



## Harmonizing Dispute Resolution Mechanisms: Enhancing Efficiency and Synergy between WTO and ISDS System

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### ABSTRACT

This research article explores aligning and optimizing dispute resolution mechanisms in international law, particularly within the World Trade Organization (WTO) and Investor-State Dispute Settlement (ISDS) contexts. Addressing challenges arising from the "spaghetti bowl effect" of multiple treaty regimes, it examines the interplay between WTO and ISDS systems, aiming for harmonization and reduced jurisdictional inconsistencies. Traditional coordination methods are evaluated, revealing limitations in adapting to this evolving paradigm. Instead, an "articulation clause" and the "principle of comity" are proposed as innovative approaches for rationalizing dispute resolution. These strategies aim to transcend rivalry between WTO and ISDS mechanisms, expediting impasse resolution in the WTO Appellate Body. The study promotes a strategic shift, encouraging stakeholders to view dual mechanisms as mutually advantageous. This pragmatic outlook empowers informed decision-making, enhancing the global rule of law's predictability, efficiency, and integrity. The ultimate goal is strengthening the WTO's dispute resolution framework and ISDS mechanism, contributing to a more streamlined and cohesive international dispute resolution landscape. The qualitative research methodology has been applied to the following article.

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## 1. Introduction

In the context of international law's diversification and expansion, various highly specialized and specialized international treaty regimes have functioned independently based on distinct logic. However, they have also engaged with one another due to the interconnectedness of their substantive rules. The interactive effect is particularly evident in international dispute resolution, where litigation or arbitration over the same facts often proceeds either sequentially or simultaneously, resulting in "successive proceedings" or "parallel proceedings." Given the absence of a strict hierarchy among international courts or arbitral tribunals and the parties' rights to pursue actions based on different legal bases, this unorganized legal phenomenon is not to be blamed. However, the emergence of certain cases involving public policy and socially sensitive issues calls for attention to the problem of overlapping jurisdiction. It raises the need for reflection on how the international multi-disciplinary dispute resolution mechanism should be articulated to avoid conflicting judgments and uphold the international legal order. The Australia Tobacco Packaging Act has been a subject of disputes, with multinational tobacco company Philip Morris and major tobacco-producing countries utilizing both the Investor-State Dispute Settlement (ISDS) mechanism and the World Trade Organization (WTO) dispute settlement mechanism to challenge and seek modifications to Australia's strict tobacco packaging measures. Uruguay, facing similar challenges, has considered settling with Philip Morris Group to suspend its tobacco control policies due to the high costs of arbitration. These dispute settlement mechanisms serve as platforms for multinational enterprises and private investors to exert pressure on host

governments and potentially influence their policies. However, existing studies have overlooked the issue of systemic coordination between these two mechanisms (Dahlan, 2018).

The disputes over Australia's "*Tobacco Packaging Act*" involve overlapping jurisdiction among inter-treaty dispute settlement bodies, potentially leading to a "regulatory shiver" in sovereign states. This situation necessitates a deeper theoretical understanding. The WTO, as the most extensive and authoritative multilateral trade discipline, has been striving to restore normal dispute settlement mechanisms after the suspension of the Appellate Body, resulting in the activation of the panel of experts and the first appellate arbitration case. Based on past cases, like the "*Tobacco Packaging Act*" disputes, where one side asserts the host country's violation of WTO rules as a breach of investment treatment standards, and the other side sees the investor's home country suing the host country in the WTO, we can make reasonable assumptions. The pressure of double litigation and high economic costs may lead the host country to modify or abandon its domestic policy, potentially manipulating international judicial order.

Moreover, suppose the DSB and Investment Arbitration Tribunal reach differing conclusions on whether the host country violated WTO rules or not. In that case, it creates a "*treaty compliance dilemma*" for the sovereign state. This situation jeopardizes the certainty and unity of the rule of law. Negative externalities affect both countries and individuals, leaving no immunity (Gaukrodger & Gordon, 2012).

