and US backtracking on binding dispute settlement in the WTO, NAFTA and investor-state arbitration.

**C. Interplay Between Drivers**

In practice, there is often an interplay between tribunal-centred and state-centred drivers. This was readily apparent, for instance, with Burundi’s withdrawal from the ICC. Burundi joined the Court early and only sought to exit after the ICC prosecutor initiated an investigation that implicated current government officials. Sovereignty costs were clearly in play. But the presence of solely African defendants at the ICC meant that the Burundian government could claim the Court had an anti-African bias, and use that claim to justify its exit.\textsuperscript{44} Longstanding US concerns with AB ‘overreach’ have, in turn, worsened the sovereignty costs experienced by the USA and heightened the perception of bias. The political change that occurred through the election of President Trump added additional exit pressure.

**4. OUTCOMES: WHAT HAPPENS TO TRIBUNALS WHEN STATES SEEK TO EXIT?**

Sovereignty costs, political change, judicial activism or tribunal bias—whether alone or in combination—do not necessarily lead to exit. Drawing on Hirschman’s well-known framework, a state with systemic concerns about an international tribunal may ‘exit’ the tribunal, or use ‘voice’ to obtain reform. ‘Exit’ may follow a failure in the ‘voice’ mechanism. Threatening to exit may also be part of a reform (or voice)

\textsuperscript{42} Voeten (n 11).

\textsuperscript{43} See Jan-Werner Müller, *What Is Populism?* (UPenn, 2016).

\textsuperscript{44} For the interplay between sovereignty concerns and allegations of bias at the ICC more generally, see Hamilton (n 41).
strategy. Alternatively, a disgruntled state may ultimately decide to stick with the tribunal out of ‘loyalty’.45

On the basis of the examples mentioned earlier, we can identify at least five different outcomes that may result when a state seeks or threatens to exit a tribunal: (i) business as usual, (ii) reform, (iii) actual exit, (iv) asphyxiation of the tribunal as a whole and (v) the creation of an alternative mechanism.

A. Business as Usual

Discontent with an international tribunal may go unanswered—leading to neither exit nor reform. The disgruntled state may decide to stay within the system, because the overall benefits of membership continue to outweigh the tribunal’s costs and/or faults.

Reform may be hard to achieve, especially when it requires the consent of all parties. Since at least 2001, the USA has accused the WTO AB of judicial activism.46 But, reform was not forthcoming, thanks to the failure to secure consensus on any reform proposal. And up until 2016, the USA continued to cooperate regardless. Likewise, the African Union has repeatedly asked the UN Security Council to instruct the ICC to defer its prosecution of the Sudanese President.47 Despite the UN Security Council’s failure to respond, the African Union’s threatened mass withdrawal from the Court is yet to take place. As the WTO scenario illustrates, however, business-as-usual may be a ticking time bomb; a thumb on the scale of one or more exit drivers can tip the balance from (failed) ‘voice’ to ‘exit’ or from business-as-usual to asphyxiation.

B. Reform

The threat of exit can lead to systemic reform of the tribunal. In the face of exit threats, parties to the European Convention on Human Rights (ECHR) have sought to address British and Russian concerns about judicial activism and backlog by reforming the ECtHR. In 2013, for example, they adopted Protocol 15 to insert references to the principle of subsidiarity and the doctrine of the margin of appreciation into the ECHR’s preamble.48 In 2012 and 2018, states adopted the Brighton and Copenhagen Declarations, respectively, both intended to reassert control by the Member States and limit the power of the ECtHR.49 As with all reforms in response to exit pressure, it remains to be seen whether they will be sufficient to avert actual exit in the future.

47 See Communique adopted by the AU Peace and Security Council, PSC/MIN/Comm(CXLII), 21 July 2008, s 11 (i) for the first request, made to the UN Security Council in 2008. The UN Security Council is yet to agree to bring the request to a vote.
C. Actual Exit

After criticizing the tribunal, some states simply left it unilaterally, invoking the withdrawal or denunciation clause that is included in most founding treaties. Burundi has formally withdrawn from the ICC. Bolivia and Ecuador denounced ICSID. Venezuela left both ICSID and the IACtHR. Rather than attempting to reform the CJEU from within, the UK invoked Article 50 of the Lisbon Treaty following the Brexit referendum. Individual exit is a blow for the tribunal and may trigger reforms in response. Nonetheless, the tribunal stays in place and operational for the remaining parties. The ICC, for example, still has 122 State Parties. ICSID has 153 parties. And the CJEU still has jurisdiction over 27 states in the EU.

D. Asphyxiation

Rather than exit, a disgruntled state may seek to stop the tribunal functioning for all parties. This is what Zimbabwe decided to do with the SADC Tribunal. Without a fallback rule in place for outgoing tribunal members to stay on, Zimbabwe simply blocked the appointment of new members, to the point where the tribunal stopped functioning. Some 5 years later, a consensus decision reinstituted the Tribunal as a state-to-state forum that could no longer accept individual petitions.

