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Study on the Expansion of ICSID Arbitration Jurisdiction

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Abstract. With the development of the global economy, international investment gradually occupies an important position in the market, and at the same time it also brings some legal disputes, ICSID is the direct main body to resolve international investment disputes, while its arbitration jurisdiction is the prerequisite and the primary issue for the arbitral tribunal to resolve international investment disputes. At present, the expansion of ICSID's arbitration jurisdiction is an issue that needs to be addressed by the international community. This paper is divided into four parts, the first part of the overview starts from the main body ICSID, the second part analyzes the expansion path of ICSID's arbitration jurisdiction and its reasons, the third part puts forward the reform path of ICSID's arbitration jurisdiction, and the fourth part puts forward China's countermeasures.

Keywords: Jurisdiction; arbitration; ICSID arbitration jurisdiction; investment disputes.

1. Introduction

At present, under the background of economic globalization, capital flows in the global economy are mainly presented in the form of international investment, which has played an indelible role in promoting the global economic development and the continuous development of international trade. However, this period is also accompanied by a variety of investment disputes arising from international investment, ICSID is the world's first arbitration organization specializing in the settlement of international investment disputes, the International Centre for Settlement of Investment Disputes (ICSID) mainly through arbitration and mediation to resolve international investment disputes. However, with the development of the world economy, ICSID has gradually appeared the expansion of arbitration jurisdiction, how to actively respond to the expansion of ICSID arbitration jurisdiction and make corresponding countermeasures is the current need to solve the real problem.

2. Overview of Arbitration Jurisdiction

In order to resolve conflicts and disagreements arising from international trade and economic cooperation among countries around the world, and to promote global capital flows and the growth of international investment, the Washington Convention was formally established in October 1966, and the Centre for the Settlement of Investment Disputes (ICSID) was set up in accordance with the Convention.As the world's first arbitration institution specializing in the settlement of international investment disputes, the ICSID resolves, by means of arbitration and conciliation, disputes in international investment. ICSID, as the world's first arbitration body specializing in international investment disputes, resolves disputes in international investment through arbitration and conciliation. Through the cases since its establishment, the ICSID has continued to highlight its expansion.

Arbitration jurisdiction is a precondition for ICSID to conduct conciliation and arbitration, so the determination of ICSID's arbitration jurisdiction is very important. According to paragraph 25(1) of the Convention, three conditions are required for the Center to hear an international investment dispute between the parties: first, the parties to the dispute must be competent, one of the parties must be a national of a State Party to the Convention, and the other a State Party; second, there must be a competent legal dispute, i.e., the dispute in question must be a legal dispute arising out of the investment; and, third, competent written consent, i.e., the parties must agree in writing to the submission of the dispute to the ICSID. i.e., the parties must agree in writing to submit the dispute to the jurisdiction of the Center.

3. The Expansion of ICSID's Arbitration Jurisdiction and the Reasons for It

3.1 Path of Expansion of Arbitration Jurisdiction

3.1.1 Expansion of Subject Matter

The subject matter of ICSID's arbitration jurisdiction, i.e. the jurisdiction ratione personae of arbitration jurisdiction, needs to be combined with the relevant provisions of the Convention to distinguish between a Contracting State and a national of another Contracting State in order to determine whether the parties to the dispute are qualified. However, since the conceptual distinction in the Convention is not clear, it gives the arbitral tribunal discretionary power, and therefore, in actual cases, there are situations where the subject matter is interpreted in a broader way.

