

Application of Mediation Mechanism in International Investment Dispute Settlement

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Abstract. Transnational trade not only brings economic development but also produces many international investment disputes. As a result, many dispute settlement methods have emerged. The international investment dispute settlement Institution has gradually developed into a permanent institution for dispute settlement, with arbitration as the main means. However, the arbitration process has exposed many drawbacks since its development for a long time. Although mediation was relatively mature in other countries, its value was not appreciated until the end of the 20th century. As more and more international voices have pointed out the disadvantages of international investment arbitration, which not only increases economic losses but also takes a long time, the International Center for Settlement of Investment (hereinafter referred to as ICSID) is also making continuous reforms and adopted a new amendment on July 1, 2022, emphasizing the method of mediation mechanism. The current mediation system in international investment has gradually moved from theory to practice, so it is necessary to conduct further research on the development and future construction of mediation mechanisms. Literature research and comparative research are used in this paper to analyze. Since mediation and ADR mechanism have been introduced into the dispute settlement mechanism, the analysis of the mediation system puts forward suggestions on the current development dilemma and future construction of the mediation mechanism.

Keywords: *International investment; Dispute settlement; Mediation mechanism; International investment arbitration; ADR.*

1. Introduction

The development of international investment reflects the intensification of the trend of economic globalization, multinational enterprises, and international investment are closely linked. There are complex relationships among transnational corporations, host governments, and private investors. Economic globalization is certainly developing rapidly today, multinational enterprises and international investment are closely linked. At the same time, the globalization of transnational corporations is also the driving force for the development of international investment. In investment exchanges between countries, some disputes are inevitable. At present, arbitration is the main means of international investment dispute settlement mechanism, as well as mediation mechanism and alternative dispute settlement methods introduced recently. However, the mediation mechanism has always been a marginal mechanism and has not been valued by ICSID. So far, the number of cases resolved through mediation is still small. Based on the overview and current research of mediation system in international investment disputes by international arbitrator Mr. Ruslan Mirzayev in order to improve the utilization rate of the mediation mechanism and reduce the number of final arbitration cases, the future development direction and advantages of mediation system are deeply discovered. This essay analyzes the advantages and obstacles of mediation mechanism and puts forward relevant opinions.

2. Background and development of dispute settlement mechanism in international Investment Law

2.1 Arbitration mechanism of international investment Law

ICSID is to promote necessary international investment and international economic cooperation and development by providing a neutral dispute resolution platform for both parties [1]. But it was not until 1987 that ICSID boarded the first investment dispute case between an investor in a BILATERAL investment treaty and the host country. In the past ten years, the number of cases accepted by ICSID has increased suddenly, which also inspires the application of ICSID mechanism, and more and more problems are exposed that need to be solved.

2.1.1 The background of international investment treaty arbitration system

The trend of economic globalization is becoming more and more obvious. In addition to having independent political sovereignty, many developing countries want to break the investment agreements signed in the colonial period in order to further their national economic development. For example, they want to revise or abolish some unfair investment agreements, or restrict access to natural resources and so on. However, at this time, the international status of developing countries is generally not significant, so that it is difficult to solve international investment disputes, and it is difficult to safeguard their own interests. In this context, ICSID was established in accordance with the Washington Convention as a permanent body to settle disputes over investment by nationals of Contracting States and other contracting states.

2.1.2 Development of international investment arbitration system

With the development of international private investment, more and more independent legal persons choose to set up multinational companies. The institutions and rules of regional settlement of commercial arbitration set up by the host country can no longer adapt to the international situation. At the same time, the strengthening of trade flows has further promoted the improvement of ICSID rules. There is a way that investors can directly initiate arbitration proceedings against the host country in accordance with the provisions of the treaty without being restricted by ICSID arbitration rules.

Arbitration is the main means to solve dispute in ICSID, an increasing number of international voice to discuss the problems in the arbitration proceedings, such as long time consuming, high cost, transparency, etc., so the ICSID mechanism also continuously to reform the new amendment, including the setting and the regulation of hearing of the arbitration tribunal has carried on the elaboration. In particular, the COVID-19 pandemic poses a great challenge to international arbitration and litigation. Many cases have to be postponed due to the COVID-19 pandemic, which also has a great economic impact on many multinational companies and reduces the trust of clients in arbitral tribunals. In this way, it is not enough to settle investment disputes only by means of arbitration and litigation.