This also seems to be what the USA has in mind with the WTO AB. The USA could easily exit the AB by withdrawing from the WTO treaty. All that is required is a 6-month notice. Instead, it has been blocking the appointment of AB members. Like in SADC, appointment of AB members requires a positive consensus of all WTO parties. A US veto can, as one outgoing AB member put it, cause the AB to ‘die through asphyxiation’. Should that happen, then the USA, just like Zimbabwe, will be able to dictate the terms of the AB’s resurrection (to be decided by consensus); for other WTO members, the choice will then be between an AB that is acceptable to the USA and no AB at all.

E. Alternatives

Following exit or asphyxiation, or simply in parallel with an existing tribunal, disgruntled states may create an alternative or competing mechanism. Latin American countries that left ICSID planned to set up an alternative dispute mechanism within the context of the Union of South American Nations. In calling for a mass withdrawal from the ICC, the African Union has urged ratification of the new African Court of Justice and Human and Peoples’ Rights. In an attempt to stay away from

---

50 SADC Protocol, art 4(6) provides that judicial vacancies shall be filled ‘within three (3) months of the vacancy occurring’, but it is silent on what happens if a judge’s term expires and the vacancy is unfilled.
51 See <https://www.wto.org/english/tratop_e/dispu_e/ricardoramirezfarwellspeech_e.htm> accessed 31 July 2018. (“This institution [the AB] does not deserve to die through asphyxiation. You [the WTO membership] have an obligation to decide whether you want to kill it or keep it alive”).
52 Katia Fach Gomez and Catherine Titi, ‘UNASUR Centre for the Settlement of Investment Disputes: Comments on the Draft Constitutive Agreement’ Investment Treaty News (10 August 2016).
conventional, reasoned arbitration to resolve tax disputes, certain states have opted for so-called baseball (or final offer) arbitration.54

5. FACTORS AFFECTING OUTCOMES

On the basis of the exit stories mentioned earlier, we can identify at least five possible factors influencing the outcome of a state’s effort to exit: (i) embedded versus stand-alone tribunals, (ii) adjudicator appointment rules, (iii) constituent support, (iv) political capital and (v) domestic mechanisms. The first three are generally tied to the design and subject matter of the tribunal in question. The latter two are connected to the constitutional structure and political power of the disgruntled state.

The table below summarizes the various factors we have been able to observe in the cases of exit we have described. Future research may be able to map more precise relationships between them.

<table>
<thead>
<tr>
<th>DRIVERS</th>
<th>FACTORS AFFECTING OUTCOMES</th>
<th>OUTCOMES</th>
</tr>
</thead>
<tbody>
<tr>
<td>Judicial Activism</td>
<td>Embedded v. Stand-Alone Tribunals</td>
<td>Business-As-Usual</td>
</tr>
<tr>
<td>Tribunal Bias</td>
<td>Adjudicator Appointment Rules</td>
<td>Reform</td>
</tr>
<tr>
<td>Sovereignty Costs</td>
<td>Constituent Support</td>
<td>Exit</td>
</tr>
<tr>
<td>Political Change</td>
<td>Political Capital</td>
<td>Asphyxiation</td>
</tr>
<tr>
<td>State-Controlled</td>
<td>Domestic Mechanisms</td>
<td>Alternatives</td>
</tr>
</tbody>
</table>

Table. Exit Drivers and Outcomes

A. Embedded versus Stand-alone Tribunals

Exit is easier when a tribunal is relatively self-standing, in that a state can leave the tribunal without necessarily leaving the substantive regime or organization that the tribunal is linked to. The ICJ, for example, is relatively stand-alone; a state can exit the Court without withdrawing from the UN Charter. This can be contrasted with more embedded tribunals, such as the WTO AB, where exit from the tribunal would also entail losing the benefits of broader WTO membership. In this sense, setting up an embedded tribunal may serve as a deterrent to exit.

Most examples of individual exit are, indeed, withdrawals from relatively stand-alone tribunals. For an embedded tribunal, ‘loyalty’ to the broader system (and the benefits it bestows) may play an important role.55 The one example of exit from a deeply embedded tribunal comes through Brexit. However, in that case, exit was motivated not only by discontent with the CJEU but also by broader opposition to


55 As Hirschman was well aware, ‘loyalty’ may be a shallow concept when there are no good alternatives to compensate for the losses that come with exit. As Jeffrey Kahn explains in relation to Russia and the ECtHR, ‘Russia is trapped: unwilling to quit one of the only European organizations willing to accept it as an equal member’ Jeffrey Kahn, ‘Russia’s “Dictatorship of Law” and the European Court of Human Rights’ (2004) 5 Rev Central & Eastern Eur L<https://papers.ssrn.com/sol3/papers.cfm?abstract_id¼1011825> accessed 31 July 2018.
EU membership. Brexit was, thus, a less common scenario where the embedded nature of the CJEU served as a catalyst, rather than a deterrent, to exit.