The expansion of the subject matter of the arbitral jurisdiction was reflected in the case of Tse Yip Sum v. Government of Peru. Xie Yeshen, a resident of Hong Kong, China, established Linkvest in the British Virgin Islands in January 2002, and in June 2002 Linkvest purchased 90% of the shares of TSG, a Peruvian company established in Peru, and in February 2005 Xie Yeshen directly purchased 90% of the shares of TSG. 2004, the Peruvian Tax Administration (ATA) adopted a series of measures in the country, and in September of the same year, it imposed an administrative sanction on TSG. In 2004, the Peruvian tax authorities took a series of measures in the country, including signing a report on TSG's tax audit in September of the same year and notifying TSG of its tax debts in December, and TSG was dissatisfied with the tax assessment, and in January 2005, the tax authorities imposed a "Tax Collateral Garnishment Order" on TSG, which it refused to revoke until March. Xie Yeshen argued that the measures taken by the Tax Administration against TSG constituted an expropriation, and on September 29, 2006, Xie Yeshen filed a lawsuit against the Peruvian government with the ICSID pursuant to the 1994 Bilateral Agreement on the Protection of Investments between the People's Republic of China and Peru (the "Sino-Peruvian BIT"), alleging that the measures taken by the Peruvian Taxation Administration against his company, TSG, constituted a breach of the Sino-Peruvian BIT and that Peru objected to the ICSID's jurisdiction over the case. Peru objected to the ICSID's jurisdiction over the case. Peru objected to the ICSID's jurisdiction over the case, arguing, among other things, that Xie Yeshen, a resident of Hong Kong, did not meet the definition of an "investor" under the Sino-Peruvian BIT (Bilateral Investment Agreement). In this case, Xie Yezhen's claim for arbitration before the ICSID was based on the 1994 China-Peru BIT [Article 1(2) of the 1994 China-Peru BIT expressly provides that "Chinese investors are natural persons who possess the nationality of the People's Republic of China"]. China - Peru BIT for the definition of the Chinese investor, but in 1994 Hong Kong has not yet returned to China, at this time Hong Kong has a high degree of autonomy, so Xie Yeshen at this time the subject is not eligible for its investor status that belongs to the arbitration jurisdiction of the subject of the subject of eligible to expand the interpretation.

In addition, in the foreign investment disputes in the determination of the nationality of legal persons, due to the Convention does not clearly stipulate this, so different cases appear different judgment standards, in the West African concrete industry v. Republic of Senegal, the arbitral tribunal that the nationality of legal persons to determine the criteria for the legal person's place of incorporation or center of management, and in the Vacuum Salt Products Company v. Ghana, the company Vacuum to the In Vacuum Salt Products v. Ghana, the company Vacuum filed a request for arbitration with the ICSID, and Ghana refused arbitration on the basis that Vacuum was a Ghanaian company and was not considered a "national of another Contracting State".

3.1.2 Expansion of Eligible Disputes

In the present case, there is also an expansion of the definition of "investment" in the Convention. First, the main problem is the lack of clarity in the definition of investment and investment disputes in the Convention. The determination of an investment involves a number of actors and their interests, including the host State, the home State of the investor and the investor, and the scope of the

investment has a direct impact on the obligations of the host State. Therefore, the determination of whether an investor's conduct falls within the scope of investment is directly related to the interests of individuals and states, and whether it can be legally safeguarded in international investment disputes.ICSID believes that an investment that meets the requirements of the Convention should, firstly, be an investment in the general sense, i.e., whether it conforms to the type of investment definition, the specific form of the definition of investment and the characteristics of the investment, and, secondly, the conduct should be recognized by both parties to the dispute and agreed upon by both parties. recognized by both parties to the dispute and explained in the agreement. At present, the Arbitral Tribunal enjoys a certain degree of power to expand its interpretation of "investment", which is clarified in different cases according to the different definitions of "investment" in the BITs signed by the parties at the time.

3.1.3 Consensual Expansion

One of the characteristics of ICSID jurisdiction is that it is voluntary, but the acceptance of central jurisdiction by the Contracting States is only a prerequisite, and each Contracting State has absolute discretion as to whether or not to accept central jurisdiction. Consent of the parties is the cornerstone of the ICSID's arbitral jurisdiction. In the 1972 case of Holiday Inn S.A and Others v. Morocco, the company filed a request for arbitration with the ICSID against the Moroccan government, which argued that the company was incorporated in Morocco and should therefore be governed by Moroccan law and did not fall under the jurisdiction of the ICSID tribunal, but HISA argued that the company had been under the control of HISA and should have been subject to the jurisdiction of the ICSID tribunal. HISA argued that the company had been under the control of HISA and that it should be treated as a foreign company with implied consent. In the end, HISA's request for arbitration was rejected by the arbitral tribunal and its implied consent was not recognized, but ultimately found to be the express consent of the parties. However, in the case of AMCO v. Indonesia, implied consent was chosen for a similar case, which shows that the arbitral tribunal's choice of whether the nationality of a legal person is the nationality of a foreign company is also a different jurisdictional expansion from implied consent to express consent of both parties.

