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Research on the International Investment Arbitration Appeal Mechanism of the ICSID

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Abstract: On the basis of considering the develop history of the arbitration mechanism of the ICSID and analyzing its crisis of legitimacy, this paper arranges the most popular ways to solve its crisis of legitimacy, which is the germination and development process of international investment arbitration appeal mechanism. Depending on the concrete proposals of establishing appeal mechanism put forwarded by the ICSID Secretariat Discussion Paper of 2004, the paper analyzes and put forwards the basic principles and system guarantee of International Investment Arbitration Appeal Mechanism under the ICSID and expounds the enlightenment of constructing the appeal mechanism of the ICSID to China.

Keywords: International investment arbitration; ICSID; Appeal mechanism

1. Introduction

On March 18, 1965, the Executive Directors of the World Bank approved the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (also known as the Washington Convention, hereinafter referred to as the Convention, formally went into effect on October 14, 1966). According to the first article of the Convention, " International Center for the Settlement of Investment Disputes(hereinafter referred to as the "the Center" or "ICSID") established. As a permanent system, it is responsible for settlement of investment disputes between the interests of investors and host states. [1] the mission and purpose of the Convention is to "create a institution to conveniently settle the disputes between investors and States", so that make every effort to help "promote the atmosphere of mutual trust to encourage more international private capital to flow to those who hope the capital ". In more than forty years after established, according to the mission of the Convention, the ICSID plays a very important role in settling international investment disputes and develops rapidly prompted by the international investment environment.

2. The Crisis of Legitimacy for the International Investment Arbitration

Faced with the huge increase of international investment arbitration cases, the limitation of the international investment arbitration mechanism based on the general international commercial arbitration is growing. As a fair institution to solve international investment disputes, the reputation of the international investment arbitration is deeply affected arbitration by the problems, such as: different appeals, bias in favor of private investors and ignore the host states' sovereignty and public interests and the acute shortage of arbitration supervision mechanism. The settlement mechanism of International investment disputes faces a major challenge. Some countries even expressed the extreme emotion to completely deny international investment arbitration mechanism, for example, Bolivia, Ecuador and Venezuela announced his retirement from the ICSID. International investment arbitration mechanism is facing the serious "legitimacy crisis". The "legitimacy crisis" of international investment arbitration means that the international investment arbitration trust crisis is caused by some incompetent at the sides of solving international investment disputes. [2] It embodies in three aspects, such as: the different arbitration, the arbitration to ignore the public interest the host states and the lack of the international investment arbitration supervision mechanism.

2.1. Consistency of the Arbitration Decision

The consistency of decision is essential feature of the judicial remedy procedure, and is also important factor for the sustainable development of international investment dispute arbitration mechanism. The reason is the consistency of decision determines the predictability of its that seriously affects the trust of the dispute parties to the arbitration mechanism. Only the arbitration cases are made the same decisions by arbitrators in the same situation, can the mechanism set clear rules for international investment participants, thus got the trust of the parties. If the decision is different in the same case, then the parties of international investment disputes will be trouble for the unforeseen results.

Due to international investment arbitration haven't followed the precedent system, cases are independent of each other, the diversification of international investment dispute settlement mechanism, the impermanent of international investment arbitration institution, many important even key substantive law provisions are unclear, unambiguous and broad and the obvious differences of arbitrator who have different profession and background in the understanding for international investment treaty. Now the international investment arbitration pursues the system of one arbitration as final, there are not ways to correct and unified the different explains and decisions made by arbitrators, so dispute parties in the same situation is likely to get a very different judgment. With the dramatically increasing in the number of international investment arbitration cases, the arbitration ruling conflict problem is increasingly prominent. The typical cases of inconsistent decision is CME v. Czech Republic and Lauder v. Czech Republic.

2.2. The Arbitration Decision Ignores the Host State's Public Interest

The solution of international investment dispute not only relates to the huge economic interests of foreign investors, also affects the legislative, judicial and administrative sovereignty of host states, the host states formulate the government management measures to protect economic and social development, financial security, public health, the environment and the labor rights and interests and the component of host state to pursuit welfare for its citizens by the sovereign. As an important institution in the non-governmental organization, International Investment Institute for Sustainable Development, the IISD points out that investment arbitration may involve five kinds of the public interest: "first, the dispute may involve water, oil, gas, electricity and other utilities; second, investment disputes challenge the control measures made by the host states to protect human rights, health, labor, public welfare the environment; third, the investors threaten the host country to submit arbitrations, which makes the host country to produce the" chilling effect " and dare not to take the regulatory measures; fourth, investment arbitration burden for the host country's public finances; fifth, words of many investment agreement are vague, which makes investment arbitration tribunal play a very important role in legal Development, thus reduces the role of the sovereign state." Therefore, the international investment disputes arbitration tribunal should pay much attention to such disputes involving public interests. However, many cases show that the international investment arbitration tribunal unilateral emphasizes to protect the interests of the private investors and ignores the public interests of the host country.