2.2 International investment mediation mechanism

2.2.1 Definition of mediation

As for the commercial mediation mechanism between international investment, first of all, no matter on what basis mediation is carried out, it refers to the process in which the parties attempt to solve the dispute with the assistance of one or more third-party mediators who have nothing to do with the case. Therefore, it can be concluded that the mediator is neither a decider nor a judge. Compared with the arbitration mechanism, the mediator only serves to promote the amicable settlement of disputes between the two parties. Therefore, we can see that the biggest characteristics of mediation are voluntary and self-determination, because whether to resolve disputes through mediation and how to reach a settlement agreement are agreed by both parties

2.2.2 Current situation of international investment mediation

2.2.2.1 Flexible time for the initiation of conciliation proceedings

Unlike international arbitration and international litigation initiation procedures, which are adversarial and require submission of application materials in accordance with strict requirements before the initiation of proceedings, the arbitration tribunal or court ultimately decides the time and venue of the hearing. There is no pre-procedure for the mediation mechanism. Current international investment mediation rules encourage disputing parties to apply for the initiation of mediation proceedings at any time and place.

Therefore, the initiation of mediation procedure can use independent adjustment to reach a settlement agreement. It can also be a combination of mediation and arbitration. The two parties can first mediate and reach a settlement agreement. At the same time, the settlement agreement can be used as the basis for requesting the arbitration tribunal to make a ruling. Finally, the model of conciliation and arbitration was reached, but attention should be paid to the limitation of mediation time, otherwise it will lead to low efficiency, prolonged indecision and higher cost.

2.2.2.2 Mediation services provided by ICSID

First, as a professional international investment dispute settlement body, ICSID has rich experience in arbitration. There is a close relationship between the mediation procedures and other ISDS procedures. ICSID is the maker of international investment mediation rules. Rules can also be interpreted through precedents and so on. Second, although the ICSID main means to settle disputes by arbitration, but in the process of accepting arbitration cases, mediation can simplify the arbitration in case of procedural parts, for example, to the time of performance or the amount in the contract agreed to pay that this model is more advantageous to improve the efficiency of problem solving, and at the same time can improve the trust of both parties to the arbitration tribunal [2].

2.2.2.3 Temporary characteristics of the Mediation Chamber

There is no fixed mediation organization because there are not many cases that solve problems through mediation mechanism at present. According to ICSID statistics, the number of investment dispute cases mediated by ICSID has reached 13. Each case consists of a different member of the Conciliation Chamber. After the conciliation procedure is initiated, the parties may choose a mediator through negotiation from the list provided by the conciliation agency. After the dispute is resolved, the conciliation panel is dissolved. The number of members of the conciliation panel is also not fixed. Generally, the principle of independent appointment is adopted, with the exception of the collegiate conciliation panel. For instance, as stipulated in Article 3 of the ICSID Conciliation Rules, Appointment of Conciliators to a Commission Constituted in Accordance with Convention Article 29(2)(b) , (1) If the Commission is to be constituted in accordance with Article 29(2)(b) of the Convention: (a) either party shall, in a communication to the other party: (i) name two persons, identifying one of them as the conciliator appointed by it and the other as the conciliator proposed to be the President of the Commission; and (ii) invite the other party to concur in the appointment of the conciliator proposed to be the President of the Commission and to appoint another conciliator [3].

3. Development and institutional dilemma of international investment dispute mediation mechanism

3.1 Advantages of mediation mechanisms used in ICSID

Compared with arbitration, the major advantage of mediation mechanism is that it can save time and money. First, mediation can be conducted by one or two mediators, the conflict is not obvious, and the focus of mediation is how to solve the dispute, so there is no need to investigate both parties according to the principle of fairness and justice in arbitration, to find out the facts of the case. Second, there is better predictability, because the autonomy of mediation is very strong, so both sides have a rough calculation of whether and what kind of agreement will be reached. Third, greater flexibility,

as the case situation is constantly changing, allows investors and host countries to adjust the settlement agreement in a timely manner in response to changes in policy considerations and business strategy. In particular, in order to maintain the image of the host country, the host country does not want to expose the dispute to the public again in order to not increase the influence of public opinion. Mediation can better solve the problem, maintain the image and attract investors. Fourthly, it is beneficial to maintain a good attitude towards investment.

Here is a list of ICSID dispute settlement cases by mediation. As can be seen, disputes resolved by the mediation mechanism are quickly resolved, but there are also cases pending. However, the time line shows that the mediation mechanism is used efficiently.

