

The Research on the EU Investment Court System

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Abstract. In view of the inherent shortcomings of the current investor-State Dispute Settlement (ISDS): 1) serious interest imbalance; 2) investor abuse of the right to appeal; 3) insufficient transparency; 4) lack of consistency in the ruling, EU's new round of trade agreements In the negotiation, the Investment Court System (ICS) was proposed to reform the traditional ISDS. This paper sorts out this new model and analyzes the innovation of the investment court model: 1) the balanced protection of the host country's regulatory power; 2) Strengthen the legality and impartiality of the arbitral award; 3) ensuring consistency of arbitral awards; 4) adding mediation procedures. Combining with the international investment environment, analyze the problems existing in the investment court model, exploring the feasibility of the EU's implementation of the global investment court model to resolve investment disputes.

Introduction

The state and private investors are both participants in international investment, and the two have long been in a delicate balance of cooperation and confrontation. The construction of national infrastructure requires the support of private investors. The normal investment activities of private investors require national policy protection, but the natural inequality between private investors and the state's main body is doomed to the contradiction between the two. The contrast makes private investors may be unfairly treated in the process of international investment, which makes international investment suppressed, resulting in poor international capital circulation and slowing economic and social development. Therefore, this requires a corresponding mechanism to resolve the dispute between private investors and the state in the process of international investment. The investor and state investment dispute settlement mechanism has undergone many changes in history, with the 1965 Washington Convention as The dividing line realizes the transition from the national standard stage centered on the diplomatic protection right or the subrogation right of the private investor's home country to the private investor's standard stage with the independent litigation right as the core. [1] This series of changes has generally experienced the three levels of "international diplomatic solutions – international arbitration – international investment courts". Although the mainstream of the world is still in the second stage, however, the inherent defects inherent in its stage, such as 1) serious interest imbalance; 2) investor abuse of the right to appeal; 3) insufficient transparency; 4) lack of consistency in the ruling have not been effectively resolved, and the third phase of the International Investment Court is the new reform of the traditional ISDS. It is led by the European Union, first mentioned in the TTIP negotiations between the EU and the US, and put into practice in the bilateral agreement between the EU and Canada CATA and the EU and Vietnam FTA. This paper focuses on the development process and innovation of the Investment Court System. Study and focus on the current progress of practice, analyze the feasibility of the EU's implementation of a global Investment Court System to resolve investment disputes.

Investment Court System (ICS)

ICS Establishment and Practice

In order to establish economic partnerships on both sides and promote the easing of various economic regulations, in 2013, US President Barack Obama announced the Transatlantic Trade and Investment Partnership (TTIP) in his State of the Union address. The European Commission also responded quickly. In view of the shortcomings of traditional ISDS, when the two sides conducted a series of negotiations on the content of TTIP, the EU showed the basic position of establishing the Investment Court System. And in September 2015, the draft proposal for <TTIP Investment Protection and Investment Court System (Investment Chapter)> was officially announced.

After the above-mentioned idea of creating an investment court was put forward, the EU quickly applied it to the practice of treaty negotiations. The European Union and Vietnam's Free Trade Agreement (FTA), announced in early 2016, has adopted the "investment court system" for the first time, marking the beginning of the EU's idea of establishing a permanent multilateral investment court. On February 29, 2016, the EU and Canada published the final text of the Comprehensive Economic and Trade Agreement (CETA), which was explicitly incorporated into the Permanent Investment Court and the Appeals System. Recently, <EU-Singapore Investment Protection Agreement> will resolve the establishment of a permanent investment court to resolve disputes.

ICS Innovation

The Balanced Protection of the Host Country's Regulatory Power

Under the liberalized investment treaty, investors can easily initiate investment arbitration against the host country based on investment treaties. This is in addition to the convenience of investors to appeal to arbitration, seeking protection of interests, but also exacerbates the risk that the country is forced to face involvement in investment arbitration at any time. The international investment arbitration system favors investors, and the actual loss of investors' losses is more likely to be discovered than the hidden public interest damage of the host country. [2]Therefore, the arbitral tribunal often ignores the national public interest and prefers private investment.

Based on this, ICS strengthens the regulatory power of the host country in many aspects to achieve a balanced protection between investor protection and the interests of the host country. Taking some of the provisions as an example: Article 2 of Section 2 of the TTIP states: "The provisions of this section shall not affect the regulatory powers of the host country within its territory to achieve reasonable policy objectives." This provision clearly states that the host country promises to give any investment protection does not affect its exercise of regulatory power in order to achieve domestic public policy.