This paper examines the practical interaction between the WTO dispute settlement and ISDS mechanisms. It explores the unique characteristics of their overlapping and proposes a new convergence approach to mitigate negative impacts and enhance the benefits of these mechanisms as "*alternative*" dispute resolution forums. By identifying the special attributes of this overlap, the study aims to foster convergence between the two mechanisms and facilitate the reform process of the WTO Appellate Body. Ultimately, the goal is to restore the complementary nature of institutional competition between international trade law and international investment law. This will enrich the tools available to Chinese investors in safeguarding their legitimate rights and interests and advocate for standardizing the order of international dispute resolution.

### **1.1. Problem Statement**

The coexistence of the WTO and ISDS mechanisms has led to a complex landscape of overlapping jurisdiction, potentially causing inconsistencies, delays, and a lack of predictability in resolving trade and investment disputes. The challenge lies in striking a balance between these two mechanisms to ensure timely, coherent, and fair resolution of disputes, while also addressing the concerns of sovereignty and access to justice for all parties involved.

### **1.2. Objectives of the Study**

The primary objectives of this study are as follows:

1. To Analyze the Interplay: Examine the existing interactions and conflicts between the WTO dispute settlement system and ISDS mechanisms to identify areas of inconsistency and overlap.
2. To Enhance Efficiency: Identify procedural and structural reforms that can be implemented within both the WTO and ISDS systems to streamline the dispute resolution process, reduce duplication of efforts, and expedite the resolution of disputes.
3. To Foster Synergy: Explore avenues for cooperation and coordination between the WTO and ISDS mechanisms, seeking ways to leverage the strengths of each system to create a more comprehensive and cohesive approach to resolving trade and investment disputes.

### **1.3. Significance of the Study**

The significance of this study lies in its potential to provide practical insights and recommendations for policymakers, international organizations, legal practitioners, and scholars. A harmonized and efficient dispute resolution framework can contribute to maintaining the stability and predictability of international trade, promoting investment flows, and bolstering the rule-based global trading system. Moreover, the study aims to address concerns about the legitimacy and fairness of dispute resolution mechanisms, ultimately enhancing access to justice for all stakeholders.

## **2. Drawbacks in WTO Dispute and ISDS Mechanism Alignment**

The WTO dispute settlement mechanism and the ISDS mechanism exhibit inherent differences, leading to a unique nature of overlap and intersection between the two systems. To explore their coordinated development, understanding the impact of this peculiarity on traditional coordination methods becomes crucial.

### **2.1. Principle of res Judicata**

In successive actions, adjudicators often invoke *res judicata* to prevent conflicts. This principle establishes that a prior final judgment holds decisive weight in the subsequent action, potentially barring the reopening of the previous case. *Res judicata* underscores the significance of "*finality*" in the judicial order and has evolved into a fundamental principle of international law. For the principle of *res judicata* to apply, four conditions must be satisfied: the proceedings must be before an international or arbitral tribunal, involve the same parties, be based on the same grounds, and seek the same relief. The main challenge in applying the principle of *res judicata* to successive WTO litigation and international investment arbitration arises from the second to fourth elements.

Furthermore, both WTO panels and international investment arbitration tribunals tend to rigorously interpret the conditions for the application of the *res judicata* principle. Additionally, there is an ongoing dispute regarding whether WTO litigation and international investment arbitration are part of the same legal order. Consequently, applying the principle of *res judicata* to subsequent proceedings between the WTO dispute settlement mechanism and the ISDS mechanism is inherently tricky (Grosse Ruse-Khan, 2016).

### **2.2. Principle of Pendency**

In parallel proceedings, adjudicators frequently apply the doctrine of *lis pendens* to determine whether to decline jurisdiction or make a *forum non-conveniens* decision due to late filing. The application of *lis pendens* typically involves identical parties and causes of action rather than solely being based on highly interrelated cases with respect to particular facts. The application of the principle in international dispute settlement proceedings remains uncertain, with limited practice suggesting that it requires the existence of the same parties and causes of action. For instance, in the case concerning Certain German Interests in Polish Upper Silesia, the Permanent Court of International Justice ruled out the doctrine of *lis pendens*, citing the involvement of different parties and different questions of law. The mixed arbitral tribunals and the Permanent Court of International Justice were deemed not courts of the same nature. Similarly, in the Australian Tobacco Packaging Act disputes, parallel proceedings occurred, but the parties involved were not the same, and it was evident that the investment arbitration tribunal and the DSB were not of the same nature. Consequently, applying the principle of pendency to parallel proceedings between the WTO dispute settlement mechanism and the ISDS mechanism proves challenging (Johnson, Sachs, & Lobel, 2019).

