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Analysis of Current Problems in ISDS and the Orient It Should Trace

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ABSTRACT
Nowadays the ICSID is criticized as a controversial settlement of international investment. In accordance with many scholar's research, the key problems usually focus on conflicts of the host state government's sovereignty of executive power and the exception of the multinational enterprise's contractual benefits. ICSID's arbitration sometimes make defective decisions that the certain party probably doesn't accept or follow. Usually, parties which refuse these decisions which tend to argue for various reasons like no jurisdictions according to contract or the discrimination on fairness or other procedural dilemmas. However, this challenge is usually created by arbitrators' factors and international economic factors. Generally, the lack of arbitrators' principles and the field in which arbitrators work are of the first factors while the sunk cost and defective contract provisions cause the third factors. To remove these current elements, they are indispensable including the revision of ICSID's goal and parties' priorities, the extra remedy for the tribunal revisions and precedents and practical provisions improvements before, during and after the contract-making period.

Keywords-*controversial settlement; key problems; sovereignty of executive power; contractual benefits*.

1. INTRODUCTION

For several decades, the investor - state dispute settlement has been being argued and modified as international economy develops. Settlements are in the form of tribunal decisions following International Centre for Settlement of Investment Disputes (ICSID) that mainly works through ISDS system, which is one of currently wide-use manners to solve international investment conflicts between investors and host states. However, defects usually exist influencing arbitration's authority among parties involved. Sometimes concern among arbitration participants in the process regarding ethical issues reflect representatives' conducts. [1] At the same time, the jurisdiction of ICSID usually fails to be invalid under the breach of the claimant party. [2] The similar opinions tended to search powerful and consistent rules to solve the difficulties in ICSID's workers. However, some others believed the real defects are on its contractual practice, such as its final provisions [3] or abuse claims with FET provisions [4]. As the matter of the fact, these current phenomena and relevant arguments are based on scientific research or exact deductions. The writer thinks the key trouble is the conflict between priorities of the governmental executive power sovereignty of and practical contractual benefits for multinational enterprises. Yet this significant issue is caused by relative explicit factors. In the first part, this paper will narrate the environment the ISDS is created in and its history. Following is the second part as analysis including barriers in ICSID's tribunals and the reason why these barriers appeared. Then the argument of orients the ICSIDS should trace and its contemporary goal will be stated. The last part is the conclusion for issues, analysis and practice.

2. BACKGROUND AND THE CODE PROBLEM OF THE ICSID

The International Center for Settlement of Investment Disputes Established under the Washington Convention. Headquartered in Washington, D.C., it is an absolutely international corporation. The purpose of the center is to increase the confidence of investors from developed countries to invest in developing countries, and to resolve investment disputes through arbitration and mediation. It requires both parties to the dispute to be members of the Convention and the subject of the dispute to be a state or a national agency or agency. The nature of the disputes to be resolved must be legal disputes caused directly by the investment.

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The center has its own arbitration rules and must use them in arbitration. The arbitrators for the trial of the case and the conciliators in conciliation shall be selected from their list of arbitrators and the list of conciliators. The award shall be final and must be accepted by the disputing parties.

The organization of ICSID is as follows: The Council, the highest authority, is composed of one representative from each member state and meets once a year. The President of the World Bank is the Chairman of the Council. The secretariat, headed by the secretary general, handles day-to-day affairs. Its membership includes Members of the World Bank and other invited countries.

The aim of international investment disputes resolution center and the task is to formulate rules of conciliation or arbitration of investment disputes, accepting a mediation or arbitration of investment disputes, deal with the problem such as investment disputes, providing convenience for settling disputes between member states and foreign investors, promoting mutual trust between investors and the host country, to encourage international private capital flows to developing countries. The center's dispute settlement procedures are divided into mediation and arbitration. However, there are also various voices criticizing its defect remained, such as insufficient fair to both sides and the lack of connection line between international arbitration precedent they make and country party's domestic legislation accepting those precedent. Perhaps the endlessness phenomena of state investor conflicts seem to be undesirable and there are usually two questions why host states inevitably intend to alternative condition promised corporations even if the punishment is strict and why investors seldom compromise. It's reasonable to suggested that there probably had been code benefits attracting parties. Actually, these problems exist indeed but the key difficulties of solving them are to overcome the conflict between domestic executive power and the contractual rights. By distinguishing the situations where either of such counterparts is available, tribunal of ICSID can comprehensively avoid most challenges in benefit balance and substantive fairness.

