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Compatibility of Different Investment Dispute Settlement Mechanisms Under the Multilateral Instrument

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Given states cannot reach consensus on adopting which reform option for investor-state dispute settlement (ISDS) multilateral reform, the establishment of a flexible multilateral instrument encompassing all discussed reform options for states to opt for has been proposed. Among these options, "mediation", "improved investment arbitration", "appellate mechanism", and "multilateral investment court" reform options have the possibility to be adopted in combination by states. In order for the multilateral instrument to operate effectively, this article respectively discusses the compatibility of investment mediation with other international investment dispute mechanisms and the compatibility of investment appellate mechanism with investment arbitration or the first-instance proceeding of the multilateral investment court.

Keywords: ISDS, mediation, appellate mechanism, compatibility

Introduction

With the increase in the number of international investment dispute settlement cases, concerns about the investor-state dispute settlement (ISDS), such as the lack of consistency and the impartiality of arbitrators, have gradually emerged. This has triggered discussions and practices in the international community regarding the reform of the current ISDS mechanism. At the bilateral level, states represented by the United States have pursued incremental reform of the investment dispute settlement clauses in their international investment agreements (IIAs). States represented by the European Union have implemented systemic reform by incorporating the investment court system into their IIAs. States represented by South Africa have abandoned the ISDS mechanism in their IIAs and returned to state-to-state arbitration. These reform practices offer valuable reference points for ISDS reform, but most of these reform measures are carried out at the bilateral level, lacking broad consensus for implementation and even carrying the risk of exacerbating the fragmentation of the international investment law system. To avoid each state acting unilaterally in ISDS reform, the Working Group III of the United Nations Commission on International Trade Law (UNCITRAL) hosted discussions on the multilateral reform of ISDS. Until now, there is broad agreement among states on the necessity of multilateral ISDS reform, but significant divergences remain regarding the specific reform options to be adopted.

In light of these challenges, UNCITRAL Working Group III has proposed to establish a multilateral instrument that encompasses all discussed reform options, allowing states to choose to apply these reform options

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through optional protocols.[1] This multilateral instrument for international investment dispute settlement (hereinafter "The Multilateral Instrument") would operate independently from the existing network of IIAs, and will modify but not replace these agreements. The reform options under the multilateral instrument can be summarized into three blocks. The block of support includes the "multilateral advisory center" reform option. The block of dispute settlement includes "improved investment arbitration", "mediation", "appellate mechanism", and "multilateral investment court (MIC)". The block of procedural rules includes "exhaustion of local remedies", "code of conduct", "security for cost", "multiple proceedings", "frivolous claims", "counterclaim", and "third-party funding". Among these, some reform options within the block of dispute settlement are interrelated and may be applied by states. For example, a state may choose to apply both "improved investment arbitration" and "appellate mechanism" to constitute the first instance and review procedure for resolving its investment disputes. Therefore, addressing the compatibility of these reform options concerns is essential to ensure internal coherence of the multilateral instrument, and will also help the multilateral instrument operate smoothly and effectively in practice.

This article focuses on compatibility problems among the "mediation", "improved investment arbitration", "appellate mechanism", and "multilateral investment court" reform options. Part II analyzes the compatibility of investment mediation with other investment dispute settlement mechanisms, including the parallel and interface problems. Part III discusses the compatibility of investment appellate mechanism with investment arbitration or the first-instance proceeding of the multilateral investment court, including the jurisdiction, objects, legal effect, and remand of the appellate mechanism. Part VI summarizes all the work on these compatibility problems.

Compatibility of Investment Mediation With Other Investment Dispute Settlement Mechanisms

In contrast to investment arbitration, mediation as an amicable dispute settlement mechanism demonstrates distinct advantages including expedited proceedings, reduced costs, and more importantly, the capacity to preserve and enhance commercial relations between foreign investors and host states (Welsh & Schneider, 2013, p. 71; Titi, 2019, p. 23). However, most IIAs merely contain generic provisions requiring parties to seek amicable settlement before resorting to the arbitral tribunal, without explicitly recognizing the independent role of mediation within investment dispute settlement. This legislative ambiguity has resulted in the benefits of mediation being overlooked and further systematic underutilization by parties.