### **2.3. Methods of Institutional Integration**

In the presence of antecedent or connected proceedings, the adjudicator may find it advantageous to employ the systematic integration approach outlined in article 31, paragraph 3 (c) of the Vienna Convention on the Law of Treaties. This approach is often considered a "*master key*" to the realm of international law. The provision primarily serves as a method for treaty interpretation and does not directly address the resolution of overlapping jurisdictions. However, when interpreting Rule A of a treaty, an international tribunal may consider rule B as part of the "*relevant rules of international law applicable in the relations between the parties.*" In such cases, the tribunal could refer to the interpretation of rule B by another international tribunal, thus contributing to the regulation of the international judicial order. The crucial question pertains to defining the scope of "parties" in this context, whether it is limited to the parties involved in litigation or arbitration before an international tribunal or encompasses all States parties to the A treaty. DSB takes a cautious approach and deems that the "*relevant rules of international law*" considered should be binding on all WTO members. The harmonization of the WTO dispute settlement mechanism and the ISDS mechanism through the systemic integration approach is a "*one-way street.*" It can only occur when an international investment arbitration tribunal invokes a WTO judgment and certain conditions are met. Specifically, the parties to the investment treaty in question must be members of the WTO, and the investment treaty must pertain to the rules of the WTO. Consequently, the

systemic integration approach is not a viable solution to address the overlap between the WTO dispute settlement mechanism and the ISDS mechanism (Sandford & TanKiang, 2011).

#### **2.4. Resolving WTO Dispute and ISDS Mechanism Intersection: Key Factors**

Given the challenge of applying the traditional judicial system coordination method to the intersection of the WTO dispute settlement mechanism and the ISDS mechanism, it becomes imperative to reassess the interaction between these two dispute settlement mechanisms across three dimensions: jurisdiction, substantive rules, and remedies. By exploring whether they compete or complement each other, we can identify novel approaches to address the observed "lack" of integration and synergy between them. Therefore, a reevaluation of the interaction between these mechanisms is essential across the dimensions of jurisdiction, substantive rules, and remedies to identify potential solutions for their lack of integration and synergy.

#### **2.5. Different Jurisprudential Bases for Jurisdiction**

The WTO dispute settlement mechanism prioritizes jurisdiction acquisition through the compelling binding force of multilateral trade disciplines, which is based on the uniformly determined rules of jurisdiction outlined in the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). The jurisdiction of DSB is both mandatory and exclusive. The ISDS mechanism places significant emphasis on jurisdiction acquisition through an arbitration agreement, underscoring the importance of "*consent*" in its content differentiation. For instance, the arbitration scope may be limited to issues "*relating to the amount of compensation for expropriation*" and the precondition of exhausting host country remedies might be excluded for the commencement of arbitration. Additionally, "*disputes concerning property and real property rights*" can be excluded from the ISDS mechanism, further distinguishing its jurisdictional foundation from the alternative mechanism (Giorgetti, 2022).

#### **2.6. Substantive Rules are Distinct and Interrelated**

Initially, the substantive rules of the two dispute settlement mechanisms differ significantly concerning subject matter. However, due to the absence of a comparable authoritative regulatory body to the WTO in the realm of international investment, the international economic legislation in the post-WTO era displays a notable "*commonality*" with the WTO legal system.

Article 10(2) of the 2012 China-Canada Bilateral Investment Treaty (BIT) and Article 13(4) of the 2020 Regional Comprehensive Economic Partnership Agreement (RCEPA) both stipulate that actions such as compulsory licensing, revocation, restriction, or creation of intellectual property rights, which comply with the provisions of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), do not contravene the expropriation clauses. These agreements employ TRIPS as a reference system to ascertain whether a host country violates the investment treatment standard. For instance, Article 7(4) of the CECA 2020 explicitly states that national treatment and most-favored-nation treatment provided by a Contracting Party to an investor of the other Contracting Party and to covered investments shall not apply to any measure that constitutes an exception to Articles 3 and 4 of TRIPS, effectively endorsing the effect of the exceptions in TRIPS (Ho, 2019).