**B. Adjudicator Appointment Rules**

Normally, the consensus of all State Parties is required for the reform of an international tribunal. As Alter, Gathii and Helfer note, ‘inertia is on the side of international courts – blocking change is easier than reaching consensus in favour of altering the status quo’. But, a requirement that adjudicators can only be appointed (or reappointed) by the consensus of all parties turns this situation on its head: Where normally consensus is needed to reform a tribunal, a single veto now allows a disgruntled state to hold the tribunal hostage. As a result, it becomes tribunal survival, not reform, that needs consensus.

It is this technical rule of procedure that allowed both Zimbabwe in the SADC Tribunal and the USA in the WTO to put in place a strategy of asphyxiation. Tribunal supporters may view it as a design flaw. States, however, may see it as an insurance policy against the risk that a tribunal subsequently delivers prohibitive sovereignty costs or deviates from its mandate.

**C. Constituent Support**

Faced with exit pressure, other State Parties may manoeuvre to keep a tribunal afloat. Tribunal staff may work to shore up support. And non-state actors may also mobilize. Here again, such dynamics will typically vary by tribunal design and subject matter.

A tribunal hearing human rights complaints by individual petition may be able to enlist the support of vocal NGOs and human rights activists. In contrast, if a tribunal is purely state-to-state, it may be more difficult to mobilize civil society. Some subject matters also lend themselves better to mass protests or widespread public indignation than others. Although not likely to stir up an NGO campaign, embattled trade or investment tribunals can be expected to find support from powerful corporate interests who can lobby State Parties about the benefits of the tribunal.

**D. Political Capital**

Because reform normally requires consensus of all state Parties, a disgruntled state with little political capital will typically have a hard time pushing through major reforms. Instead, such weaker states may be forced to either stick to the tribunal or to exit, individually. Only powerful states are likely to have the clout and influence to push through major reforms or to engage in the long-term strategy of asphyxiation.

Burundi and Venezuela did not have the power to change, the ICC and ICSID/IACtHR, respectively; instead, they opted for individual exit. The USA may be able to slowly ‘asphyxiate’ the AB by blocking appointments. But, one can readily imagine that less powerful states would be unable to withstand broad membership pressure and continue to block AB appointments in monthly WTO meetings over a period of years.

---

56 Alter and others (n 4) 315.
57 ibid 328 (‘The appointment procedure that Zimbabwe exploited to suspend the Tribunal appears to be more of an oversight than an intentional tool for court curbing.’).
58 The same applies to Zimbabwe and its campaign against the SADC Tribunal. As Alter and others (n 4) explain, ‘Zimbabwe’s economy is in disarray, but its political influence in the SADC is elevated by Mugabe’s prominence as one of Africa’s longest-serving leaders and his anti-colonial bona fides.’ ibid 317.
E. Domestic Control Mechanisms

Exit may be blocked by domestic control mechanisms, in particular a requirement that the legislature formally approves a decision to exit. South Africa’s effort to withdraw from the ICC was foiled when the South African High Court ruled that ministers had unconstitutionally bypassed parliament in their rush to leave the Court.\(^{59}\) Likewise, the UK Supreme Court decided in January 2017 that the UK government needed the approval of parliament to trigger Article 50 Brexit procedures.\(^{60}\) In the USA as well, a debate rages as to whether the US Executive can withdraw from NAFTA or the WTO without Congressional approval.\(^{61}\)

6. CONCLUSION

This Commentary marks the first effort to provide a comprehensive overview of the attempts that states have made to exit international tribunals over the past decade. Others have seen pieces of this puzzle from the vantage point of different subfields of international law. Scholars have sought to explain state dissatisfaction with adjudicatory actions in trade or human rights. But by looking at exit across international law as a whole, we can begin to gain a fuller appreciation of the drivers (and deterrents) to exit at a system-wide level.

In a time of growing populism, and its associated backlash against international law and courts in general, it is easy to lay the blame for tribunal exit at the feet of parochial national leaders. We conclude, however, that this represents an oversimplification of the exit story. As this Commentary suggests, changes at both the state and tribunal levels are fuelling the push towards exit. State-centred drivers of populist ideology and the weight of sovereignty costs undoubtedly play a role. But, tribunals need to take some share of the responsibility too.

In the optimism of the late nineties and early 2000s, it was easy to forget that international law remains a consent-based system. As one of us warned more than a decade ago, legalization is not a unidirectional process where law replaces politics; indeed, legalization can only be sustained with the participation of political actors.\(^{62}\) Save a rare historic moment, international law can but nudge states beyond their comfort zones. Without being duly attentive to this reality, tribunals—and the international lawyers who serve in them—may have over-reached, issuing decisions that, while legally defensible, have left them politically vulnerable.

While the picture we paint will be troubling for many concerned with the progress of international law, we are eager not to fall into alarmism. Just as the period of tribunal proliferation led to excessively optimistic claims about the future of international law, it would be a mistake to view the current period of tribunal exit as sounding the death knell of international adjudication. A period of recalibration is in order, and both states and tribunals have a role to play.


\(^{60}\) Owen Bowcott, Rowena Mason and Anushka Asthana, ‘Supreme Court Rules Parliament Must Have Vote to Trigger Article 50’ The Guardian (24 January 2017).