Strengthen the Legality and Impartiality of the Arbitral Award

In the ICDS, 1) The temporary nature of the investment arbitral tribunal, the arbitrator lacks a full understanding of the host country's national public policies and laws and regulations; 2) The non-independence of the arbitrator, the arbitrator is determined by the parties, and the salary standard is based on the case. The situation is determined to be vulnerable to economic interests; 3) Lack of international conventions or investment agreements that elaborate on the arbitrator's standards of conduct, the traditional ISDS faces a crisis of confidence due to the legitimacy and impartiality of the arbitral tribunal.

The EU investment court system intends to reform the existing deficiencies and makes specific provisions on the selection of investment court members, payment methods, etc., and design a complete mechanism for the qualification and independence of judges. Through these measures, the legality and impartiality of arbitral awards are strengthened. 1) Replace the provisional arbitral tribunal with a permanent arbitral tribunal, stipulate the hiring methods and rewards of its members; 2) A high standard of entry barriers is set for the selection of judges; 3) The investment court system also places higher demands on the ethics of investment court members. [3]

Ensuring Consistency of Arbitral Awards

The lack of consistency is considered a systemic flaw in ISDS, and the traditional method of resolving this problem is to revoke the arbitral award and only in the event of serious violations of the procedural behavior and rulings under Article 52 of the ICSID. However, this approach often lacks practical value in view of complex cancellation procedures.

As a result, ICS created a two-trial final review investment court system and established an appeals court. By introducing an appeal mechanism, the case of applying a legal error or clearly identifying a factual error (including a misunderstanding of the domestic law of the host country) is reviewed again. At the same time, ICS also emphasizes that the court of first instance should respect the corrections made by the Court of Appeal. For the same or similar cases, the judgment of the Court of Appeal is legally retroactive to the court of first instance. Therefore, the Court of Appeal's review and correction of the judgment of the court of first instance can reverse the inconsistency between the different judgments and judgments of the same court, and strengthen the legal consistency and predictability of the referee.

Adding Mediation Procedures

Although ICSID has established a mediation mechanism in addition to the arbitration mechanism, there is a parallel relationship rather than a progressive relationship between the two. As long as the parties reach a consensus on the arbitration, they can submit the application without first mediating. Outside of this, the ICSID allows the host country to retain power and may require that arbitration be initiated after the exhaustion of local remedies has been invalidated. Under this circumstance, in order to protect its own interests and avoid falling into too many cases, the host country may use domestic judicial means to increase the cost of investor relief, delay the process of investor relief, and cause the interests of investors to be violated.

The investment court system established a mediation link for the obligation. Within 60 days of the submission of the dispute, the parties to the dispute will need to choose a place to negotiate and adjust in the capital of the State party. Both parties need to provide information about themselves, the content of the dispute and the agreements involved, so that disputes can be resolved peacefully and friendly. The case can only be tried by the court if the dispute cannot be settled 90 days after the case is filed. [4] By relying on this pre-mediation process, the power between investors and the host country is better balanced. It creates a buffer between investment behavior and dispute resolution. In the event that the power is indeed infringed, the investor is no longer subject to the domestic law of the host country. They can seek relief directly from the dispute resolution agency. For investors who excessively use the right to appeal, the host country can also begin to defend its use in the lower cost mediation process, and eliminate the abuse of the right to appeal.

Feasibility of the General Implementation of the Investment Court System

In combination with the EU's behavior in the field of international investment in recent years, it is not difficult to find that it actively promotes the traditional ICDS reform, and strongly advocates ICS. On the one hand, it is based on the long-term illness of traditional ICDS, and hopes to find a new way out. On the other hand, the EU also hopes to use ICS to break the shackles of investor-led private legal investment arbitration established by the United States through NAFTA, and to establish a more state-oriented public law investment arbitration that is more suitable for the EU. [5]

It is undecidable. Compared with traditional ICDS, ICS is really bright, but as a new generation product, ICS has some problems and defects:

(1) The investment court system is based on international agreements. Unlike the ICSID Convention, which has a large number of members, the investment court system which based on a treaty of a bilateral nature cannot guarantee that the award will be recognized and enforced in territories outside the member's territory, or that the decision of the International Investment Tribunal is not binding because the relevant third party is not a member of this bilateral treaty. [6]

(2) The establishment of a permanent court and appeals body by ICS may increase the time and money costs. And the original efficient, convenient and flexible advantages of arbitration will be lost.

(3) ICS eliminates the potential conflict of interest between the judge and the investor in the case, but may also become an investment court that tends to the state. This mechanism eliminates the autonomy of parties to investment disputes (including investors and host countries) to choose referees and may not be welcomed by investors.

It can be seen that the EU is attempting to promote ICS on a global scale and break the traditional ISDS framework to establish an EU-led investor-state dispute resolution mechanism. Under the premise that the defects of ICS have not been effectively solved, this process will be difficult and the future is unknown.

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