The WTO dispute settlement mechanism and the ISDS mechanism cannot be viewed in total isolation. Jurisdiction fundamentally differs from the application of the law, and limited jurisdiction does not restrict the scope of the law's application in interpreting and applying these treaties.

#### **2.7. Different Ways and Paths to Relief**

The WTO dispute settlement mechanism mainly provides behavioral remedies, and the winning party often requests the DSB to authorize "tit-for-tat" trade retaliation against the losing party to make up for the loss and maintain multilateral trade disciplines. The ISDS mechanism primarily offers monetary relief, allowing investors to initiate arbitration proceedings to seek compensation unilaterally. This difference in relief options is precisely what investors desire, with prospective relief benefiting from the resulting modification or revocation of the challenged measure. In contrast, retroactive relief directly restores the value of their impaired investment. It has been noted that the "*competition*" relationship between dispute

settlement procedures arises only when parties seek comparable or identical relief. This article supports the notion that competing dispute resolution mechanisms undermine judicial finality and promote party "forum shopping" and conflicting decisions.

This paper contends that the WTO dispute settlement mechanism and the ISDS mechanism may appear to have competing jurisdictions, but in essence, they complement each other. They interactively impact the specific operation of the process and ultimately benefit the investor. The linkage of substantive rules in both mechanisms necessitates viewing them as mutually supportive, which can enhance the efficiency and certainty of the international rule of law by promoting the efficacy of dispute settlement procedures (Katz, 2016).

### **3. Enhancing Effectiveness: Balancing WTO and ISDS Mechanisms**

The analysis of the interaction between the WTO dispute settlement mechanism and the ISDS mechanism, considering their differences and connections, reveals a complementary relationship between the two. This understanding serves as a crucial guideline for identifying an appropriate system coordination method. Additionally, the ISDS mechanism's practice of invoking decisions from the WTO dispute settlement mechanism helps clarify the true significance of this complementary relationship, making the proposed path of systemic harmonization in this section practical and relevant.

#### **3.1. Applicability of The Principle of Comity**

The principle of comity entails courts in one jurisdiction demonstrating respect and deference to the legal interpretations and rulings of courts in another jurisdiction, commonly referred to as the "*by-reference*" approach. No DSB decisions have invoked the principle of comity in relation to the same government measure as an investment tribunal. For instance, in the Softwood Lumber Series of Disputes, where both the WTO dispute settlement mechanism and the ISDS mechanism were sequentially activated, the 12 decisions issued by the DSB did not make any reference to the North American Free Trade Agreement (NAFTA). On the other hand, the "*Decision on Preliminary Issues*" by the NAFTA Arbitral Tribunal did cite the relevant government measure, while also drawing on the findings of the relevant WTO Panel. The NAFTA Arbitral Tribunal held that the U.S. position before the WTO constituted "*relevant factual evidence*" in the case. The DSB's 12 decisions did not incorporate any of the NAFTA Arbitral Tribunal's rulings. International investment arbitration tribunals have noted that when two unrelated and independent tribunals assert jurisdiction over the same dispute simultaneously, no rule of international law prohibits either tribunal from exercising its jurisdiction. However, in the spirit of comity, either tribunal may choose to suspend or stay its jurisdiction pending the other tribunal's decision, considering the interests of the international judicial order (Ben-Moussa, 2017).

Based on the analysis of the practices as mentioned earlier and considering the distinct jurisprudential foundations of jurisdiction in both mechanisms, this paper suggests applying the principle of comity to parallel or consecutive proceedings involving the WTO dispute settlement mechanism and the ISDS mechanism. Specifically, the ISDS mechanism could opt to suspend the case, considering comity principles, while awaiting the WTO's decision. This approach aligns with the longer duration typically associated with investment arbitration disputes under the ISDS mechanism, averaging around 3.4 to 3.7 years, compared to the relatively shorter hearing period required by the WTO dispute settlement mechanism. By incorporating comity, the ISDS mechanism enhances the efficiency of international dispute settlement through this approach (P. Wang, 2020).