3.2 Reasons for the Expansion of Arbitral Jurisdiction

Firstly, the fundamental reason for the expansion of ICSID's arbitration jurisdiction is that the Convention lacks clear provisions on its related issues. In actual cases, ICSID has left some jurisdictional issues to the arbitral tribunal to decide and handle, thus granting the arbitral tribunal a great deal of discretion, and the expansion of discretion has made the problem of the expansion of the ICSID's arbitration jurisdiction become more and more obvious. Secondly, there is also a subjective factor in the expansion of ICSID's arbitration jurisdiction, in which there is inevitably a tendency to favor domestic investors.

As a result, the continuous expansion of ICSID arbitration jurisdiction will bring harm to individuals and the state, first of all, the host country will suffer from the risk of damage to the public interest, the host government as the main body of public power tends to safeguard their own public interests, so its internal regulatory behavior is generally from this purpose. And foreign investors are generally manifested as profit-oriented business activities, in order to maximize the pursuit of personal interests as a private subject. Two diametrically opposed interests tend to be very easy to produce differences, naturally, also became the root cause of international investment disputes occur frequently. Secondly, the arbitrator's subjective views and experience will lead to different arbitration awards, ICSID arbitration tribunal arbitrators are not full-time arbitrators, most of them are from different countries in various fields of work, it is easy to happen, because the arbitrators are different, so the similar cases do not have the same decision. Moreover, the ICSID system does not formally adopt the rule of following precedent, the same case, the same judgment rule, the ISCID arbitral tribunal has greater discretion will also make the ICSID arbitral awards for the host country's public policy to have an immeasurable impact.

4. Reform Paths to Address the Expansion of ICSID Arbitration Jurisdiction

4.1 Existing International Response Measures

From the developed countries led by the United States as an example, the response adopted by developed countries to the expansion of ICSID arbitration jurisdiction is mandatory intervention, taking the North American Free Trade Agreement (NAFTA) as an example. In order to cope with this trend of expansion of ICSID arbitration jurisdiction, the United States has adopted measures to forcefully promote the reform of the ICSID supervisory mechanism, requiring it to set up an arbitration appeal mechanism and review the decision of the case from both the substantive and procedural aspects.

4.2 Reform Paths for the Expansion of ICSID Arbitration Jurisdiction

4.2.1 Expanding the scope of the "investor" subject matter

In HELLER v. China, the Chinese government argued that HELLER was not qualified as an investor under the Sino-German BIT and should not be a claimant in the arbitration because it was incorporated in China. According to the practice of ICSID arbitration, the criteria for determining the nationality of a legal person varies from case to case. If the nationality of the legal person is determined by the criterion of place of registration, HELLER is registered in China and does not qualify as an investor; if the nationality of the legal person is determined by the criterion of place of management, HELLER, as a subsidiary of HSG, has an independent legal personality and its place of management should be in China, and it does not qualify as an investor; if the nationality of the legal person is determined by the criterion of capital control, HELLER, as a subsidiary of HSG, has an independent legal personality and its place of management should be in China and does not qualify as an investor. If the criterion of capital control is used to determine the nationality of a legal person, HELLER Company, as a subsidiary of HSG, has an independent legal personality and its place of management should be in China, which does not meet the conditions for investors. If the criterion of capital control is used to determine the nationality of the legal person, HELLER Company, as a wholly-owned subsidiary of HSG, can be regarded as a qualified investor of HSG. If a different standard is used to determine HELLER's nationality, the final course of the case will be very different. Since the Washington Convention does not establish clear criteria for determining the nationality of legal persons and lacks a definition of these concepts, it is often left to the discretion of the arbitral tribunal to confirm the nationality of the legal investor in a specific case. However, the arbitral tribunal often adopts different criteria for interpreting "foreign control" and determining the nationality of a legal person in different cases, which expands the jurisdiction of the arbitral tribunal. However, arbitral tribunals have tended to expand their jurisdiction by adopting different criteria for interpreting "foreign control" and determining the nationality of legal persons in different cases, leading to discontinuity in the effectiveness of the cases, which has aroused the concern and dissatisfaction of States parties. Therefore, the scope of the definition of investor and the definition of the nationality of legal persons of investors and companies should be clearly stipulated in the Convention or other international legal rules.