Table 1. ICSID list of dispute settlement cases by mediation

party	dispute	Applicable mediation rules	record date	result of mediation
Société d'Energie et d'Eau du Gabon v. Gabonese Re-public	Water and electricity permits	ICSID Convention Conciliation Rules	2018/3/30	The report was released on September 19, 2018
Xenofon Karagiannis v. Al-bania	Cement terminal construction project	ICSID Convention Conciliation Rules	2016/5/16	Pending
Republic of Equatorial Guinea v. CMS Energy Corporation and Others	Oil and gas companies	ICSID additional facilitation rules - mediation rules	2012/6/29	The report was released on May 12, 2015
Hess Equatorial Guinea Inc. and Tullow Equatorial Guinea Limited v. Republic of Equatorial Guinea	Oil and gas license	ICSID additional facilitation rules - mediation rules	2012/5/12	Pending
RSM Production Corporation v. Cameroon	Oil and gas exploration and development concession agreement	ICSID Convention Conciliation Rules	2011/9/19	The report was released on June 11, 2013
Shareholders of SESAM v. Central African Republic	Log production and processing enterprises	ICSID Convention Conciliation Rules	2007/8/13	13-Aug-08
Togo Electricite v. Republic of Togo	Electricity permits	ICSID Convention Conciliation Rules	2005/5/20	The report was released on April 6, 2006
TG World Petroleum Limited v. Republic of Niger	Petroleum licensing	ICSID Convention Conciliation Rules	2003/12/8	Terminated by settlement on April 8, 2005
SEDITEX Engineering Beratungsgesellschaft für die Textilindustrie m.BH v. Madagascar	Textile enterprise	ICSID Convention Conciliation Rules	1994/6/13	Report issued on 19 July 1996
Tesoro Petroleum Corporation v. Trinidad and Tobago	Petroleum exploration and production	ICSID Convention Conciliation Rules	1983/8/26	Settlement, report issued on 27 November 1985
SEDITEX Engineering Beratungsgesellschaft für die Textilindustrie m.BH v. Madagascar	Textile enterprise	ICSID Convention Conciliation Rules	1982/10/5	Terminated by settlement on 20 June 1983

It is well known that once a dispute is brought to the court of arbitration, trust between the two parties has broken down, which is not conducive to further investment and cooperation. But mediation allows both parties to resolve disputes confidentially, on the basis of maintaining a cooperative relationship, or perhaps jointly develop new theft in order to solve the problem [4].

3.2 Obstacles to the use of mediation mechanisms in ICSID

Whether the mediation mechanism can develop well depends on whether it can play an important role in the settlement of investment disputes. As mentioned earlier, there are many reasons why ICSID currently has a low number of mediation cases and a low success rate. Although ICSID has designed flexible procedural rules specifically for investment disputes, investment mediation still faces many institutional challenges, mainly in the following two aspects:

3.2.1 External challenges facing investment mediation

It is generally believed in the international community that the biggest challenge facing investment mediation mechanism is the host country of investment [5]. Although there is a willingness to mediate, the practical obstacles are still unable to advance.

First of all, the secrecy of the investment allocation mechanism is not conducive to the supervision of the host country's citizens, which will cause great pressure on the host country's government. Because some international transnational corporations will involve the public interests of the citizens of the host country, it is very likely that the compensation of the investors of the host country will be borne by the citizens, at this time, the citizens of course hope to carry out effective supervision over them. But for the confidentiality characteristics of the mediation mechanism and it is difficult to meet the requirements of the people, coupled with the pressure of media opinion, will hit the enthusiasm of the host country to participate in the investment mediation, but will tend to use antagonistic arbitration means to solve.

Second, the settlement of international investment disputes through investment mediation mechanism is not conducive to the establishment of the image of the host government and national trust, which is also a major obstacle to the host country's participation in investment mediation. Because the governments of many countries are elected by national vote, the host government should consider the will of the people when choosing the way of international investment dispute settlement, and the approval rate of the people will ultimately affect the election result. If the host country keeps making compromises in the process of dispensing drugs, it will not be conducive to increasing the popularity of its people.

Third, investment disputes are very sensitive or highly political. In this case the controversy was not suitable for mediate, the host country, the right to regulation through legislation may cause adverse effect in the investment of foreign investors, or alleged violation of relevant bilateral investment treaties or multilateral investment agreements, etc., in this case, through the mediation of legislating for the host country, it is obviously impossible. In addition, investment mediation often involves multiple government departments of the host country, and it is difficult for different parts to reach a consensus or have different views on investment mediation programs, which will affect the success rate of mediation.

3.2.2 Internal challenges facing investment mediation

First, investment mediates the conflict between voluntary and mandatory. One of the biggest characteristics of the mediation mechanism is that the parties to the voluntary dispute can start and quit the mediation process at any time, but this will increase the time and cost of investment dispute settlement, and the mediation mechanism is less attractive to the parties to the investment dispute. However, there are different views on whether the mediation procedure should be compulsory. Some people think that the compulsory mediation procedure can increase the utilization rate of the investment mediation procedure. The objection is that this undermines the voluntary nature of the mediation mechanism.