#### **3.2. Feasibility of a Pathway for Authorization by States Parties**

Applying the principle of comity in international dispute settlement relies heavily on the arbitral tribunal's discretion and willingness to consider and incorporate it. The timing and content of such consideration are to be assessed on a case-by-case basis by the arbitral tribunal. It is important to note that sovereign States are the true contracting parties in international agreements, and the establishment of various dispute settlement mechanisms aims to ensure their adherence to treaty rules based on their genuine intentions. This, in turn, fosters the rule of law on the international stage. To avoid leaving decisions solely to dispute settlement bodies and to minimize the complexities arising from multiple overlapping mechanisms "*spaghetti bowl effect*," there should be a focus on facilitating "*dialogue*" between

these mechanisms during the contracting process. This approach will contribute to streamlining the international judicial system, promoting efficiency, and bolstering certainty in international legal matters (Khan & Wu, 2021).

Currently, the international investment treaty regime is expanding faster, more flexible, and more diverse than the WTO trade treaty regime. The ISDS mechanism still maintains its superiority and encounters less resistance to reform. Therefore, this paper proposes that States Parties should proactively consider the reality of international parallel proceedings and their likelihood of a continuation in the dispute settlement provisions of investment treaties. A "bridging clause" should be integrated to achieve this, empowering the arbitral tribunal to consider the relevant WTO dispute settlement procedures. The suggested "*bridging clause*" would come into play when the WTO dispute settlement procedures significantly impact the handling and settlement of investment disputes or when there is an overlap between the jurisdiction of the WTO dispute settlement body and the investment tribunal. In such situations, the investment tribunal would have two options: either adjourn the case or ensure that the progress and outcome of the WTO dispute settlement decision are duly considered during the proceedings. This proposal is in line with the differences in the jurisprudential basis of the jurisdiction of the two mechanisms and the interconnection of the substantive rules involved, as previously discussed.

Additionally, the "interface clause" provides greater legitimacy to the investment tribunal's reference to the WTO award, as it stems from a direct authorization granted by the Contracting States. The rationalization of the litigation logic in investment arbitration tribunals can be achieved by applying the principle of comity and including "connecting clauses" in investment treaties. This approach provides clear guidance to adjudicators in the ISDS mechanism, which is the sole mechanism available for dispute settlement by investment arbitration tribunals (Y. Wang & Chen, 2023).

The first objective is to avoid conflicting decisions. Unlike the WTO dispute settlement mechanism, the ISDS mechanism lacks the authority to rule on violations of WTO trade rules. Therefore, measures must be taken to prevent conflicting rulings. The second goal is to address the current ambiguity faced by investment tribunals. In specific investment disputes arising from the Tobacco Flat pack Act, tribunals have taken an evasive stance, neither affirming the relationship between WTO treaty obligations and investment treaty obligations nor clearly defining their jurisdiction in matters involving WTO treaty obligations. This ambiguity may encourage investors to exploit these uncertainties, blurring and expanding the scope of investment treatment protection while potentially limiting the host country's regulatory authority over foreign investment.

Thirdly, aligning the ISDS mechanism reform with the ongoing developments in the WTO dispute settlement mechanism is essential. With the imminent reform of the WTO Appellate Body, some WTO members, including China and the EU, have proposed a multi-party interim appellate arbitration arrangement, and the majority of member's support restarting the Appellate Body. This situation makes reforming the ISDS mechanism less constrained and relatively faster. Taking the lead in initiating reform attempts, reaching a consensus with relevant countries in the realm of international investment, and recognizing the significance of the normal functioning of the WTO dispute settlement mechanism for international dispute resolution is crucial. Otherwise, if an investment arbitration tribunal is required to await a final ruling from the WTO on matters of mandatory jurisdiction, and WTO disputing parties have filed appeals, the investment arbitration process may be stalled or face significant difficulties in reaching a final resolution. In the long term, investors' home countries will need to consider and participate in the reform process of the WTO Appellate Body. This could be seen as a strategic "*legal battle*" aimed at pressuring the WTO dispute settlement mechanism to continue operating efficiently (Kucik & Puig, 2023).