3. FACTORS OF THE CONSTANT PROBLEM

3.1 Arbitrator factors

The lack of principles which limit arbitrators' decisions can be a vital issue. Some scholars have pointed out that ICSID arbitration is often an investor - friendly form of tribunals that tend to take investors aside. Maybe the evidence is adequate and sufficient to prove their opinions whereas the tribunal decision needs to follow approved or set principles or rules regulating decision makers, the arbitrators, despite what party they are going to protect. The fact is arbitrators of ICSID have quite large space of interpretation while regulation is rare. For WTO, there was the 1996 WTO Code of Conduct for the Dispute Settlement Understanding created for the panel to help review relevantly consistent code principles; for ECHR there was the 2008 Resolution on Judicial Ethic setting standard for makers. On the contrary, ISDS has no universal purpose that guides them to make decisions [5], which means arbitrators partly can make a decision flexibly. If arbitrators are going to protect a certain party, they can directly make such a decision but few regulations can warn them not to betray principles like ethic principles, practical principles, fair principles or some others. In other words, both the executive power and contractual benefits have few opportunities to rely on a stable standard. Thus, for parties， the interpretation will be uncontrolled.

If space of interpretation appears, how will arbitrators use the space to support parties? Most cases have seen the key conflict is the substance of host state's behavior: reasonably administrative enforcement or simple violation against a contract. The answer to this question depends on arbitrators' views. The fact is, arbitrators prefer to be business-minded. Actually, as article The David Effect and ISDS evaluated that under the conditions that arbitrators are drawn often from the areas of international business law, they cannot adequately adjudicate investors challenges to public laws especially an approach that is consistent with a state's expectation of sovereignty in domestic policy. [6]

From the above it is not difficult to find because of field where arbitrators often work, government politic power can easily get invalid as arbitrators move conflict to typical business area where even host country is equal to a corporation with no sovereignty or privilege. In this case, some action with mandatory can inevitably be determined as a kind of "breach". This can also partly explain the reason why the successes for investors in the tribunal are surprisingly fewer.

3.2 The Disparity in international community

However, as individuals without any advocates or sponsors, arbitrators may fail to make valid and executive decisions because states are always stronger than individuals. It is important to review parts of difference among systems of mentioned legal organizations. In regard with the payment for cases, conventionally the cost of a DSU of WTO will be paid by its own budget members fund and ECHR gets paid from council of Europe budget as well. Varying from them, arbitrators in ICSID can only obtain remuneration from parties in case. Although this phenomenon associates with the low threshold over which most countries and corporations can apply for tribunal, the fact is these parties become directly related with arbitration's work. There's less guarantee against bias in decision-making process influenced by international policy circumstance. It had to be admitted that in the case of Yukos v. Russia and Morris v. Uruguay,

the tribunal makes different decisions which aim at backing the weaker one, supporting the damage claimed by Yukos Corp while demanding that Morris compensate for its emission of pollution to Uruguay Republic. [7] The fact is, however, the totality of such improvements of determined cases is relatively small. To illustrate, in Azurix Corp. v. Argentine Republic, host state's legal system had been influenced to a large extent by ICSID Convention. At the end of the arbitration, as to the question whether Argentina must provide the security guarantee in return for the stay of enforcement about compensation ordered to Argentina for Azurix, the Committee stated that Argentina had no burden of explaining the necessity of avoiding providing security while the counterpart had. But it is worthy of noticing that the main supports of decision given by Committee:

(i) Argentina didn't deny the ICSID convention and kept being bound by its article 54, recognizing ICSID awards as Argentina domestic courts' final judgments;

(ii) the absence of a history of non-payment of ICSID awards of failure by Argentina to put in place award-enforcement mechanisms in accordance with Article 54;

(iii) Argentine's constitutional and municipal law enforcement regime was in conformity with the convention [8].

Actually, Argentina had indicated that its Supreme Court and new Constitution treated ICSID Convention so and that any other pursuant awards also had supremacy over municipal law. Those facts saw to some extent Argentine sacrificed its sovereignty in legislation by means of becoming bound lower process for Convention in order to exchange for its valid claim and availability according to ICSID system. Meanwhile, a neutral opinion given by Committee that overwhelming security ordered to developing host countries might damage all states' confidence due to the possibility of suggesting discrimination in fact and legally could also prove the bias led by international politic circumstance.

3.3 International character of economy factor

The sunk cost in early investment sometimes causes later disagreement on profit distribution.

The sunk cost means the cost investors invest in the early phase that can hardly return or create interest but without which investors can never wait for the phase in which the rest of the cost return the interest. In other words, sunk cost cannot directly expect for incomes but it is the vital condition set for following cost directly expecting for incomes.