4.2.2 Expanding the Definition of "Investment"

Although the Washington Convention attempted to define "investment" during the negotiation and drafting stages, the parties did not reach a generally acceptable conclusion. In Hai Le v. China, HSG's conduct was an "investment" under the Sino-German BIT and Protocol, despite the Chinese government's jurisdictional objection that HSG's claim did not arise directly from an investment, but only related to the land use rights and other assets of the claimant's subsidiary, Hai Le." ... In 1996, a German company called Hailo Seasoning established a joint venture with a local meat products factory in Jinan, China, until it became a wholly-owned German enterprise in 1999 and is now a wholly-owned subsidiary of HSG, which commissioned a factory in the Huashan area after obtaining

the use rights to state-owned industrial land in 2004.In 2014, the factory was determined to be within the Jinan Licheng District's housing expropriation announcement. The plant constructed by HELLER in Licheng District, Jinan City is real property and is a property right within the meaning of "investment" as defined by China and Germany." HSG's establishment of a subsidiary in China for the purpose of selling its products in China is an act of investment by a foreign investor in the host country under the Washington Convention, and the definition of 'investment' has not been expanded in this case." But in other cases, ICSID tribunals have exercised jurisdiction by expanding the definition of "investment." In Mitchell v. Congo, on March 5, 1999, Mitchell's law firm was seized by a Congolese military tribunal on suspicion that the law firm and its clients were engaged in illegal activities, two of the firm's lawyers were imprisoned, and all of the firm's documents and other items were confiscated. The military court acquitted Mitchell and eight months later released the two previously imprisoned lawyers and returned the firm's documents and other belongings. Mitchell filed a request for arbitration before the Center on October 6, 1999, in connection with the seizure measures taken by the Congolese military court, arguing that the case concerned only the confiscated documents, that the routine seizure of documents could not constitute an expropriation, and that the case therefore did not involve an investment.

However, the tribunal found that the absence of a definition of "investment" in the Convention and in the report of its Executive Director was an attempt to broaden the interpretation of the term "investment" and that the Congolese Government, in the absence of a declaration, had failed to take the necessary steps to exclude a particular investment dispute from the Central Arbitral Tribunal.146 The tribunal also found that the Government of the Congo had failed to take the necessary steps to exclude a particular investment dispute from the Central Arbitral Tribunal. The tribunal held that parties to a bilateral investment treaty (BIT) may not go beyond the level of protection recognized under international law when interpreting "investment" in accordance with their respective domestic laws, and that the host State's deprivation of ownership of a foreign investor's private property for a public purpose constituted an expropriation. In the present case, the tribunal found that the confiscation by the Congolese Government of the office, documents and other items in this case, which resulted in the cessation of the operation of Mitchell's office, was sufficient to find the office to be expropriated, essentially expanding the concept of expropriation. The Special Committee is of the view that, in the absence of a clear definition of "investment", the decision should be made on the basis of the investment agreement entered into by the parties or the applicable investment agreement, and not solely on the basis of the failure of one of the parties to take the form of a declaration. A party's failure to make a declaration excluding the jurisdiction of a centralized arbitral tribunal with respect to a particular investment dispute cannot be presumed to be the basis for that party's adoption of an expansive interpretation of the acceptance of the definition of "investment". It can be seen that in the absence of a clear definition of "investment" in the Washington Convention, the ICSID has exercised its discretion to obtain greater jurisdiction. Therefore, a clear definition of investment is also a pressing issue of the day.

4.2.3 Clarifying the Scope of Effect of Treaty Interpretation

The expansive nature of the jurisdiction of ICSID tribunals determines the manner in which investment treaties are interpreted. Limiting the scope of a court's interpretation of an investment treaty is conducive to constraining the court's tendency to expand its jurisdiction arbitrarily if it is expressly provided for at the outset of the treaty's conclusion. Contracting parties may make provision within the treaty for the validity of interpretations made at the time of the treaty's entry into force. In practice, many parties to BITs may conclude BITs with unclear agreements on certain issues, where the content of the treaty may provide for an agreement on the effect of the interpretation at the time of its entry into force. At the level of effectiveness, it may be agreed that the effect of the interpretation of the treaty is the same as the effect of the treaty itself, as Article 30(3) of the 2012 U.S. Model BIT provides that a common decision of the parties on the interpretation of the provisions of the treaty shall be binding on the arbitral tribunal. Any decision made by the arbitral tribunal shall be consistent

with the interpretative decision. Under that provision, the tribunal should follow the clarifications made by the parties and should not examine whether there had been any change in the treaty. As far as jurisdiction ratione temporis is concerned, even if the dispute arose before the entry into force of the treaty, the arbitral tribunal acquires jurisdiction by slicing and dicing the dispute in order to attribute jurisdiction ratione temporis to the treaty. Thus, the tribunal's jurisdiction is acquired.

