

On the Construction of International Investment Dispute Arbitration Appeal Mechanism

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ABSTRACT

Today's international investment dispute (ISDS) arbitration is facing the uncertainty and inconsistency of arbitral awards. At the same time, the ISDS arbitration also lacks an effective error correction mechanism. These problems seriously undermine the international credibility of ISDS arbitration. The establishment of a stable and effective ISDS arbitration appeal mechanism can improve these problems, and to a certain extent the trial court's power of treaty interpretation and discretion should be limited, urging the arbitration tribunal to examine the facts of the case more carefully and make a ruling. Referring to the attempt and practice of OECD, ICSID, UNCITRAL and EU in establishing ISDS appeal mechanism, it is a better choice to add a special investment arbitration appeal court in WTO under the principle of maintaining ISDS arbitration system and party autonomy.

Keywords: *International Investment Arbitration, Appeal Mechanism, ISDS.*

1. INTRODUCTION

With the rapid growth of the number of ISDS arbitration cases, the disadvantages of the current ISDS arbitration mechanism are gradually becoming prominent. In other words, the current ISDS arbitration system lacks an error correction mechanism to ensure the consistency and correctness of the award, which leads to the unpredictability and uncertainty of the international investment law. This has aroused people's concern about the legitimacy of the system. There has been a long-standing call for reform of the international investment arbitration system. One of the suggestions is to set up an appeal mechanism for ISDS arbitration. The academic circle mainly focuses on the advantages and disadvantages of the ISDS arbitration mechanism to discuss the construction of the ISDS arbitration appeal mechanism. Due to the consideration of the effectiveness, feasibility and legality of the appeal mechanism, the mainstream views on the construction of the appeal mechanism include setting up an appeal mechanism in the investment agreement, setting up an appeal mechanism model within the WTO and setting up an appeal mechanism model within the framework of ICSID. This paper discusses the way to realize the function of the appeal mechanism from the perspective of system design, analyzes the attempts and practices of the current appeal mechanism, and discusses the possibility of adding a

special investment arbitration appeal court within the WTO as the appellate body for all ISDS arbitration awards, as well as the term of office of the members of the appeal body and the scope of acceptance of appeal cases.

2. THE ATTEMPT AND PRACTICE OF EXISTING APPEAL MECHANISM

2.1. Crisis of Legitimacy in International Investment Arbitration

Today's international investment arbitration is facing a crisis of legitimacy. The most obvious problem is the uncertainty and inconsistency of the arbitral award. Inconsistencies in decisions often arise, including inconsistent interpretations of the same or similar provisions, and different decisions on the same facts. Inconsistent interpretations result in uncertainty of key investment obligations and unpredictability of future case decision outcomes. Sometimes, different results will appear due to different understandings of the semantics of IIAs in specific cases. Cases in which arbitral awards are inconsistent or even conflicting can seriously undermine the international credibility of international investment arbitration, such as Ronald S. Lauder v Czech Republic in 2001 [1] Case against Czech Republic with CME Company in 2003 [2] Ronald S. Lauder is the

controlling shareholder of CME Company. The parties of the two cases are basically the same, and the facts of the cases are the same. The applicable arbitration rules in both cases are UNCITRAL Arbitration Rules (1976) and the applicable legal instruments are also Czech Republic-United States BIT. However, the two arbitral tribunals have rendered totally different judgments in the two cases. The arbitration tribunal of the Arbitration Court of the Stockholm Chamber of Commerce held that the Czech Media Commission's deprivation of CME's exclusive rights in the television industry constituted discrimination against investors. Therefore, according to the terms of the Czech-Dutch BIT, this is recognized as expropriation. On the other hand, when the US-Czech BIT basically adopted the same levy standard, the arbitral tribunal of the London Court of International Arbitration held that the Czech measure did not constitute a levy because the Czech government's deprivation of CME's franchise did not directly infringe Lauder's property rights, and the Czech government did not benefit from this measure.