On the other hand, once the investment with sunk cost eventually passes, a tremendous number of capitals will be back in a short time and the following interest will be continuous. Under ordinary conditions only corporation with strong financial power such as MNEs is able to operate these projects. Apart from foreign direct investment, ordinary international investment agreement usually includes demands associated with public benefits such as local employment, environmental protection and so on. For developing host state, it generally provides offer of contract with few obligations and sufficient share for investors because state has no capability to hold the project independently to attract investors. As financial effects of investment increase, host state still holds certain stock and enjoy limited share while foreign investors make main incomes flow out. [9] The problem is, automatically, government is impossible to ignore domestic benefit so that various changed terms in contract and expropriation tend to be raised. As authors of Do Trade and Investment Agreement Lead to more FDI? Accounting for Key Provisions inside the Black Box said that the time consistency problems should be solved with relevant powerful mechanisms or the sunk cost could finally move the leverage to the host state. [8]

So-called time inconsistency problem should be referred to the mentioned phases in which the disparity of income between the host nation and multinational corporation can be quite large because there won't be an extra element but time change that influences the rate of share of host country wants in a long - term period. If so in regard with the domestic price such as paying for constant environment preserve, suffering from pollution the investors make, it is considerable that government adopt methods by which the domestic welfare can get enlarged otherwise the risk host state takes is not sufficiently equal to the profit it attains. Mentioned article Do explained that it is the reason why many bilateral investments treatments (BITs) tend to alternative several times that host state tries to avoid obsolescing bargain about discrimination (like expropriation) and discretion that are described by Vernon in 1971[8]. Yet such return is also an opportunity for corporation because the goal of this consideration is commercial profit.

In addition, some defective provisions can be a barrier of settlement in procedure. As for trade, a significant phenomenon should be referred. That is current liberalization of trade and investment. As mentioned before, FDI policy or FDI term in agreements usually allows foreign investors to decide main item independently, which means the limit investors assume is less than that in a cooperation investment while the dividend is more. The key issue is, nevertheless, nowadays, cooperation can lead to relevant capital flows outside and with bilateral investment treaty or provisions FDI can attract more capital flowing inside. At present the multinational investors tend to occupy foreign market as much as possible through regional trade agreement that constantly includes direct investment provision. Thus, it can be suggested that the result of investor's active expansion can deny the bare intention of host states.

Besides, the Fairness and Equitable Treatment (FET), a provision conventionally involved in current BITs, is another element contributing to the out flow to foreign investors. Based on customary international law, FET sometimes plays negative roles in claims for arbitration. Similar to ICSID system, its content was unsettled but keeping bias of preserves for colonic benefits since Declaration of Havana was created [9]. In certain case companies like to use this provision to exclude most of host states' action for the breach of the minimum standard of foreigner despite the fact that NAFTA had indicated that the minimum standard may not be suitable in situations in which the relation between parties is country and country or MNEs rather than individual.

Moreover, dispute settlement provision also confuses tribunal. The arbitration is not the only way to solve a conflict as court is also available widely despite the cost and difficulty. In most situations two parties will negotiate and make an agreement for the option of conflict settlement such as our ICSID. Things go the other ways, nevertheless, item out of ICSID provision doesn't need to be bound by ICSID. Thus, the question is, how will any conflicts of which the jurisdiction is vague be solved if opposite parties disagree whether conflicts are appropriate to ICSID? The answer can be found in article Delegating Difference Bilateral Investment Treaties and Bargaining over Dispute Resolution Provision which argued that although BITs had become the dominant source of rules on foreign direct investment, they varied significantly in at least one important respect: whether they allow investment disputes to be settled through ICSID [10]. Because of unsettled words, each party can interpret its explicit meaning partially. The FET is good evidence for this. For instance, in article Portfolio Investment: re-conceptualizing the Notion of Investment under the ICSID Convention, author Michail Dekastros stated that the precondition of the existence of the investment could be waived altered by the cost state's consent and the fact that the parties seldom provided definitions of terms about the investment didn't mean they had the authority to definite the investment in BITs for disputes thus they were not free to expand the jurisdiction by consent. [11]

Michail Dekastos cites the decision in Joy Mining Machinery Limited v. Arab Republic of Egypt: ".....If the parties could define investment through bilateral consent, then Article 25(1) would not be turned into a meaningless concept. [11]" Therefore, it is not difficult to prove that the rigidity of both sides' intention expecting make the application of jurisdiction unstable and vague.