Therefore, the Contracting Parties should expressly agree in the treaty on the time at which a dispute is to be submitted to the jurisdiction of the ICSID. If the contracting parties expressly provide for temporal jurisdiction within the treaty or interpret it on the premise of the right to interpret the treaty, it will effectively constrain the arbitral tribunal's extended interpretation of the jurisdictional provisions within the treaty.

5. China's Countermeasures to the Expansion of ICSID Arbitration Jurisdiction

With regard to the expansion of ICSID's arbitration jurisdiction, China should adopt a prudent attitude to deal with it, and can accept ICSID's jurisdiction in the form of "limited consent". "Limited consent" is a relatively robust consent, rather than "full consent" as rash and categorical rejection of ICSID jurisdiction. This kind of consent is especially suitable for BIT with developed countries, which is mainly due to the relatively perfect legal system and efficient and transparent government behavior in developed countries, as well as less political risk. And China's international investment relations with developed countries, China is still mostly in the position of capital-importing countries. Therefore, the form of "limited consent" not only allows China to retain part of the control power and the right to decide whether to file a dispute with the ICSID, but also to a certain extent to accept the jurisdiction of the ICSID arbitration will help attract investors from developed countries to invest in China. However, along with the gradual development of China into a major capital exporting country and the diversification of its role in economic and trade exchanges with developed countries, the attitude towards the expansion of ICSID arbitration jurisdiction should be changed with the change of China's status. In the case of signing BIT with developing countries or being a foreign capital exporting country, China should adopt the form of consent supplemented by comprehensive consent and important exceptions to accept the jurisdiction of ICSID. Due to the unstable economic and political situation and unsound legal system of some developing countries, or the fact that China has invested more in foreign countries, in order to safeguard the interests of our investors, China should adopt an open and fully consensual attitude towards the arbitration jurisdiction of ICSID. And because the number of investors from these countries is relatively small, so the chances of our country being sued to ICSID is also relatively low, even if we take a fully consensual attitude, but also not so much as to pose a threat to our country to be sued.

At the same time, in order to protect the rights and interests of our government and the good image of our judicial system, our country cannot give up the principle of exhaustion of local remedies and accept the expansion of ICSID's arbitration jurisdiction, international investment disputes are disputes between foreign investors and the host country's government, which should be solved by the host country's domestic law, and only when the dispute does not belong to be solved by the domestic law should it be submitted to ICSID for settlement. Therefore, the jurisdiction of the Center should be a supplementary avenue of relief to local remedies in the host country, not a substitute for local remedies. Because the Convention adopts a method different from international practice, that is, the principle of exhaustion of local remedies "request needs to be expressed", "waiver is tacit", leading to some countries in the way to clarify the principle of loss and can not use the principle. This has led to some countries not being able to use the principle because they are at a disadvantage in clarifying it. Therefore, our country should carry out BITs to expressly stipulate that the principle of exhaustion of local remedies is a prerequisite for submission to ICSID arbitration, otherwise the application of this principle will be waived by default.

Second, China's existing BITs have MFN clauses. However, the ICSID Arbitration Tribunal is prone to interpret this provision in an expansive manner, thereby expanding its jurisdiction. Based on the above, the tribunal will allow the investor concerned to submit any dispute related to the investment to ICSID arbitration under the MFN clause on the grounds that the treatment of the investor concerned is not favorable enough. In order to avoid the malicious use of the MFN clause by arbitral tribunals and foreign investors, China should provide a direct interpretation of this issue in the conclusion of BITs, on the basis of which exceptions to the MFN clause can be adopted to limit the abuse of this provision. Such exceptions could be made by clearly setting out the specific matters to which the provision does not apply or by indicating that the MFN provision has no retroactive effect, etc.

6. Conclusion

The expansion of the ICSID's arbitration jurisdiction is an inevitable trend of the day, and the resulting harm can jeopardize the interests of individual investors as well as the national interests of Contracting States. The expansion of arbitration jurisdiction mainly involves the expansion of the subject matter, the expansion of the investment interpretation and the expansion of the consent rule. As some of the elements are not clearly defined in the Washington Convention, it has led to the expansion of the arbitral tribunal's discretionary power. In order to cope with this situation, China, as a developing country, should respond positively to the countermeasures of developed countries and other countries, and cautiously respond to and promote the benign reform of the ICSID system and mechanism.

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