To institutionalize mediation as an effective investment dispute settlement mechanism, the multilateral instrument for international investment dispute settlement has incorporated the "mediation" reform option. Specifically, UNCITRAL Working Group III has promulgated the Draft Provisions on Mediation and the Guidelines on Mediation in order to modernize the relevant provisions in existing IIAs and guide the disputing parties on the application of the mediation procedure. Where mediation is explicitly established as a kind of investment dispute settlement mechanism, clarity on its relationship to other investment dispute settlement mechanisms, such as investment arbitration or domestic remedies, will contribute to the effective operation of the multilateral instrument.

[1] See A/CN.9/WG.III/WP.194, Possible Reform of Investor-State Dispute Settlement (ISDS) Multilateral Instrument on ISDS Reform.

The Parallel Problem of Investment Mediation and Other Investment Dispute Settlement Mechanisms

To encourage disputing parties to apply mediation, the ICSID Mediation Rules, UNCITRAL Mediation Rules, and Draft Provisions on Mediation all stipulate that parties may initiate mediation at any stage after the commencement of other international investment dispute settlement proceedings.[2] However, permitting mediation initiation during other proceedings may lead to the problem of parallel proceedings. Addressing this concern and preventing procedural abuse through delay tactics, Article 3 of Draft Provisions on Mediation provides that "the parties shall request the suspension of that proceeding pursuant to the rules applicable to that proceeding".[3]

In addition, the concurrent operation of mediation with other investment dispute settlement proceedings also raises another complex issue of procedural integration. The combination of arbitration and mediation (hereinafter "Arb/Lit-Med") refers to a hybrid mechanism whereby the arbitral tribunal or court assumes a mediatory role ex officio upon parties' mutual consent during arbitration or litigation. Under this model, arbitrators or judges temporarily transition into mediators, thereby eliminating the need for separate mediator appointments and achieving procedural economy through integrated case management. In practice, some investment arbitration rules hold a positive attitude towards the Arb/Lit-Med. For instance, Article 43 of the China International Economic and Trade Arbitration Commission (CIETAC) Investment Arbitration Rules (2021 Edition) stipulates that "where both parties wish to conciliate, or where one party wishes to conciliate and the other party's consent has been obtained by the arbitral tribunal, the arbitral tribunal may conciliate the dispute during the arbitral proceedings".

Notwithstanding the purported advantages of Arb/Lit-Med permitting arbitrators or judges to concurrently act as mediators raises concerns regarding procedural independence and the impartiality of adjudicator (Lack, 2010). Specifically, statements of position, concessions, or admissions made by disputing parties during mediation may unduly influence the arbitrator/judge-turned-mediator's perception of the merits of the case. Should mediation fail, there exists a risk—whether consciously or subconsciously—that such preconceptions formed during mediation could influence the tribunal's subsequent decision of the claim, thereby jeopardizing parties' substantive rights. Furthermore, to expedite disputing parties to reach a settlement agreement, arbitrators/judges acting as mediators may disclose their preliminary views on the merits of the dispute, thereby possibly exerting certain pressure on disputing parties to accept unfavorable compromises. Consequently, from the perspective of due process, separation between mediation and adjudicative processes is preferable, but it inevitably increases temporal and financial costs, creating disincentives for parties to adopt mediation as the primary dispute settlement mechanism.

Given the Arb/Lit-Med model both has advantages and disadvantages, this article holds that the multilateral instrument can draw on the practice of the International Chamber of Commerce Arbitration Rules, making the separation between mediation and arbitration/litigation as the default rule for disputing parties. In other words, only with the expressly consent of disputing parties can arbitrators or judges act as mediators to resolve the investment dispute.[4] The benefit of this approach lies in that it prioritizes due process, ensuring the parties'

[2] UNCITRAL Mediation Rules, Art. 10.1.
[3] A/CN.9/1150, Draft Provisions on Mediation—Note by the Secretariat, p. 4.
[4] International Chamber of Commerce Rules of Arbitration, Appendix IV(h).

legitimate expectations that the adjudicative outcomes remain unaffected by mediation. Meanwhile, parties are allowed to opt for Arb/Lit-Med through contractual agreements or joint declarations, thereby balancing procedural efficiency with party autonomy.