In international investment disputes, the public interest of the host country is often involved, and the uncertainty of the ruling result caused by inconsistency damages the reasonable expectations of the investors and the host country. On the one hand, it is difficult for both investors and the host country to understand their obligations and make the expected response. On the other hand, the inability to understand one's specific obligations may seriously undermine investors' investment confidence and make them flinch from international investment. In view of the fact that the inconsistency of rulings endangers the foundation of the investment arbitration system, the concerns behind the consistency crisis must be dealt with in an effective way, or it will threaten the international legal order and the continued existence of investment treaties. [3]

2.2. The Necessity of Establishing an International Investment Appeal Mechanism

Establishing a stable and effective international investment arbitration appeal mechanism is the best choice to solve the above problems. It can not only weaken the legal interpretation function of the first instance arbitration tribunal, but also prevent the arbitration tribunal from making the same legal interpretation later, which will lead to the arbitration entering the appeal procedure again, through the mechanism of cancellation, modification and remand of the award. It can also limit the arbitrators' right to interpret the treaty to a certain extent, prevent the arbitrators from abusing their discretion, promote the consistency of the award [4], and to a certain extent, promoting the balance between the individual interests of investors and the public interests of the host country.

The ISDS appeal mechanism can also strengthen the correctness of the ruling. The appeal mechanism can correct the wrong judgment of case facts and the application of law. The appeal mechanism can not only allow the reconsideration of the controversial issues in the case entity, but also urge the arbitration tribunal to examine the facts of the case more carefully and make a decision to some extent. [5]

3. THE ATTEMPT AND PRACTICE OF EXISTING APPEAL MECHANISM

3.1. The OECD's First Initiative

In 1998, in the Multilateral Agreement on Investment (MAI) negotiations led by OECD, the possibility of setting up ISDS arbitration appeal mechanism was first put forward at the government level. In the meantime, the representative of France proposed to establish an appeal mechanism to enhance the consistency of the treaty interpretation by the parties and to correct possible factual errors or errors in the application of the law. At the same time, in order to ensure the unity of the interpretation of the law, in the appeal mechanism, the arbitrators will carry out a unified interpretation of the application of the law to avoid different interpretations; The appeal mechanism shall review the investment disputes in MAI, correct and supplement the factual issues and the application of laws therein, and ensure the consistency of the arbitral awards through the above measures. However, with the failure of the MAI negotiations due to various reasons, the idea of an appeal mechanism could not be put into practice. However, the draft MAI reflects the strong demand of various countries for a free investment environment, which is of great significance for the construction of an ISDS arbitration appeal mechanism in the future.

3.2. The Proposal of ICSID on Establishing an ISDS Appeal Mechanism

ICSID issued a document entitled "Possible improvements to the arbitration framework of ICSID", in which it proposed the idea of establishing an ICSID appeal mechanism. Through this document, ICSID advocates the establishment of a unified appeal mechanism on the ICSID mechanism. Appellate body's jurisdiction will be confirmed by a new international treaty. The award may be challenged on the grounds set out in article 52 of the ICSID Convention, as well as "manifest error of law" or "gross error of fact". In 2005, the proposal to establish a permanent appeal mechanism of ICSID was finally cancelled. In the original document, it was indicated that if an appeal procedure is to be established, it should still be based on the current ICSID mechanism. However, most members of the ICSID Administrative Council believe that there are still legal and technical problems in establishing an appeal

mechanism and it is difficult to set up a unified ICSID appeal mechanism. [6]

3.3. UNCITRAL Report on Establishing an International Investment Appeal Mechanism

UNCITRAL Working Group 3, which is in charge of ISDS reform, released the proposals submitted by governments in 2019 to set up an appeal mechanism. [7] The report's proposal to set up an appeal mechanism has two main modes. One is to establish a multilateral investment court, which will use the court's second instance mechanism as an appeal mechanism; The second is to maintain the existing ISDS mechanism and establish a single permanent appeal mechanism on this basis. [8]