4. APPROPRIATE DEVELOPING WAY

4.1 Re-conceptualization

ICSID has a relatively high power to make applicable decisions in counties accepting its main framework and comment, thus its decision generally has to represent a multilateral agreement by compromising. Committee has to realize that the substance of current economy is not a procedural negotiation any longer. The ICSID should focus on a benefit balance in fact based on equity instead of temporary liberal balance in accordance with pieces submitted of complex cases. ICSID did set rights to bring selected evidence to tribunal whereas these rights could not avoid artificial tilt for personal private or domestic benefit. To be more evidence-minded, arbitrators should make sufficient of synthetic examination system to determine there is a complete net of detailed facts. David Effect and ISDS [6] bring the creative and persuasive view that parity will cease and things tilt heavily in favor of the respondent state rather than having an equity of bargaining power in an exclusively negotiate-based regime. In addition, in article This opinion is suitable to prove the necessity of reconstructing dispute settlement mechanism of investment. Only if those concealed processes of evidence get exposed can both sides' immunity be reasonably estimated

ICSID should strengthen the admission of policy space for the developing countries. International law offers no exemption for any foreign subjects in commercial area thus an arbitration for investment has to follow this regulation not to isolate executive power away from BITs. The difference between discrimination and public management should be clear according to specific fact rather than a so-called consistent set of precedents since a government of state has various available characters in an investment project to play and theses roles should not be distorted or mixed. In other words, writer will choose the method that regards the states' alternative behaviors as processes of one independent public enforcement not associated with breach of the contract. On the contrary, corporations are on a subordinated position in executive activities foreign to a contract, too.

ICSID should consider more remedies to offset the defect on reviews system. As D.Gaukrodger and K.Gordon mentioned, ICSID had no legal appeal mechanism. This character could make ICSID a shelter for countries using baleful arbitration behaviors. To illustrate, in the case of ConocoPhillips. v. Venezuela [12], Venezuela stated that according to Wikileaks cables, the American representative's private connection saw the different compensation opposed to Arbitration's previous decision, which meant the breach of obligation to negotiate in good faith thus the decision must be reviewed, recognized as non-finality. Eventually arbitrators held that the decision was res judicata refusing the revision. In Venezuela's submission, yet Jessica. O. Ireton criticized that,

"This raises significant questions regarding the type of information that can be submitted into evidence in a tribunal. The use of leaked diplomatic cables against the originating country seems contrary to common notions of international law." [13]

This opinion revealed the conflict between legitimacy of evidence collection and substantive justice. As arbitrators held, a tribunal was theoretically in a transnational rather than an international legal order. Thus, the ICSID has to notice the different conditions in different situations to care each party's procedural and factual benefits.

4.2 Exceptional provisions of treaties making

A widely available of way to protect hos state's extremely vital benefit such as rare fuel resources, military industry and nature resorts, is to make exceptional provision under which host state's restriction to the company cannot be assess as any breach of contract through tribunals. In article Fair and equitable treatment and investor's due diligence under international investment law, Levashova have stated that exceptional provision is used to guarantee country's important possession but in environmental area such provisions are rare except nuclear industry and else [14]. Therefore, it is significant to appeal to attention of states to directly notify the tribunal for a determination of a special broad. Things go the other way: tribunal should provide a binding document in the phase before the establishment after sufficiently submitted with both parties' condition and the form they agree with to fulfil their obligations.

4.3 Improvement of arbitration process

Mentioned comparison between WTO and ICSID on the arbitration have seen some potential defects of procedures and practices. In fact, the settlement of disputes of WTO can reflect a fact that WTO Committee is allowed to make precedents although these precedents vary from national case law with the enforcement. To some extent can the precedent of Committee serve as routines or widely accepted methods. After the supposed improvement of arbitrators' rules, necessary next is still to build up the reputational foundation for fairness which should be told in decisions. How to convince countries parties? For them the appropriate way is to keep opportunities for them to suspect original decisions and the right to obtain persuasive explanation from decision-makers.

5. CONCLUSION

The factors and solutions of the ICSID's key conflict between executive power and contractual benefits are pointed out. The background of ICSID and the main issue that the government executive power cannot compromise to contract obligations for corporations are described, then the analysis of arbitrators' factors leading to this issue is given: there are few regulations to limit the interpretation of arbitrators so that arbitrators possibly dominate the "justice" personally; besides, the field they work in makes them keep business-minded to simplify the complex relations between host states and multinational companies into an equitable relation, which means the policy sovereignty of host state is despised; additionally, the disparity between the international status of opposite parties can influence the fairness of finality decisions by compelling states' domestic legal system. In regard with economic factors, above all, scrambling shares of profit of projects caused by sunk cost threat almost make conflicts inevitably; secondly, some defects exist in contract provisions influencing the application of ICSID, the enforcement of its decisions and valid dense against breach of FET. To solve the main problem, three approaches were desired to restructure the link from arbitration to contract making, including conceptualization of dispute settlement ultra-remedy for evidence submission and reviewing procedures and improving exceptional provision to prevent bias in claims.

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