Apart from initiating a mediation procedure in other investment dispute settlement proceedings, another situation leading to the problem of parallel proceedings is that parties initiate other investment dispute settlement proceedings during ongoing mediation. Article 3 of Draft Provisions on Mediation categorically prohibits this situation. That is, only after the mediation proceeding is terminated can the disputing parties initiate or continue other investment dispute settlement proceedings. It should be noted that the initiation of other investment dispute settlement proceedings after the mediation fails between the disputing parties cannot be regarded as the termination of the mediation proceeding.[5] The termination of the mediation proceeding still needs to be implemented in accordance with the mediation rules applicable to the parties.

Interface Between Investment Mediation and Other Investment Dispute Settlement Mechanisms

Investment mediation may have two outcomes: successful settlement or failed negotiation. If mediation fails, it means that the dispute has not been effectively resolved; therefore the investor retains the right to initiate arbitration or litigation according to IIAs or investment contracts, and the investment tribunals should resume the suspended proceeding and render binding awards.[6]

If the parties concerned succeed in a settlement agreement through mediation, other investment dispute settlement proceedings shall be terminated, and the decision made by the arbitral tribunal or court shall no longer be effective. To address the risk of relitigation on the same dispute, the multilateral instrument can draw on the practice of some arbitration rules and allow the parties to request the arbitral tribunal or court to convert the settlement agreement into consent awards.[7] Such conversion grants the settlement agreement res judicata effect, thereby precluding subsequent claims on the same dispute. Critically, absent such conversion, whether the settlement agreement can prevent future proceedings depends on the recognition of the res judicata of the settlement agreement on investment disputes.

Res judicata refers to the legal principle that a final judgment or award conclusively resolves a dispute, barring the relitigation of the same dispute. The settlement agreement on investment dispute was generally deemed devoid of res judicata effect, allowing parties to reinitiate arbitration or litigation over the same dispute. However, the Singapore Convention on Mediation alters this paradigm, conferring legal validity upon qualifying investment settlement agreements.

Specifically, Article 3(2) of the Singapore Convention provides:

> If a dispute arises concerning a matter that a party claims was already resolved by a settlement agreement, a Party to this Convention shall allow the party to invoke the settlement agreement in accordance with its rules of procedure and under

[5] Article 10 of the UNCITRAL Rules on Mediation expressly excludes the initiation of other dispute resolution proceedings is regarded as a termination of the mediation; the ICSID Mediation Rules and the IBA Mediation Rules do not explicitly exclude such the situation, but they also do not include it in the article on the termination of the mediation. Therefore, they can be regarded as implicitly excluded.

[6] This is also the practice of many arbitration rules, such as Article 43(6) of the CIETAC Arbitration Rules and Para. 8 of the SIAC-SIMC Arb-Med-Arb Protocol.

[7] e.g., Para. 9 of the SIAC-SIMC Arb-Med-Arb Protocol, Article 43(5) of CIETAC Arbitration Rules, and Article 36(1) of the UNCITRAL Rules on Mediation.

the conditions laid down in this Convention, to prove that the matter has been resolved.

Unlike the New York Convention, which explicitly imposes the obligation on contracting parties to recognize arbitral awards, this article avoids the term "recognition"—a concept subject to divergent jurisdictional interpretations—and instead adopts a functionalist approach to describe the legal consequences of the settlement agreement in precluding future proceedings on the same dispute. From a textual perspective, this article applies when a party attempts to relitigate a dispute previously settled through mediation. In such circumstances, the other party should first invoke the settlement agreement under the procedural rules of the jurisdiction where enforcement is sought, as the legal effect and recognition procedures for such agreements may vary across jurisdictions.[8] Moreover, compliance with the substantive conditions of the Singapore Convention on Mediation is required to successfully block subsequent arbitration or litigation on the same dispute. Thus, Article 3(2) effectively establishes a "shield effect", enabling parties to assert the settlement as a jurisdictional defense before tribunals or courts, and then preclude renewed arbitration or litigation over the dispute already resolved through mediation.