3.4. EU's Practice of Improving Appeal Mechanism

In November 2013, the EU passed the Investment Protection and EU Investment Agreement, in which it proposed to construct an investment court mechanism with an appeal court for reforming the ISDS mechanism. This proposal also indirectly constructs an appeal mechanism, because the investment court system contains an appeal mechanism. Three years later, in the EU-Vietnam Free Trade Agreement, the EU formally incorporated the international investment court mechanism into the agreement for the first time. In the agreement, the composition and selection criteria of the members of the arbitration tribunal for appeal are specified, and the operating procedures of the arbitration tribunal are also specified. A secretariat is set up to be responsible for the preparation before the hearing of specific cases. The provisions of the agreement are the first attempt to build the EU. At the same time, the EU has also incorporated the above-mentioned reform measures into the "Trans-Atlantic Trade and Investment Partnership Agreement" and proposed to add a provision for the establishment of an ISDS arbitration tribunal in the agreement. This is conducive to improving the ISDS mechanism and making it a negotiation text with higher degree of investment protection, deeper reform and more innovations.

By drawing on the experience and lessons of the United States, the EU advocates the establishment of a more independent investment court system based on the judiciary under the unified leadership. In addition to providing for general investment arbitration procedures, the court has clearly established a permanent court of appeal. It also stipulates that the members shall be randomly appointed from the Court of Appeal to form an arbitration panel to review the arbitral tribunal's ruling that the facts and legal interpretation of the case are incorrect, the procedure is improper or obvious facts are found to be incorrect. Through these provisions, the

Court of Appeal is given the right to deal with decisions. A typical example is that in the Comprehensive Economic and Trade Agreement (CETA) signed between the European Union and Canada, the main right of the Court of Appeal is to make different decisions under the following three circumstances: errors in the application or interpretation of the law, obvious errors in the determination of facts and the reasons stipulated in Article 52, paragraph 1, of the ICSID Convention. The provision of these powers indicates the increasing power of the arbitrators of the Court of Appeal, which is likely to correct or even cancel the erroneous award in the initial arbitration within their own scope of authority. This plays an significant role in ensuring the fairness of the ruling and maintaining the unity of legal interpretation.

4. THE PATH SELECTION OF APPEAL MECHANISM

4.1. The idea of setting up an appeal mechanism

The establishment of an appeal mechanism is not the only solution to solve the crisis of the current ISDS system, but it can maintain the basic features of the proven effectiveness of the ISDS arbitration system, so as to establish an additional appeal mechanism to strive to establish clear and consistent case law, correct legal errors in specific cases, and thus regain trust in the mechanism. Therefore, it is the most important to set up an appeal mechanism based on the existing ISDS arbitration system. The core purpose of setting up the appeal mechanism is to reduce the misuse and ambiguity of the law as far as possible in a way of improving the legitimacy and strengthening the consistency. At the same time, when the appeal mechanism is established, the whole mechanism cannot be ignored to resolve the investment disputes faced by the parties. Therefore, party autonomy is still the core of the appeal mechanism. [9]

4.2. The Path Selection of Appeal Mechanism

Adding a special investment arbitration appeal court within the WTO, which accepts appeals from arbitral awards, can give full play to the advantages of the WTO and establish a stable and effective appeal mechanism. [10] Firstly, due to the large number of WTO members, adopting such a model would play a role similar to that of an independent appeal mechanism. The establishment of multilateral ISDS arbitration tribunal is conducive to avoiding the defect of fragmentation of ISDS arbitration appeal mechanism. [11] The scope of the objects of review can cover most countries in the world. Adopting similar measures to review different arbitral awards in the same institution can achieve the consistency of the awards to the greatest extent. Secondly, we can rely on the mature mechanism of WTO to make the appeal review more in line with the standard in procedures and

entity review, and to ensure the consistency and fairness of the ruling. However, the "Trade Dispute Settlement Rules" currently applied in WTO are not applicable to the settlement of investment disputes. Before dealing with investment disputes between investors and countries, it is necessary to sign an agreement on the relevant investment dispute appeal mechanism. This issue is similar to the difficulties faced by the independent appeal mechanism model. Many countries need to reach a unified opinion on the appeal mechanism. Moreover, in the multilateral development of international investment arbitration appeal mechanism or ISDS arbitration court, it is very important for the countries concerned to improve the consensus of legitimacy and credibility of international investment law. [12] Whether the independent appeal mechanism model needs to reach an appeal mechanism agreement within the scope of the United Nations, judging from past experience, it is difficult to achieve both, but in contrast, the possibility of reaching an appeal mechanism agreement within the framework of the United Nations is higher.

