Thinking of ISDS Arbitrators Selection

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ABSTRACT
Arbitrators play an important role in international investment arbitration. With the increase of international arbitration cases, criticism of the results of international arbitration has gradually increased. Therefore, from the perspective of the selection of arbitrators in international arbitration institutions, this paper will discuss the problems and possible negative effects of the selection mechanism of arbitrators in investor-state dispute settlement ("ISDS"). Based on the analysis of the background of arbitrators, the personal preference of arbitrators and the influence of school thought on the arbitration results, this paper discusses the direction of the reform of the selection mechanism of arbitrators including the reform of the current arbitrator selection mechanism, the reform of the operation mechanism of arbitration institutions, and the introduction of artificial intelligence to help solve the current dilemma.

Keywords: *ISDS, arbitrator selection, reform of ISDS arbitrator selection.*

1. INTRODUCTION

In the past few years, investor-state dispute settlement ("ISDS") has garnered considerable scholarly, policy, and media attention. [1] ISDS is gradually taken a burden responsibility of international arbitration, according to the research, the number of cases in ISDS has been largely growth in 21th century. However, the criticism of ISDS also increased in last ten years. Since the international investment arbitration is closely related to public interest, the public citizens remove their attention to the ISDS cases. In this situation, results of international arbitration would likely trigger social discussions and might cause a negative influence, which could lead to a trust crisis of ISDS. Among those discussions, the most criticism is the selection of arbitrators. Not only the public argues about that, scholars also states that current selection of arbitrators existing problems would cause the biases of conclusion. The standards for arbitrator challenges in ICSID arbitration, which by definition is investor state arbitration, are even stricter than in commercial arbitration. That appeared to be softened somewhat in the Blue Bank case, in which the Chairman of the ICSID Administrative Council stressed the importance of the appearance of impartiality in the mind of a reasonable third-party observer. The proof of the pudding is in the actions and attitudes of the arbitrators, who are the first enforcers of the standards, and in the decisions on challenges. Those decisions evince a still high bar for arbitrator challenges, although perhaps not as high as it once was. [2]

On paper, the standards for recusal is similar to the national judiciary, but not so in practice. For example, one of this author's former partners who became a federal district judge would recuse himself from any case in which his former colleagues were to appear as counsel. He followed that rule for decades after taking up his position on the bench-a practice that seems completely alien to international arbitration-because of his concern that there might be a perception of partiality due to the former relationship. Another example familiar to the international arbitration community was provided in the Yukos enforcement proceeding in Washington, D.C., where the judge recused herself from the case because of the possibility that her contacts with one of the counsel might give rise to an appearance of impropriety, the contacts being that the two had attended the same bar association events and their children had attended the same school.[3] Again, that strict approach is unheard of in international arbitration, where far more extensive contacts are routinely dismissed and often not even disclosed.[4] For the above reasons, there are some problems in the selection of arbitrators in international arbitration, thus, this article would try to explore the existing problems of arbitrator selection and also its solution.

The main questions of this article are the points how the background and personal bias of arbitrators influence

the arbitration and the reform of arbitration selection. The arbitrators' selection of ISDS play an important role in the field of international investment arbitration. Since the arbitration is award as the final conclusion and the tilt protection for the foreign-investors. The existing mechanism of ISDS is considered controversial in fairness, which includes the transparent of arbitration procedure, the selection of arbitrators, and the right of arbitrators.

2. THE BACKGROUND OF ARBITRATOR SELECTION

In the arbitration procedure of the investment dispute settlement mechanism (investment dispute settlement mechanism), the parties mainly focus on the selection of arbitrators because arbitrators are crucial to the outcome of dispute settlement. More broadly, the characteristics of the group of investment arbitrators may affect the overall trend of investment law interpretation, thus affecting the legitimacy of ISDS and the consistency of awards. [5]

The scholars suggest that the development of reforms was desirable to address concerns related to the lack or apparent lack of independence and impartiality of ISDS tribunal members and the existing treaties and arbitration rules are questioned, and the disclosure and challenge mechanism is questioned whether it is sufficient, effective and transparent. Most arbitral institutions do not provide parties with reasoned decisions regarding the challenge a party makes to an arbitrator based on an alleged lack of independence or impartiality, the outcome of the decision is given without explanation. [6] Besides, the lack of appropriate diversity among persons appointed to serve as ISDS tribunal members and the mechanisms for constituting ISDS tribunals is also deserve attention. [2] Thus, there would provide the existing problems of arbitrator selection to explore why the process of arbitrator selection should be reform.