For the settlement agreement on investment disputes, the applicability of the Singapore Convention on Mediation depends on multiple factors, for example, whether the respondent state has ratified the Convention without reservations for investment disputes, whether the agreement involves parties with business establishments in the same state, and so on. Where these conditions are met, host state may invoke the settlement agreement under domestic procedural rules to bar investors from reinitiating claims. Conversely, if the Convention is inapplicable, the settlement agreement retains only contractual force. In other words, investors can initiate investment arbitration or litigation in respect of the same dispute.

Compatibility of Investment Arbitration or the First-Instance Proceeding of the MIC With Investment Appellate Mechanism

Within the multilateral instrument, the "appellate mechanism" serves dual functions. It may operate both as a review body for international investment arbitration and as a second-instance proceeding for the MIC. Given states may choose to apply both "appellate mechanism" reform option and "improved investment arbitration" or "multilateral investment court", it would be necessary to discuss the compatibility of international investment arbitration or the first-instance proceeding of the MIC with the appellate mechanism, which refer to as the "first-tier tribunal" in following text.

Jurisdiction of Investment Appellate Mechanism

The jurisdiction issue of the investment appellate mechanism mainly involves the scope of jurisdiction, the access to it, and the structure of the right to sue.

Firstly, the jurisdiction of the investment appellate mechanism within the multilateral instrument should be confined to investment-related disputes, excluding broader authority over state-to-state disputes or counterclaims. While expansive jurisdiction could theoretically ensure high adjudicative standards for all stakeholders and enhance consistency in treaty interpretation, it risks overburdening the appellate mechanism with excessive

[8] UNCITRAL Working Group II, Report of Working Group II (Dispute Settlement) on the Work of Its Sixty-Sixth Session (July 2017), A/CN.9/901, Para. 21.

caseloads and operational costs. Given that many states concern about the costs brought by the appellate mechanism, the multilateral instrument may adopt a restricted jurisdictional scope to attract broader state participation. However, states that choose to apply the appellate mechanism should be allowed to discuss expanding the scope of jurisdiction when they deem it necessary.

Secondly, the access to jurisdiction of the investment appellate mechanism depends on whether it operates as mandatory or optional. Under the MIC, the right of appeal is a statutory entitlement that automatically vests upon the initiation of judicial proceedings, irrespective of the opposing party's consent. In this context, the jurisdiction of the appellate mechanism derives from international agreements ratified by states, distinguishing the arbitration feature of the autonomy of will of the parties. While the jurisdiction of an optional appellate mechanism requires the parties' express consent, on the basis of which parties can file an appeal against the original award. If no ex ante consent is reached, jurisdiction can also be activated through ex post consent before the first-instance award is rendered.

Within the multilateral instrument, since the appellate mechanism has dual functions, its jurisdiction may stem from either international agreements or the mutual agreement of the parties. When the appellate mechanism serves as the second-instance proceeding of the MIC, its jurisdiction originates from the "multilateral investment court" protocol signed by the investor's home state and the host state, as this protocol would modify the dispute settlement clause in IIAs. In other words, once the first instance-proceeding commences, the right of appeal applies automatically, even if the investor objects. When the appellate mechanism serves as a review body for international investment arbitration, its jurisdiction originates from the "appellate mechanism" protocol signed by the investor's home state and host state, or case-specific consent by disputing parties. In other words, the jurisdiction of the appellate mechanism comes from either the international agreement signed by states or the consent of disputing parties. It should be noted that since the ICSID Convention Article 53(1) explicitly excludes the application of appellate mechanisms, the jurisdiction over ICSID awards requires unanimous state consent via treaty amendments, which means the case-specific consent by disputing parties cannot grant jurisdiction to the appellate mechanism, while non-ICSID awards (e.g., UNCITRAL awards) face no such restrictions. Thus, the jurisdiction of the appellate mechanism under the multilateral instrument originates from two sources: treaty obligations and party consent.