As mentioned above, the decision of the arbitration tribunal has a significant negative influence on the host country to exercise the sovereignty as well as maintain the public interest. For fearing the arbitration tribunal may treat the measures on public interests as a action to violate obligations of international investment treaty, the host country often hesitate whether take sovereign management measures or not for the foreign investors and put the measures off even don't take measures, which serious damage its own public interest. A typical example is that in order to protect its own natural environment, the Indonesian government has issued some bans that don't allow mining in the forest protection zone using the way of the opening, which prompts complain and grievances of some foreign investors, they put forward the behavior of the host country has violated the clause "fair and just treatment" to "indirect tax", foreign investors threaten the Indonesian government and claim to raise international investment arbitration. In such cases, a few months later, the Indonesian government has to repeal the ban. Another example is that in 2006 Ethyl Corporation v. the Government of Canada, because concerns about itself may be decided by international investment arbitration tribunal to pay huge compensation, the Canadian Government has to abolish the import and export control law to protect the environment.

3. The Concrete Setting of Appeal Mechanism in the ICSID Secretariat Discussion Paper of 2004

Under the pressure of "legitimacy crisis " and the affect of setting the appeal mechanism put forwarded frequently by the United States in the investment agreement, the ICSID Secretariat published the discuss paper of ICSID arbitral system reform. In the sixth part and the appendix, the discuss paper makes the possible improvements of the framework for ICSID appeal mechanism, including the applied range, composition and membership, the object, the appeal reason, the trial period, the authority and guarantee of the charges.

First of all, the ICSID has been clear to create a single rather than multilateral appeal mechanism that is suitable for the ICSID convention arbitration, non-ICSID convention arbitration (including on the basis of the ICSID additional convenience rules and the arbitration made by the arbitration rules of Trade Law Committee of the United Nations) and the international investment treaty investors – the any other form arbitration ruled by the host stats dispute resolution clause.

Secondly, ICSID has made the detailed analysis and rules about the treaty amendments to establish appeal mechanism. The article 66 in The Washington Convention rules that the suggested text can take effect, only through the ratify, acceptance or after approval of all states parties. So it is difficult to realize that appeal mechanism is stetted by the agreement of all member countries. Hence, ICSID discussion paper also examines article 41 in the

Vienna Convention on the Law of Treaties "modify the agreement of the multilateral treaty only between several parties". Finally, the ICSID discussion paper come to the conclusion that the international investment arbitration appeal mechanism can be applicable between part of the contracting states and don't have to be consistent in all the states parties to ratify, accept, or approval, that is, appeals mechanism is applied through the way of accepting each other between contracting states.

Next, the discussion paper regulates the composition, the object, the appeal reason, the authority and the appeal cost of the appeal institution:

First, the composition of the appeal institution. ICSID will set up a appeal panel of 15 members. The members is first to be nominated by the secretary general, and then is elected by the ICSID administrative council, each member's the term of office is six years and the term of office of the eight of the original 15 members term is three years. Drawing the successful experience of the WTO appeal institution, ICSID discussion paper regulates that each member of the appeal panel should be the authoritative experts who must come from different countries and are recognized to have professional standard in the international investment law, treaties and related practices. Casing members of the appeal court must be members of the appeal panel, who are nominated case-by-case after consulting assigned between ICSID secretary general and the client. In general, the appeal court shall consists of three appeal panel members, unless the client has other agreements.

Second, the appeal object. ICSID provides two different schemes: one is the clients can only appeal for the final decision; Another is the clients can appeal for the middle and final decision. Recommendation paper put forwards that it is better to set some securities, including such programs: the appeal of the clients must be allowed by a member of the appeal panel elected firstly.