2.1 The Criticism of Arbitrator Selection

The appointment of arbitrator has been questioned in recent years. By contrast to the national judge, an arbitrator whose livelihood depends upon party appointments may think twice before rendering a decision that might be upsetting not only to one of the parties involved, but also to the myriad observers who compile lists of arbitrator candidates for future cases. It should be borne in mind that, unlike commercial arbitration, a large percentage of investor-state awards find their way into the public domain and are studied not only in law schools, but by potential litigants looking for trends and arbitrator candidates for future cases.

As far as the qualification of arbitrators is concerned, arbitration institutions are private and arbitrators are mainly lawyers. This may lead to questions about the objectivity and impartiality of those who serve as arbitrators in one case and lawyers for transnational corporations in another. In this case, the parties would question the fairness about the final conclusion of ISDS, which makes ISDS loss its credibility. Meanwhile, since the public interest of large percentage cases, the public would also criticist to this situation, thus, the appointment mechanism is facing a great challenge.

Some people argue that the arbitrators' own standard would do too much impact on the procedure of arbitration, the mechanism gave arbitrators too much power. The most common criticism is that the personal views of the arbitrators will have a great impact on the conclusion of the case. For example, the conclusion between the developing countries' arbitrator and the developed countries' arbitrator would likely be different, they might have a contradiction about the same investment disputes, which means the conclusion of the case is not directly decide by the rules, it's more about how the arbitrators explain the rules, moreover, since there is no official explanation of international law including the agreement, whatever the explanation arbitrators made, each party has no right to argue, they have to burden the negative conclusion.

Besides, ISDS itself might reinforce arbitrators to make an "unfair" judge, as a business mechanism, ISDS prefer to protect the investor so that to attract more investor to solve the disputes through ISDS rather than international arbitration tribunal. ISDS' s preference also draws the public's attention. Generally, the agreement including ISDS treaty would promise the protection to the foreign investors, which aims to protect the developing countries' investors. However, most investors are actually from the developed countries, those investors, who enjoy the welfare of the agreements by establishing a multinational subsidiary, are considered as unfair. Since the treaty of ISDS is to protect the real developing country investors, those developed country investor clearly not involved.

Same situation was happened in America. For example, US was sign for such agreements to protect the foreign- investors' right, however, they finally found out that there are seldom investors could actually adopt the aims of agreement, it is US investor who largely benefits from the agreements. The arbitration practice of the North American Free Trade Agreement (now replacing by USMCA) shows that the situation has changed. Many U.S. state governments are subject to international arbitration by foreign investors due to environmental and other regulatory measures. This is a wake-up call for the United States. In February 2009, the Obama administration began to review the bits model of the United States in 2004. After more than three years of review, the internal discussion was ended on April 20, 2012 and the bits model of 2012 was released. Despite various criticisms, the model retains the ISDS clause, but it provides a very detailed procedure for the settlement of

disputes between investors and the host country through international arbitration, with a length of 12 pages, detailing the qualifications of investors and other issues, Conditions and restrictions agreed by the parties, selection of arbitrators, conduct and transparency of arbitration procedures, applicable laws, etc.

The personal will of arbitrators and the development trend of ISDS mechanism have an obvious impact on the unfairness of international investment arbitration cases, but these two factors are not easy to change. Firstly, the process of self-determination is inevitable in the arbitration process. Although each arbitrator will give a unique legal interpretation, it does not necessarily mean that the arbitration result is absolutely unfair, even in the domestic courts of each country, Judges will give different interpretations of domestic law, of course, to the extent permitted by law. In this case, no one questions the impartiality of domestic law; Secondly, the protection deviation of foreign investors in ISDS mechanism is determined by the characteristics of ISDS mechanism. In international commercial arbitration, the court tends to protect the interests of the host country rather than the interests of investors. Based on this phenomenon, ISDS mechanism came into being. For fairness, ISDS lost its own mechanism characteristics. This requirement itself is unreasonable. Absolute justice will lead to the complete loss of its function. Moreover, if these two factors are reasonable and inevitable, we need to explore what causes the amplification of the negative impact of these factors and rational factors, Finally, ISDS mechanism has been controversial in recent years.