Finally, the appellate mechanism adopts a bidirectional litigation structure, granting both disputing parties equal rights to initiate an appeal. A contentious issue persists regarding whether the appellate right should vest exclusively in the party bearing specific claims (e.g., investors) or extend symmetrically to both parties. Supporters of asymmetric rights argue that restricting appeals to respondents (host states) would ensure systemic fairness by incentivizing investors to exercise due diligence before initiating claims, thereby reducing frivolous claims. However, such an argument may contravene the rule of law (Lee, 2015, p. 485). Specifically, while the ISDS employs a unidirectional litigation structure (investor-only arbitration initiation), according to the principle of due process, the disputing parties should participate in the entire arbitration process on an equal legal basis. Moreover, the existing annulment mechanism does not deprive investors of the appellate right.[9] As the appeal mechanism serves as a review body of the same nature as the annulment mechanism, allowing both parties to file

[9] ICSID Convention, Art. 52(1).

appeals will be more in line with the previous procedure. Therefore, it may be more appropriate to grant equal appellate right to both disputing parties.

Objects and Legal Effect of Investment Appellate Mechanism

In order to ensure the efficiency of the appeal mechanism and avoid its interference and delay in the entire investment dispute settlement procedure, it is necessary to clarify the types of decisions that can be appealed and the legal effect resulting from the appeal of different decisions.[10]

Firstly, the final decisions made by a first-tier tribunal on its jurisdiction or the merits in relation to an international investment dispute should generally be subject to appeal.[11] Within the multilateral instrument, given the dual functions of the appellate mechanism, appealable final decisions on the merits include ICSID arbitration awards, non-ICSID arbitration awards, and the decisions rendered by the first-instance investment court, but exclude awards rendered by domestic courts. Additionally, partial decisions on the merits, such as a decision upholding liability but deferring the assessment of damages, may also qualify for appeal.[12]

Once an investment dispute enters the appellate proceeding, to prevent conflicting legal effects between the appellate decision and the original decision, the first-tier decisions shall be temporarily deprived of legal enforceability, and parties are barred from seeking domestic enforcement during the pendency of the appeal. This aligns with appellate arrangements in domestic and international judicial systems. Nevertheless, this approach also poses a risk of abusive delay tactics, where parties may initiate appeals to avoid recognition and enforcement of the original decisions. To mitigate such a risk, states choosing to apply the appellate mechanism can consider incorporating the "security for costs" reform option, namely requiring appellants to post financial guarantees as a safeguard against procedural abuse.

Regarding appeals against decisions on the jurisdiction, the Initial Draft of Appellate Mechanism issued by UNCITRAL Working Group III stipulates that a disputing party may appeal the decisions on the jurisdiction rendered by the first-tier tribunal. However, negative decisions on the jurisdiction, such as a decision on declining jurisdiction, are not subject to appeal. This exclusion reflects the Working Group's intent to limit caseloads and reduce operational burdens on the appellate mechanism, but it may undermine the procedural right of investors and lead to an imbalance of rights between disputing parties. Accordingly, from the perspective of procedural fairness, the multilateral instrument seems not to be warranted to distinguish between affirmative and negative decisions on the jurisdiction when it comes to the application of the appellate mechanism. Furthermore, the timing of appeals also impacts the efficiency of the appellate mechanism. Challenges to affirmative decisions on jurisdiction should be raised as early as possible during the proceeding rather than deferred to the final decision stage.