Third, the appeal authority. Appeal institution has the right to review the procedure and entity issues at the first decision and maintain, alternate, overthrow the whole or cancel the part of arbitration decisions or order the original arbitration court to retry the case according to some reasons, such as: " a clear error of law", "serious error of fact" or any reason to cancel the decision in article 52 of the ICSID convention. If the appeal institution changes, overthrows or cancels the original arbitration decision, but do not further process the disputes of the clients, then the clients can submit the disputes to a new arbitration court. On the contrary, if the appeal court make the deal, then the appeal court's decision is final decision that are binding on the clients.

Fourth, the cost of appeal. The recommend paper rules, in general, the other procedural costs will be borne by the prosecution, such as: the cost pay the members of the appeal court, in special circumstances, the appeal court can make the different decision. The appeal court can also ask prosecution to provide the bank guarantee. The appeal court has the right to decide how to share the costs of trial between the clients.

Fifth, the term to give up on the other matters of relief way. In order to ensure efficiency, ICSID discussion paper rules that the appeal court can request the clients make the commitment that they no longer seek to perform the original arbitration decision during the period of appeal, and strictly enforce the original decision maintained in whole or in part under the condition of the appeal court maintains those. In addition, the appeal or cancel of the clients is no longer allowed.

4. The Basic Principles and System Guarantee to build the International Investment Arbitration Appeal Mechanism

4.1. Establish the Appeal Mechanism within the ICISD System

In the whole international investment arbitration system, ICSID international investment arbitration mechanism is the most used. By the end of 2009, there are 357 international investment arbitration cases based on investment treaty, among them, 225 cases are submitted to ICSID, which accounts for about two-thirds of the total. According to ICSID statistics, by the December 31, 2010, ICSID has registered 331 dispute cases under the ICSID Convention and the ICSID Additional Convenience Rules. More and more contracts signed between foreign investment laws and regulations of developing countries, bilateral investment treaties and foreign investors and host countries directly rule that international investment disputes resort to ICSID arbitration uniformly, which makes the ICSID became the most important support mechanism among current international investment arbitration. In addition, many international arbitration agency mutual aid with ICSID and other international economic organizations is also actively cooperate with ICSID, which enhance the function and efficiency of ICSID and make the influence of ICSID gradually enhance in the field of international investment.

In addition, according to the ICSID statistics, by 2005, 20 countries have signed investment agreements containing appeal mechanism rules, which regulate appeal mechanism can to review the decision of international investment arbitration, and most of these countries are the member of the ICSID convention. If establishing separate appeal mechanism according to many bilateral investment treaties of these countries, which may lead to low efficiency of arbitration and can not realize the goal to enhance the consistency of the decision by setting up the appeal mechanism. In this case, the unified investment arbitration appeal mechanism set up by the ICSID for countries provides the unified arbitration appeal service,

which can makes countries don't have to set up the similar mechanism repeatedly, so as to ensure the consistency and predictability of international investment arbitration award and maintain efficiency and economy of international investment arbitration. Therefore, whether from improving the consistency of the arbitration award or avoiding the confusion may be leaded because investment treaty set up appeal mechanism, the appeal mechanism should be established within the ICSID system. And ICSID has the good foundation because it has explored to set up the appeal mechanism. Establishing the appeal mechanism within the ICSID system is the must.

4.2. Client Autonomy should be Respected by Appeal Mechanism

In theory, client autonomy is a basic value concept in the field of arbitration, which also is one of the important advantages of arbitration than litigation. If blindly adhere to the "single ruling", the client will be will be no relief way to maintain their own rights faced with possible injustice; On the contrary, if breaking through the consistent tradition of arbitration completely and hard and fast ruling unconditionally apply appeal mechanism, there is no doubt that the efficiency of arbitration will be detracted. Therefore, it is the best idea that clients grasp value rates that are persuaded by themselves. From the point of practice, many international arbitration institutions don’t use compulsory norms to rule appeal process, but specification or defect specification: the former regulates that if the parties choose the appeal mechanism, then in the arbitration proceedings, they shall apply the appeal mechanism; The latter regulates that if the parties have no bellows or special instructions, appeal mechanism are applied to resolute disputes.