#### **4. Exploring Synergy: Practical Options for WTO And ISDS Mechanisms**

Having established the complementarity of the WTO dispute settlement mechanism and the ISDS mechanism, the proposal for harmonization through "*comity*" or "*convergence clauses*" necessitates the collaborative efforts of the international community, including WTO members (both home and host states), and transnational investors (engaging in ISDS). These stakeholders hold the key to achieving a truly complementary relationship between the two

mechanisms. Thus, the application of the proposed coordination method in practice becomes crucial to assess its feasibility and guide investors and sovereign states in scientifically formulating litigation or response strategies. They can effectively safeguard their rights and interests by leveraging the convergence of the two dispute settlement mechanisms.

#### **4.1. The Centering Link: Investors Can Initiate International Dispute Settlement Procedures in Both Directions with Caution**

Considering the distinct yet interconnected substantive rules of the WTO dispute settlement mechanism and the ISDS mechanism, the host country's violation of WTO trade rules may assume significance in the ISDS mechanism and potentially serve as a legal basis for requesting arbitration. Consequently, investors might seek to activate both the WTO dispute settlement mechanism and the ISDS mechanism simultaneously to counteract the detrimental actions of the host government, safeguarding their investment interests with a dual approach. However, as previously mentioned, this litigation strategy entails evident negative externalities. To mitigate these negative externalities at their root this paper proposes a coordination path that guides investors in harmonizing the complementary advantages of both mechanisms. By pursuing this approach, investors can achieve similar litigation objectives and effects while reducing the undesirable consequences associated with parallel proceedings (Jillani, M. A. H. S., Khan, A., Bhatti & Abdelrehim Hammad, 2021).

Based on the mandatory jurisdictional character of the WTO dispute settlement mechanism and guided by the principles of comity and the interface clause, investment tribunals are precluded from ruling on whether a host State violated WTO trade rules. Consequently, investors' attempts to initiate parallel proceedings to enforce WTO rules and TRIPS-plus standards under the ISDS regime will be frustrated. Determining which dispute settlement mechanism an investor should prioritize for relief necessitates a case-by-case analysis. In politically sensitive investment disputes, the investor's home country should take the lead and file a complaint in the WTO dispute settlement mechanism. This approach safeguards the investor from potential retaliation by the host government and benefits the entire domestic industry. The relevant rulings by the WTO can serve as crucial evidence for the investor in initiating the investment arbitration procedure. On the other hand, in general, investment disputes, it is recommended that investors prioritize the ISDS mechanism. This choice allows them to capitalize on the litigation initiative and seek direct monetary compensation if successful in the case. If the investor still seeks a ruling that the host country violated WTO trade rules, the "*comity principle*" or the "*convergence clause*" can play a "*defense*" role, safeguarding the primacy of the WTO dispute settlement mechanism in enforcing the WTO Agreement (Khan, A., Abd Elrhim, & Soomro, 2021).

As of October 2022, there have been 20 China-related investment arbitration cases involving Chinese investors, including those from Hong Kong and Macao, as claimants. One noteworthy case is Philip Morris Asia Inc. v. Australia, where a tobacco company registered in the Hong Kong Special Administrative Region of China was the applicant. However, the case concluded without jurisdiction. The Australian government argued that the issue of whether Australia violated TRIPS should not fall under the jurisdiction of the arbitral tribunal but rather the exclusive jurisdiction of the DSB of the WTO. This highlights the importance for Chinese investors to exercise caution when challenging the jurisdiction of the WTO dispute settlement mechanism in ISDS cases.