Secondly, appeals against non-final decisions should be permitted but subject to strict limitations. When determining the applicable object of the appellate mechanism, the multilateral instrument needs to balance the effectiveness and efficiency of investment dispute settlement mechanisms. Specifically, the first-tier tribunal may

[10] The term "decision" encompasses awards and decisions rendered by arbitral tribunals and the first-tier tribunal of the multilateral investment court.
[11] A/CN.9/WG.III/WP.224, Possible Reform of Investor-State Dispute Settlement (ISDS)—Appellate Mechanism, Note by the Secretariat, p. 2.
[12] Ibid., p. 3.

issue some decisions that have a significant impact on the first-tier proceedings before rendering final decisions. Accordingly, granting parties the right to appeal such non-final decisions during the first-tier proceedings could enhance procedural integrity while conserving time and costs. However, unlimited appeals of all non-final decisions may overburden the appellate mechanism and interfere with and delay the first-tier timelines. To mitigate these risks, the multilateral instrument may consider establishing a screening or filtering mechanism to qualify appealable non-final decisions. For instance, the decision on provisional measures should generally be excluded from appeal unless they cause irreparable damage to the disputing parties, since such measures are generally case-specific and temporary, and they may be revoked by the first-tier tribunal.[13] Moreover, procedural decisions, such as decisions on challenges to arbitrators or bifurcation, should also be non-appealable. The reasons lie in that the appeal of these procedural disputes may delay the whole proceedings, and these disputes can be resolved through the first-tier tribunals' inherent corrective powers.

The procedural consequences of appealing non-final decisions remain contentious, namely, whether the first-tier proceeding should be automatically stayed. On one hand, since the appellate decision may reverse the first-tier decision, automatically suspending the first-tier proceeding is conducive to saving judicial resources. On the other hand, automatically suspending may lead the first-tier tribunal to delay rendering the final decision and even trigger systemic appeals. Given this dilemma, the multilateral instrument could empower the first-tier tribunal to exercise discretionary suspending authority, weighing factors such as the type of appealed decisions, the timing of the appeal, and the need to prevent abusive delays and costs.

Remand of Appellate Mechanism

The appellate tribunal may uphold, modify, reverse, or remand the appealed first-tier decision. For the multilateral instrument, the most contentious issue is whether the appellate tribunal can remand the case to the first-tier tribunal. Civil law and common law diverge sharply in this regard. In civil law countries, the appellate body generally has the authority to review both legal and factual errors, which is known as "a second bite at the apple". This paradigm has been adopted by France, Belgium, Germany, Japan, and South Korea, which ensures comprehensive accuracy in legal and factual findings but risks procedural inefficiency due to undifferentiated review without focus (Platto, 1992, pp. 135-173). In this case, remand becomes redundant, as the appellate body fully reviews the case. Conversely, common law countries, such as the U.S. and the UK, restrict appellate review primarily to legal errors and manifest factual errors (Martineau, 1990, p. 6). This paradigm stems from the jury trial tradition in the common law system, where the issues of fact are determined by the jury. Allowing for an appeal on all factual errors would be a denial of the jury's trial rights. Accordingly, appellate bodies may reverse the factual findings made by the first-tier tribunal only if the adjudicators of appellate bodies deem that there is a "manifest error" of the fact, or the jury determines that no reasonable jury could reach a factual finding (Platto, 1992, p. 150). While this paradigm enhances efficiency, it may compromise factual precision. To address some disputes about facts unresolved through appellate review, the remand procedure is retained.

At the international level, the most developed appellate mechanism is the World Trade Organization (WTO) Appellate Body, which closely resembles the common law paradigm by restricting review to legal errors, yet it

[13] See Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of Its Fortieth Session (Vienna, 8-12 February 2012), p. 14.

does not establish a remand procedure. The Appellate Body can only uphold, modify, or reverse the original decision. This design reflects WTO members' preference for arbitral finality over comprehensive accuracy. In other words, they prefer to enhance the efficiency of dispute settlement and avoid delays and further complications in WTO dispute settlement. However, the absence of remand and constrained review scope leads to a dilemma when the facts are unclear or the panel has overlooked critical matters that should have been decided (Pauwelyn, 2017, p. 12). Specifically, if the Appellate Body refuses to complete the analysis, it will leave all or part of the dispute unresolved and may force the plaintiff seeking to settle the dispute to initiate a new proceeding, resulting in a waste of time and resources. If the Appellate Body completes the analysis, it may be suspected of exceeding its authority and violating due process, as parties are denied the right to challenge factual findings before the first-tier panel. In practice, neither approach yields satisfactory outcomes.