2.2 The Power of Arbitrator

Before dealing with this issue, we need to understand how the ISDS mechanism ultimately acts on the parties, that is, the tool used by ISDS to limit disputes between the parties. Obviously, when the parties cannot reach an agreement on the investment dispute, ISDS's decision is the final decision of the dispute between the parties (the arbitration result can only be challenged under special circumstances), since it didn ’ t provide an error correction mechanism. The determined facts, the applicable law and whether to support the claim, it has a final impact on both sides. The power of adjudication is the power granted by ISDS to arbitrators, and the parties shall not directly affect the exercise and scope of this power. The finality of the award, the scope of the content of the award and the impact of the award are the extension of the arbitrator's power (the arbitration result can be challenged only under specific circumstances). In addition, we can clearly see that both of the above factors will affect the outcome of the award. This arbitration mechanism has been questioned, although it is not decisive. What really raises public doubts is the power of arbitrators.

Under ISDS mechanism, the power of arbitrators is too much. Compared with domestic arbitration, although China's arbitration is also final, the parties still have the opportunity to overturn the arbitration result through judicial award. In contrast, the ISDS arbitration result cannot be revoked by any superior organization, and the parties can only accept the ISDS arbitration result. it is a function of one of ISDS's principal shortcomings, the sovereignty of individual arbitral tribunals. In a mature legal system, judges are not free to render decisions on points of law in accordance with their personal views, without regard to binding precedent. They may disregard precedent at the risk of their reputations and reversal on appeal. The parties can rest assured before the judge that if they had previously made a decision on a basic legal issue and were overturned in the appeal, the judge could not simply ignore the decision of the court of appeal. In other words, the developed legal system infrastructure fundamentally limits the judge's personal power and makes the concept of problem conflict meaningless. In investor-state arbitration, where that check does not exist, issue conflict assumes greater importance in the impartiality analysis. 'Abuse of rights' and 'abuse of process' are arguments increasingly used by respondents in international investment arbitration. [7]

In addition, compared with ordinary arbitration, international investment arbitration involves cases of multinational corporations and often has government background. In this case, the dispute in this case will involve a large number of investment and construction projects. The arbitration result will have a wider impact, and the final arbitration result may even affect the economic operation of the country. To sum up, the current power of arbitrators is unreasonable in law and practice.

3. REASONS OF THE CURRENT CRITICISM OF ARBITRATOR SELECTION

3.1 The Nature of ISDS

As it is known to us, there are numbers of disputes solving mechanism, International business arbitration, ICS, national courts etc. Each party have the equal rights to choose a mechanism by their own will. ISDS, as a solely non-governmental institution, should have its priority to attract parties to choose them, therefore, they provide a preference to the international investor. Although this preference didn ’ t write down in the ISDS constitution or any other express provision, it could be easily concluded from the final conclusions made by ISDS.

In this case, the arbitrator appointed by the ISDS could be concluded that he obeys this invisible preference. Moreover, the process of arbitrator selection

might also be influenced by this preference, which manifested as the selection of arbitrators' nationality, specific school of thought etc.

As it also mentioned, ISDS as an arbitration tribunal, the candidate arbitrator is all the lawyer. It is common to choose the lawyer to be an arbitrator, but compared with the nation disputes, international disputes are more related to multinational disputes and government background, and those arbitrators mostly serve for multinational enterprises. According to this selection system, the choice of arbitrators will be questioned by most participants. Therefore, I believe that ISDS, as the current mechanism for solving most disputes, should change the choice of arbitrators to make it different from ordinary arbitration institutions.