There are many similarities between the establishment of an appeal mechanism model within WTO and the establishment of an international independent appeal mechanism. Both of them need to refer the review of various arbitral awards between investors and nations to an independent body for re-review, taking advantage of the large number of members of this independent body, ensuring the wide scope of review and maintaining the consistency of arbitral awards.

4.3. Permanent establishment model with fixed-term members

During the term of office of the members of the Appeals Tribunal, reference can be made to the provisions of the WTO Appellate Body. The long-term and stable membership of the Court of Appeal ensures consistency in the interpretation and application of the law to a certain extent. For example, permanent members are nominated by countries and elected, meaning that each country that agrees to establish an appeal mechanism has the right to nominate candidates. In order to keep the system non-politicized, and considering the objective reality that ICSID has undertaken the management of the vast majority of investment arbitration cases at present, the state can be encouraged to nominate from the ICSID's existing list of mediators and arbitrators, instead of directly proposing proposals by the state. [13] Each case is heard by three members of the Appellate Body, but decisions should be made by all of its members to make the decisions more accurate. [14] The members of the Appellate Body shall be subject to a rotation system, with one-fifth of the members elected at regular intervals to be specifically responsible for the hearing of cases. As for the selection of the members of

the Appellate Body, the following rules should also be followed: First, a higher quality standard should be set for the selection of arbitrators. They should have the background of international investment law and relevant international and domestic laws and regulations, so as to ensure that the Appellate Body has stronger professional competence than the first instance arbitral tribunal, and thus make more correct and consistent decisions. Secondly, the decision made by the Appellate Body must have greater influence than the first instance arbitral award. In the Appellate Body, the risk of "issue conflicts" faced by its members is more serious than under the ordinary arbitral procedure. Therefore, the members of the Appellate Body are not allowed to participate in any other arbitral cases (whether as lawyers or arbitrators) during their tenure. Finally, possible nationality restrictions for members of the Appellate Body should be considered when one of the parties to the dispute is a national of the State itself or from the same State.

4.4. Scope of acceptance of appeal cases

Although the scope of accepting cases of the appeal mechanism has been specified in detail in WTO, there are still some problems in practice. The most prominent one is that the appeal panel is usually required to explain and distinguish whether the appealed matter is a factual issue or a legal issue, which is highly dependent on the appeal panel. From this point of view, although it is very important to clearly define the scope of accepting cases in law, it is also necessary to solve the problem of interpretation in the specific practical application. Although the EU has expanded the scope of accepting cases of the appeal mechanism in CETA and the Europe-Vietnam FTA, it cannot fully guarantee the smooth and correct interpretation in the future application.

The question about the scope of the review is whether the appeal review should be limited to applicable law or should include the review of applicable law and facts. Generally speaking, the review of legal issues by the international appeal mechanism is rarely restricted. [15] the review of factual issues is generally limited. However, setting up of an ISDS appeal mechanism should include errors in fact finding in the scope of the review. Problems of application of law and factual issues may be intertwined. In practice, even if an appeal is filed based on a factual error in a case, the appellate tribunal may need to review specific facts. Correct identification of the facts in a case is the basis for making a correct final decision. Therefore, the inclusion of factual issues in the scope of appeal review can ensure errors in the application of law and in the identification of facts in the decision are corrected, which is helpful to ensure the overall correctness of the final award.

5. CONCLUSION

One of the reasons for the reform of the ISDS arbitration system is the lack of consistency, which leads to doubts about its legitimacy. The reform plan, which focuses on setting up an appeal mechanism, can not only maintain the basic characteristics of ISDS arbitration, but also enhance the consistency of ISDS awards. In the past, the discussion on the establishment of the appeal mechanism basically remained at the theoretical level. However, some countries have begun to incorporate the mechanism into the treaties recently concluded, indicating that the reform proposal has begun to gradually move from theory to practice. In view of the current fragmented investment treaty system, only by adding a special investment arbitration court of appeal within the WTO as the appellate body for all ISDS arbitration awards can the current concerns about consistency be alleviated. WTO can cover the advantages of most countries in the world, and can make the consistency of adjudication be realized to the greatest extent.

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