Second, the confidentiality of mediation mechanism and ISDS transparency requirements contradiction [6]. Since international investment disputes often involve issues of public interest and the responsibility of host countries, ICSID reform is also focused on transparency. As some countries will inevitably make concessions in investment mediation, which will affect the interests of a country, transparency will be required. But at the same time, confidentiality, as one of the most important advantages of the mediation process, helps both parties to communicate without hesitation. If transparency requirements increase, the chances of reaching a settlement will decrease.

Third, the settlement agreement reached through mediation procedure lacks enforceability. Whether the settlement agreement can be finally realized is the most important step of investment mediation, which is also the core of the entire mediation mechanism. This involves the enforcement of settlement agreements. Different from the arbitration procedure, the final arbitration result is binding on both parties of the dispute, and the settlement agreement is not legally enforceable, so it is more difficult to carry out transnational execution.

4. Suggestions on mediation mechanism in international investment disputes

4.1 Responses to external challenges mediated by international investment

4.1.1 Establish internal safeguards and external disclosure mechanisms for investment mediation

In order to relieve the concern that the host government may bear domestic legal liability when participating in investment mediation, it is suggested that the host country establish internal guarantee mechanism and external disclosure mechanism related to investment mediation [7]. With regard to internal safeguards, the host country may enact an internal procedure law on persons involved in investment mediation. In terms of external disclosure mechanism, the Energy Charter Conference adopted the Guide on Investment Mediation in 2016, encouraging parties to the Energy Charter Treaty to use Mediation as a way to resolve Investment disputes on the basis of resources, so as to promote amicable settlement of disputes. Parties are also encouraged to promote the effective implementation of settlement agreements with foreign investors in accordance with applicable laws and domestic procedures, and to make active public disclosure of cases where mediation is under way and of the fact that settlement agreements have been reached.

4.1.2 Use joint investment mediators to settle international investment disputes

Since international investment disputes involve the host country, international investment mediation rules should be designed to facilitate the participation of the host country. Given that the host country usually involves government officials in the mediation process, investment mediators need to have expertise not only in resolving international investment disputes, but also in dealing with government officials of the host country [8]. Therefore, mediation rules should allow disputing parties to use joint mediators, one for mediation and one for communication, to work together to reach the final settlement.

4.2 Responses to internal challenges of international investment mediation

4.2.1 Break the voluntary principle of investment mediation and increase the utilization rate of investment mediation procedures

More and more BITs contain mediation clauses that adhere to the principle of voluntary mediation procedures. But the ISDS reform proposal submitted by some Southeast Asian countries mentions mandatory mediation and sets it as a pre-procedure to reduce the number of cases that go to arbitration [9]. For example, the provisions of articles 14 and 23 of the Comprehensive Cooperation Agreement between Indonesia and Australia show that many countries have made a breakthrough in the principle of voluntary investment mediation.

4.2.2 Put forward mandatory international clauses for settlement agreements.

UN-CITRAL adopted the Convention on the Implementation of International Settlement Agreements (hereinafter referred to as the Singapore Convention on Mediation) in 2018 [10]. It was the world's first multilateral treaty to settle commercial disputes by conciliation. The Singapore Convention on Mediation aims to promote the widespread use of mediation in dispute resolution of cross-border transactions, provide enforcement guarantees for multinational enterprises to resolve cross-border commercial disputes through mediation mechanisms, and promote the sound development of international commercial dispute resolution. Hailed by many as the New York Convention of mediation, the Singapore Convention now only applies to international commercial disputes. In particular, when it comes to investment disputes between ISDS host countries and investors, the principles and spirit of the provisions are entirely applicable.

5. Conclusion

International investment mediation has its unique advantages in settling international investment disputes, including short time, low cost and high efficiency, which is conducive to achieving win-win results for both investors and host countries. However, investment mediation mechanism has been at the edge of ISDS mechanism for a long time, although the main reform direction of ICSID is to promote the development of alternative dispute resolution methods represented by investment mediation. However, investment mediation faces external and internal challenges and still has institutional development difficulties. For example, the conflict between the principle of voluntariness and transparency requirements and the enforcement of settlement agreements. By breaking the voluntary principle, setting up pre-mediation procedures and clarifying the means of disclosure in investment mediation, the investment mediation mechanism is constantly constructed and improved. In short, it remains to be seen whether we can draw lessons from international commercial mediation procedures and combine them with investment mediation to achieve a new development direction.

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