The WTO experience demonstrates that merely considering the judicial economy is not a wise move. Despite the remand procedure may increase procedural complexity, it remains indispensable for resolving disputes effectively where factual or legal gaps preclude definitive appellate decisions. In the field of international investment law, states and investors, like WTO members, are concerned that the investment dispute settlement proceedings will become lengthy and complicated due to the appellate mechanism and the remand procedure. Accordingly, judicial economy remains a critical consideration when designing the appellate mechanism. However, drawing lessons from the WTO experience, the design of the investment appellate mechanism should not only focus on judicial economy, but also balance efficiency and effectiveness. Specifically, the appellate mechanism could expand its scope of review to encompass both legal errors and manifest factual errors, while incorporating a remand procedure to address situations where the appellate tribunal cannot conclusively resolve disputes due to factual or legal gaps. This approach would mitigate the procedural delays caused by a comprehensive factual review, while ensuring effective resolution of investment disputes. Furthermore, with the consent of disputing parties, the authority of the appellate mechanism could be expanded to include investigations and evaluations of facts, empowering the appellate tribunal to complete the analysis where first-tier records are insufficient (Pauwelyn, 2017, p. 28). Although such expansions may raise concerns about parties forfeiting the appellate right over factual issues, allowing the appellate tribunal to conduct factual investigation and analysis would reduce the consumption of judicial resources brought about by initiating a remand procedure. Thus, this may be a good strategy for balancing the judicial economy and the effectiveness of the investment dispute settlement.

If allowing the appellate tribunal to remand, a critical design challenge lies in how to be compatible with two distinct first-tier proceedings: investment arbitration and the first-instance proceeding of the MIC. The first issue is the constitution of the remand tribunal. In domestic and international judicial practice, to mitigate risks of bias from the first-tier tribunal, particularly where the first-tier tribunal committed serious misconduct or procedural errors, the remand typically requires de novo proceedings before a different tribunal. For example, ICC Statute Article 83(2) provides that the remand shall be conducted by a different trial chamber.[14] While reconstituting a new tribunal enhances independence and impartiality, it sacrifices efficiency, as a new tribunal

[14] Rome Statute of the International Criminal Court, Art. 83.2: "If the Appeals Chamber finds that the proceedings appealed from were unfair in a way that affected the reliability of the decision or sentence, or that the decision or sentence appealed from was materially affected by error of fact or law or procedural error, it may: (b) order a new trial before a different Trial Chamber".

needs to reacquaint itself with case records. Thus, in order to balance fairness and efficiency, the multilateral instrument may adopt this approach exceptionally. If the first-tier adjudicator is denied impartiality or there are procedural errors, a new investment arbitration tribunal or a first-tier investment court shall be formed to conduct the remand proceeding. Absent such grounds, the remand proceeding should ideally retain original tribunal members. Notably, the MIC is composed of permanent judges, and it is relatively easy for the appellate tribunal to remand the case back to the original court. However, the ad hoc investment arbitration tribunal may risk member unavailability during remand. For this problem, the multilateral instrument can consider drawing on the proposal made by the EU and Jordan for WTO panel reconstitution. That is, when any member of the original panel is unavailable, the WTO Director-General shall appoint a substitute member within "seven days (as proposed by the EU)"or "five days (as proposed by Jordan)".[15] Under the multilateral instrument, the UNCITRAL Secretariat could assume analogous functions to appoint a substitute member within a fixed timeframe. However, given parties' contractual autonomy in arbitrator selection, the Secretariat should first consult parties to seek consensus on the substitute member. If consensus is unattainable, the Secretariat would exercise default appointment authority, ensuring procedural continuity while respecting party autonomy.

The second issue is the appeal of the remand decision and the repeated remand, which both implicate balancing judicial economy and due process. Permitting the appeal of the remand decision inevitably prolongs dispute settlement timelines, yet prohibiting such appeals may undermine the rationale for remand, namely, safeguarding the appellate right of disputing parties. Guided by the principle of due process, domestic courts and international tribunals generally allow the appeal of the remand decision, even if it is detrimental to judicial economy. Therefore, the multilateral instrument should similarly permit such appeals to uphold procedural fairness.