So, if in the legal and technical issues of establishing international investment arbitration appeal mechanism in the future, all parties can agree with each other and make a practical action to overcome the difficulties, the appeal mechanism is likely to be set up, prompted and applied in international investment arbitration. Appeal mechanism is able to correct the contradiction and errors of the arbitration and maintain the efficiency and economy of the arbitral decisions, so that it makes great contribution to solute the international investment disputes. [3]

4.3. The Coordination between Appeal Mechanism and Arbitration "Finality"

Gary Born, the chairman of the International Arbitration Practice Group did not take "finality" into consideration when compared the advantages of international commercial with the ones of court litigation; Yangyi Liang, prominent maritime law experts and senior arbitrators in Hong Kong, also didn't mention "finality" when discussed the superiority of arbitration. [4] As stated earlier, in arbitration legislation of many countries and regions in the world and some arbitration rules of international arbitration institutions, finality is not the absolute principle must be followed by the international commercial arbitration. The current international commercial arbitration is like this, international investment arbitration involved in huge economic interests and public interest of the host state is more, the justice, accuracy, consistency and predictability of arbitration are more important to the disputes parties.

In fact, people often say that arbitration has "finality", which actually emphasizes the high effect and fast of arbitration, this can be realized fully through electing and nominating the high level’s arbitrator, limiting time for the appeal mechanism and requiring the procedural matters of the cost of the parties to appeal. Basically, we should not refuse appeal mechanism due to the afraid of damaging the "finality" of arbitration, instead we should draw successful experience of existing appeal mechanism within the world to regulate the operation of the international investment arbitration appeal mechanism, so that ensure the efficiency of settling the disputes. As long as set reasonably, believe that the appeal mechanism can ensure to modify the erroneous decisions and don’t loss the obvious advantages of the traditional arbitration mechanism.

4.4. The Necessary Restrictions on the Right of Appeal

There is no doubt that if without the necessary limit to the parties’ right of appeal, appeal mechanism is likely to be the reason of unsuccessful party to delay executing decisions and in turn it damages the impartiality and effectiveness of international investment arbitration mechanism. In addition, when gives the rights of parties, it should be also set to its corresponding obligations. Therefore, in addition to the guarantee measures of costs set in the ICSID secretariat discussion paper, it should be also make some compulsory measures to sanction against malicious appeal and increase the economic risk and liability of malicious prosecution, thus reduce the proportion of the malicious appeal and better help appeal mechanism benign development.

4.5. Enhance the Transparency of Appeal Mechanism

The current international society is frequently calling for enhancing the transparency of arbitration, and appeal mechanism set is largely considering the issues that international investment disputes often involve in public policy and public interest, so only transparency is enhanced, we can better promote fairness and justice and to safeguard the public interest. So, it is necessary to take effective measures to improve the transparency of the appeal mechanism. First of all, we can draw lessons from the experience of the NAFTA to rule the system of ap-

peal information disclosure. NAFTA rules, in addition to relevant procedures regulation, domestic law regulation of contracting states and the documents of containing secret contents should not be disclosed, dispute parties have not confidentiality obligation, the public can get international investment arbitration related files through the proper way, including files of dispute parties submit to the arbitration tribunal and files issued by the arbitration tribunal. Second, we can introduce the "amicus" mechanism in the process of the appeal, which allows individuals or organizations of non-dispute parties, to participate in the trial process and can submit themselves' written comments about the case to the arbitration tribunal. Thus it can form a certain constraints and supervision to achieve better protection to public interests.

5. The Inspiration to China of Establishing the ICSID Investment Arbitration Appeal Mechanism

Due to historical reasons, China didn't participate in the formulation of the Washington Convention and the establishment of the ICSID. However, China has now become the contracting party of ICSID and has been fully accepted the jurisdiction ICSID. In addition, according to the message issued by the ministry of commerce, Chain has been the second in the world for the total number of absorbing foreign investment and the lead the developing countries continuously 18 years. Although China is not arbitrated as applier in ICSID now, that is possible with the development of China's economy. Therefore, on the one hand, it is necessary for China to fix the roof while the sun to deeply study the influence to China to establish the ICSID arbitration appeal mechanism, especially combining with China's national conditions and the change may happen of China's identity in the future, and to comprehensively investigate the appeal mechanism into the influence may bring to itself, so that strive for more convenience for oneself to face reform in the future process of establishing international investment arbitration appeal mechanism. On the other hand, in the process of discussing and signing a new bilateral investment treaty and revising the old one, if the developed country require to introduce relevant provisions or mechanism, China should be careful consideration, because in the current situation we should not fully accept ICSID arbitration appeal mechanism. If the conditions gradually mature in the future, China can fully understand and grasp the specific situation of each other country's bilateral investment treaty firstly and decide as the case, among them, we can discriminatively accept the appeal mechanism through the way of revising or signing the new agreement.

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