3.2 The Deviation Between the Current Selection Mechanism and the Spirits of International Law

All arbitrators are supposed to be independent and impartial including the two party-appointed arbitrators, and to have no prior involvement in the dispute.5 When accepting an appointment, arbitrators often sign a declaration either confirming independence and impartiality or disclosing circumstances that might compromise independent judgment.[8] However, to our knowledge, arbitrators do not receive training or information on how implicit biases may affect decision making.[9] In this situation, ISDS didn't provide a specific training for candidates, and didn't require an international law background for arbitrators .It is reasonable to argue that arbitrators who decide the conclusion of each case, may not coordinate with the expectation of international law. The experiment results suggest that, for many stakeholders, the legitimacy of legal regimes such as international investment law may require a minimum expectation of fairness between the parties with unequal resource endowment. [10]

It is true that ISDS responds to concerns over access to procedural justice when a state abuses its power to disrupt productive investments in opportunistic ways, [10] and ISDS can therefore be seen as a way to ensure effective justice when domestic remedies are inadequate. However, there is an ambiguous boundary in the effect, or the preference. Under this situation, the arbitrators received the power to balance the resource allocation, but as mentioned before, they didn't received training and ISDS didn't restrict or set boundaries for this right.

In this case, more attention should be paid to the selection process of arbitrators including the training of arbitrators on the rules of international law, in order to avoid deviating from arbitration that is not in line with the spirit of international law due to the personal reasons of arbitrators.

4. THE REFORM OF ISDS ARBITRATOR SELECTION

In the past decade, countries all over the world have increasingly resisted ISDS in international investment arbitration. Governments have reacted to the perceived bias in arbitration. In recent years, states have either withdrawn from the ICSID system, [11] or threatened to leave (for example, El Salvador, Nicaragua, Argentina) because of their exposure to large international claims. It is high time for states to take action on many fronts. Obviously, there are some problems in the existing arbitrator selection mechanism. Although the arbitration can still be carried out under the existing arbitration mechanism, the problems gradually emerging in recent years have gradually made the arbitration subject lose the trust in ISDS, and then look for the establishment of new arbitration institutions, such as the European Investment court ICS. Therefore, there is a considerable need to reform the arbitrator selection mechanism. It is a feasible reform direction to reform the existing disputes and introduce advanced technology. Continuing to maintain the status quo will be like the sword of Damocles, which will eventually have an adverse impact on international arbitration. It must be acknowledged that we are bereft of ready-made solutions to what may be the most tectonic shift besetting international arbitration since the adoption of the 1958 New York Convention. Our challenge is therefore to be innovative, yet retain legitimacy and stability. Rather than clinging to a model that is showing cracks, or getting on a high horse about the desirability or otherwise of a multilateral investment court, our interest and endeavour are more contained, but no less challenging for all that. [12]

4.1 Change the Background Selection of Arbitrator

First of all, the paper will take ICSID as an example. The arbitrators are unevenly distributed. Most arbitrators are from Europe and North America, about 75% are from OECD countries, and 95% of arbitrators are male. [13] Therefore, female arbitrators and arbitrators from developing countries should be selected as far as possible on the premise of selecting qualified candidates with relevant experience, including public international law, investment law and arbitration fields. According to the research conducted by Waibely and Wu in 2011 and 2017, they found that the background of the arbitrators would have a certain impact on the decision-making of international investment arbitration after setting up a database of more than 500 arbitrators. [14]

According to the change of the background of the choice of arbitrators, a film on the current situation of ISDS can be made to make the arbitral award itself more in line with the provisions of international law. It reduces the deviation between the personal preference of

arbitrators and the spirit of international law, and makes the arbitration results fairer and more open.

4.2 Incentives for Arbitrators

The majority of ISDS arbitrators do not work full time and they often have other jobs with a legal background. When the arbitrator's arbitration income is insufficient, it may not necessarily lead to bribery and exchange of interests, but to a certain extent, it affects the fairness of the arbitration. According to the survey, arbitrators (such as full-time scholars) who earn a significant portion of their annual income from arbitration are more likely to assert jurisdiction. However, the economic incentives for arbitrators can maintain a wider range of interests in a highly profitable ISDS industry to a certain extent, thus affecting the consistency of ISDS arbitration results.

In current situation, most arbitrators appointed by the ISDS are not the full-time arbitrator, in fact, their main income comes from the lawyer job, which severed for the multinational enterprises. Thus, the personal bias of arbitrator would be doubt that has a negative impact on the justice fairness.