In cases involving the application of WTO trade rules, the Chinese government should consider filing a complaint in the WTO dispute settlement mechanism and seeking relevant interpretations from the DSB. One notable case that may entail an overlap between the WTO dispute settlement mechanism and the ISDS mechanism is Beijing Urban Construction Group v. Yemen. In this case, the dispute revolved around determining whether Beijing Urban Construction Group, as a state-owned enterprise, qualified as an investor under the investment treaty. The arbitral tribunal, relying on the Brochures standard and principles of attribution in the Draft Articles on State Responsibility, found that despite being a state-owned enterprise, Beijing Urban Construction Group qualified as an investor because its investment activities served a commercial function. The tribunal thus asserted jurisdiction over the dispute regarding compensation for expropriation. It is increasingly recognized that state-owned enterprises are qualified investors in the context of investment treaties. The rising trend of Chinese state-

owned enterprises investing overseas has also highlighted the nuanced differences between standards applied in international investment and trade (Jillani, Khan, Bhatti, & Abdelrehim Hammad, 2021).

Chinese investors are cautioned against pursuing parallel litigation in the WTO dispute settlement mechanism to avoid potentially counterproductive outcomes and confusion. Instead, they should consider each case's specifics and consider the practical difficulties and proceedings in the WTO. When faced with parallel proceedings between the WTO dispute settlement mechanism and the ISDS mechanism, Chinese investors are advised to leverage investment arbitration's excessive time and economic costs as a bargaining chip. Proposing a settlement to the host government in the ISDS mechanism can be a strategic approach to resolving disputes and promoting peaceful resolutions.

#### **4.2. Clarifying the Difference: The Host Country can Vigorously Assert the WTO Compulsory Jurisdiction Defense**

When a host country becomes entangled in the WTO dispute settlement mechanism and the ISDS mechanism, it represents an undesirable situation. The prolonged and economically burdensome litigation may cause domestic policies and foreign investment regulatory measures to weaken under the pressure of being sued either by the investor's home country or by the investor itself.

The TRIPS-linked expropriation provision in the mentioned investment treaty suggests that the host country may raise certain defenses. One such defense is based on the "*linkage*" provision, which serves as a "safe harbor," allowing the host country to implement its domestic policies and regulatory measures concerning foreign investment. The "*linkage*" clause may exempt the host country from violating the expropriation clause if the investor can demonstrate non-compliance with TRIPS and prove that the host country's actions amount to an unlawful expropriation concerning lawful purpose, due process, and non-discrimination. In addition, the WTO dispute settlement mechanism should address whether the host government's behavior aligns with TRIPS. As per the guidance of the Linkage Clause, the host country should request the Arbitration Tribunal to suspend the case and await relevant decisions from the WTO. Suppose the WTO dispute settlement mechanism renders a "consistent" decision. In that case, the host country can use it as evidence to be submitted to the investment arbitration tribunal, thus seeking exemption from legal responsibility for illegal expropriation (Wu & Shah Jillani, 2020).

As of October 2022, there have been nine China-related investment arbitration cases where the Chinese government acted as the respondent. Although these cases did not involve "*linkage*" clauses, it does not imply that China will be exempt from facing pressure from foreign investors in both directions during future international investment arbitration disputes. China holds membership in the WTO and has signed over 120 investment treaties, ranking among the countries with the highest number of such treaties in force. In recently signed BITs between China and Colombia and China and Canada, "*linkage clauses*" exist, explicitly stating that the ISDS mechanism governs investment disputes. Consequently, this sets the stage for the possibility of parallel or sequential litigation between the WTO dispute settlement mechanism and the ISDS mechanism for China.

Moreover, the United States initiated a "*301 investigation*" against China and, together with the European Union, filed a WTO lawsuit against China concerning forced technology transfer, aiming to address intellectual property protection issues related to international trade and investment. This situation prompts foreign investors to seek support from their home countries and encourages the WTO to take action against China. In response, foreign investors may lobby their respective countries to file lawsuits within the WTO dispute settlement mechanism to safeguard their investment interests. Lastly, the successful signing and implementation of the RCEPA highlight China's strategic initiative. The Treaty covers trade and investment matters and incorporates a "*linkage*" clause. In its dispute settlement chapter, it emphasizes the parties' obligation to endeavor, through cooperation and consultation, to reach a mutually agreed settlement at each stage of the dispute. Considering this, it is proposed that China utilize the Regional Comprehensive Economic Partnership Agreement to differentiate the jurisdictional basis of the WTO dispute settlement mechanism and the ISDS mechanism. The



emphasis should be on the indispensability of the WTO dispute settlement mechanism in addressing economic and trade disputes.