However, as for the repeated remand, the appellate mechanism should prioritize judicial economy, since the repeated remand would cause a significant delay in the dispute settlement process, which may not be acceptable to states and investors. Specifically, if an appellate tribunal cannot resolve the dispute after the appeal for the remand decision due to ambiguous unresolved facts, it may adopt the limited remand doctrine employed by domestic judiciaries. This permits the appellate tribunal to directly investigate and assess factual issues, thereby concluding proceedings expeditiously without further remands.

Conclusion

In order to ensure that the multilateral instrument covering all discussed ISDS reform options operates effectively in practice, this article respectively analyzes the compatibility of investment mediation with other investment dispute settlement mechanisms and compatibility of investment arbitration or the first-instance proceeding of the MIC with investment appellate mechanism.

Firstly, regarding the parallel problem of mediation and other international investment dispute settlement proceedings, it involves the initiation of the mediation proceeding during the operation of other investment dispute settlement proceedings, and the initiation of other investment dispute settlement proceedings during the

[15] Communication from Jordan, Jordan's Further Contribution Towards the Improvement and Clarification of the Dispute Settlement Understanding, TN/DS/W/56 (19 May 2003); Communication from the European Communities, Contribution of the European Communities and Its Member States to the Improvement and Clarification of the WTO Dispute Settlement Understanding, TN/DS/W/38 (23 January 2003).

mediation. For the former situation, the multilateral instrument should require that other investment dispute settlement proceedings must be terminated upon written notification by the disputing parties to the arbitral tribunal or court requesting termination. Moreover, to enhance the efficiency of dispute settlement, the multilateral instrument can also consider making the mediation proceeding independent of arbitration or litigation proceedings as the default choice for the parties, and only with the consent of the parties, adjudicators can act as mediators for mediation. For the latter situation, the multilateral instrument can consider explicitly prohibiting parallel proceedings.

As for the interface between investment mediation and other investment dispute settlement mechanisms, it should consider two situations, namely mediation success or failure. If the disputing parties fail to reach a settlement agreement through mediation, investors who have not initiated investment arbitration or litigation proceedings can file arbitration or litigation based on IIAs or investment contracts, and the suspended investment arbitration or litigation proceedings will continue. If the disputing parties successfully reach a settlement agreement through mediation, other investment dispute resolution procedures are terminated, and the award made in the arbitral tribunal or court will no longer be effective. Regarding the legal effect of an investment settlement agreement, whether an investment settlement agreement can prevent investors from relitigation on the same dispute depends on whether it meets the conditions of the Singapore Convention on Mediation.

Secondly, the compatibility of the appellate mechanism with the first-tier tribunal involves issues such as the jurisdiction, applicable objects and effect, and the remand of the appellate mechanism. The jurisdiction of the appellate mechanism in the multilateral instrument derives from international agreement and the mutual agreement of the disputing parties. The appealable decisions generally include final decisions on merits and jurisdiction. Non-final decisions can also be appealed, but a screening or filtering mechanism should be set up to weigh the effectiveness and efficiency of the investment dispute settlement proceeding. After the appeal of final decisions on the merit, the first-tier decision will temporarily lose its legal binding force, and the parties cannot seek enforcement in domestic courts, while whether the appeal of other decisions on the merit or jurisdiction would suspend the first-tier proceeding may be determined by the first-tier tribunal, based on the type and time point of the decision for appeal and the necessity to avoid undue delay and costs.

In addition, based on considerations of the effectiveness and judicial economy of dispute settlement, the investment appellate mechanism may incorporate a remand procedure, limit repeated remand, and allow the appellate tribunal to investigate and assess factual issues in some cases, thereby avoiding overly lengthy and time-consuming procedures. Moreover, the appellate mechanism can draw on the inspiration from the proposal of the EU and Jordan for the WTO to have the UNCITRAL Secretariat exercise the function of appointing substituted arbitrators to address the situation where the arbitrator of the original investment arbitration tribunal is unavailable.

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