Improving the incentive of arbitrators can reduce public doubts about the impartiality of arbitration. By increase the income of arbitrator could also increase the percentage of full-time arbitrator, in that case, would likely to reduce the influence of arbitrators' background. IN addition, while increasing the incentives for arbitrators, we should also establish corresponding incentive mechanisms and clarify the incentive standards for arbitrators. For the purpose of improving the fairness of arbitration, it is suggested to establish a corresponding relationship between the award amount obtained by arbitrators and the arbitration results, and increase the corresponding awards for cases with good arbitration results. In determining the impact of arbitration, the impact of arbitration should be assessed objectively, such as the establishment of an independent commission to assess cases or in a manner more acceptable to the public.

4.3 the Use of AI (Artificial Intelligence) in ISDS Arbitration Cases

4.3.1 Assist the Arbitrator in Making the Conclusion

Intelligent machines hold the promise of more rational, consistent, and unbiased decisions when compared to human actors. [15] In recent years, the technology of AI arbitration has been largely developed. In US, AI was being used in the practice of justice, including the digital datasets, which select and analysis the most formal documents. By using this technology, the users can look into the contents and metadata of documents, and classify the documents. Moreover, AI could also predict the conclusion of justice. Through the analyze of the formal documents, it would assign the scores on tags, in order to improve the result of the prediction.

Through this technology, we can summarize the similar judgments in similar cases in the arbitration process, including the proportion of judgments made by different arbitrators. In this case, it can help arbitrators make consistent decisions in similar cases, so as to avoid the public questioning the fairness of arbitration, because the arbitrators' arbitration results are very different from previous awards. More importantly, the introduction of high and new technology can further limit the personal preferences of arbitrators, so as to strengthen the restrictions on arbitrators. However, how to balance the free arbitration of arbitrators and the restrictive factors in the specific implementation process needs further consideration.

4.3.2 Assist the Arbitrator in Taking the Evidence

In the current international investment arbitration cases, the choice of evidence will directly affect the arbitration results, but there is no clear rule for the choice of evidence in the current international investment arbitration, which brings great subjectivity and freedom to the arbitrators in the choice of evidence. For example, arbitrators may prefer to use the evidence of vulnerable groups because of their vulnerable status, and artificial intelligence can analyze the data and materials of similar cases, summarize how the previous arbitrators choose evidence as the reference basis for arbitrators in the arbitration process under similar circumstances. In the absence of special circumstances, arbitrators are required to follow the evidence selection rules of similar cases, limit the rights of arbitrators and keep the evidence selection process consistent.

In addition, this approach can improve the transparency of arbitration proceedings. By using neutral artificial intelligence without any position, or by selecting evidence to restrict arbitrators, the specific rules of arbitration, namely precedent arbitration, reveal the specific rules of arbitration to the public to a certain extent, so that the arbitration subject can foresee the results of arbitration. It avoids the arbitration subject from questioning the arbitration result due to the opacity of the arbitration process and the subjectivity of the arbitrators.

4.3.3 Assist in the Selection of Arbitration Rules

At present, although the arbitrators of international investment arbitration have good legal quality, there will be no mistakes in the application of law in general arbitration cases. However, in rare cases, due to the complexity of the case and the excessive and limited application of law, it is difficult for arbitrators to choose the applicable law. For example, the owners of

multinational enterprises are couples of different nationalities, but the change of marital relationship leads to the division of property in their name, this requires that the relevant provisions of national marriage laws be considered when reviewing cases. The introduction of this technology will help arbitrators analyze the applicable rules of law in similar cases and avoid disputes over the applicable rules.

5. CONCLUSION

In conclusion, this paper addresses the existing problem in the selection of arbitrators in ISDS. First of all, arbitrators have great influence on the result of arbitration including their personal preference, their too much power, and their school of thought, which leads to doubts about the fairness of the results. Secondly, the reform of the selection mechanism of arbitrators is mainly divided into the following directions including reforming the selection standard of arbitrators, reducing their preference for the parties' arbitration subject through the analysis of the selection background of arbitrators and rebuilding the remuneration mechanism of arbitrators, increasing the number of full-time arbitrators, and preventing part-time arbitrators from adversely affecting the arbitration results due to work reasons. Moreover, AI can help arbitrators make consistent decisions in the same case through the analysis of AI and datasets. This paper only makes a rough analysis in the above aspects, hoping that more scholars can pay attention to this issue and put forward more directions on the ISDS arbitrator selection mechanism.

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