Furthermore, it can become a crucial venue for dealing with "*prerequisite issues*" of investment disputes. Advocating for the convergence of the effectiveness of both mechanisms and consolidating the strength of regional groups could facilitate breaking the deadlock of the WTO Appellate Body. To achieve this, "*regional/multilateral*" and "*bilateral*" coupling can be utilized as a starting point in negotiating China's BITs in the future. This approach allows for the innovative introduction of "connecting clauses," granting parties, even if they are passively involved in a lawsuit, the ability to assert a jurisdictional defense before the investment arbitration tribunal (Khan, 2022).

## 5. Conclusion

In conclusion, this research article navigates the intricate terrain of aligning and optimizing dispute resolution mechanisms in international law. By delving into the convergence of the WTO dispute resolution framework and the ISDS mechanism, we have unearthed innovative strategies to enhance efficacy and coordination amidst complexity. The "spaghetti bowl effect" challenges have underscored the pressing need for harmonization and the mitigation of jurisdictional discrepancies. Through a thorough examination of traditional legal coordination methods, we have revealed their shortcomings in addressing the evolving dynamics of this field. Our proposed alternative, anchored in the "*principle of comity*" and the introduction of an "*articulation clause*," offers a promising avenue for rationalizing dispute resolution procedures. This approach seeks to transcend rivalry between the WTO and ISDS mechanisms and aims to expedite the resolution of impasses within the WTO Appellate Body.

Moreover, this study advocates for a paradigm shift in perspective, inviting investors and host countries to perceive the coexistence of these mechanisms as a synergistic advantage rather than a source of conflict. This forward-looking outlook empowers stakeholders to make well-informed decisions, aligning litigation or response strategies with the intricate interconnectedness of the two systems. In the broader context, our research aspires to amplify the mutual benefits intrinsic to the WTO dispute resolution framework and the ISDS mechanism. Doing so reinforces the predictability, efficiency, and integrity of the global rule of law, thereby fostering a more streamlined and cohesive international dispute resolution landscape. As we move forward, we hope these insights will pave the way for greater cooperation, understanding, and progress in international law and dispute resolution.

The study's findings underscore the complexities of maintaining a balance between sovereign interests and international trade norms. The theoretical implications lie in recognizing the evolving nature of global trade governance and the necessity of adapting dispute resolution mechanisms to address modern trade realities. The study contributes to the theoretical discourse by highlighting the importance of synergy between distinct systems in achieving comprehensive and just outcomes. The practical implications of this study are manifold. First, the identification of areas of inconsistency and overlap between the WTO and ISDS mechanisms presents an opportunity for reform. Policy recommendations should focus on establishing clearer boundaries and guidelines for the two systems to operate harmoniously. Second, the proposed procedural and structural reforms can significantly enhance the efficiency of dispute resolution, reducing delays and duplications. Third, the exploration of cooperation between the WTO and ISDS systems opens avenues for leveraging their strengths to create a more cohesive approach.

### 5.1. Policy Recommendations

- **Clarification of Jurisdiction:** Establish clear guidelines for determining whether a dispute falls under the purview of the WTO or ISDS system, minimizing jurisdictional conflicts and uncertainties.
- **Streamlined Procedures:** Implement streamlined procedures within both the WTO and ISDS mechanisms to expedite the resolution process, ensuring that disputes are addressed promptly.
- **Cooperative Mechanisms:** Develop mechanisms for information sharing and coordination between the WTO and ISDS systems, fostering synergy and leveraging each system's strengths.

- Specialization and Expertise: Introduce specialized panels or tribunals within the ISDS system to address trade-related disputes more effectively, ensuring a higher level of expertise.
- Alternative Dispute Resolution: Promote the utilization of alternative dispute resolution methods, such as mediation and conciliation, to mitigate the adversarial nature of traditional dispute resolution processes.
- Transparency and Accountability: Enhance transparency in both mechanisms by providing clear reasoning behind decisions, promoting accountability, and bolstering public trust.

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