

The Annulment Procedure under the ICSID Convention --Is the Current Practice Regarding the Standard of Review Satisfactory?

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Abstract. "International Center for Settlement of Investment Disputes" (ICSID) arbitration mechanism is one of most important international investment dispute settlement mechanism nowadays, as the case it is handling is very special, often concerns in the government acts of the host state, the subject matter is of a huge amount and with immerse influences, so the fairness and consistency of the ICSID arbitral award is of vital importance. In this concern, the ICSID set up an independent in-built relief for the supervision of its awards, i.e. the ICSID arbitral award annulment mechanism. On one hand, the mechanisms is endowed with inherent uniqueness and advantage; while on the other hand, the ICSID arbitration awards annulment mechanism is only focusing on the procedural review, it has no right to review the substantive matters, and omnipresent contradicting interpretations and inconsistent awards nullified this mechanism. This paper focuses on the status quo of annulment mechanism; it analyzes the defects and the current crisis of the system from the perspective of five grounds for annulment, and proposes suggestions for improvements.

Introduction

In this era of globalization, the "economic globalization" gradually integrates individual national economies into a whole global economy. The rapid development of international investment had significant increased the amount of international investment disputes. Investment disputes relatively more complex, and of great concern of interests of each parties, if there is no timely and smoothly remedy, it may have negative impacts on investors, the host country, and the international economy as a whole, and therefore, the international community needs an effective and fair dispute resolution mechanism of international investment disputes.

ICSID arbitration is a new way of investment dispute resolution, which characterized by the loaned a lot from the commercial arbitration, say applicable laws continues to be the rules of private international law, and the confidentiality of arbitration, etc.. But in addition, it also has its own innovations and differences in comparison to commercial arbitration, the ICSID characterized by: arbitration procedural keeps a high control on the arbitration; the res judicata of arbitration award is highly respected by signatory states; and internal relief to the annulment of the awards. ICSID set up an internal relief mechanism to review the arbitration activities of the center, i.e. the ICSID arbitration annulment mechanism. This system is independent of review of the domestic courts of signatory states, and grant reliefs within the ICSID system, rather than the exterior remedies, i.e. judicial remedies of the commercial arbitration, thus the fairness and consistency ICSID awards is ensured.

This article will further discuss ICSID award annulment system later.

B. Definition

"Annulment" of award generally refers to the judicial ruling which rendered by a domestic which cancels part of all of the legal effect of the arbitral award. In the context of ICSID system, it refers the ruling which is rendered by an ad hoc committee appointed by the Centre pursuant to the Convention,

which reviews of the award of the arbitral tribunal, and overrules the award if a ground for annulment is satisfied.

Characters. Independence or internality. The annulment mechanism is evidenced by, firstly, "Convention on the settlement of investment disputes between states and nationals of other states" Article 53, and Article 54 directly states that ICSID award is final, and that each contracting state shall recognize and enforce, it is subject to no domestic court review; secondly, if a party refuses to accept the ruling of the ICSID tribunal and the award cannot be remedied by interpretation, revision and other remedies provided by the convention, as the parties can recourse to no remedies provided outside of the ICSID convention, the only remedy is to annul the award according to the convention, last but not least, in order to review the validity of the award, the convention provides that internal remedy institution, i.e. ad hoc committee, and its members are exclusive appointed from the Panel of Arbitrators.

Thus, this institutional review mechanism is built within, and this build-within remedy is independent of any other country, international organizations or international conventions, as well as improper domestic judicial intervention and annulment, so as to maintain the neutrality, finality and unity of implementation.

Non-appealability. Annulment of the award process is not an appeal process, nor do the annulment body - the ad hoc committee is a Appellate Body, the ad hoc committee is different from a the Court of Appeal, it is not entitled to examine the merits of the case, and it is also not entitled to alter the award, can only examine whether there is any ground for the annulment and render decision for set aside the award or not.

Only procedural defects shall lead to the annulment. The parties can not set aside an award on rounds other than five grounds that provided in ICSID convention Article 52(a. that the Tribunal was not properly constituted; b. that the Tribunal has manifestly exceeded its powers; c. that there was corruption on the part of a member of the Tribunal; d. that there has been a serious departure from a fundamental rule of procedure; e. that the award has failed to state the reasons on which it is based.); however, all of the grounds provided in Article 52 are procedural matters, which mean that ad hoc committees can only review the defects of ICSID arbitration procedure, but is not allowed to rule on the substantive justice.

Flexibility. Although the Article 52 of the ICSID convention restricted the annulment for five ground, but in addition to the improper composition of the arbitral tribunal and the bribery of arbitrator, which is already clear enough and there is no ambiguity in interpretation and application, the other three reasons, the ultra vires of arbitration tribunal, the award fail to state the reasons on which it was based and seriously departure from the fundamental rules of procedure, is to be flexibly interpreted, and the arbitral tribunal is at its discretion to rule on these matters, and the composition of the tribunal differs from case to case, the awards do not bind on each other as precedents, and the criteria is also differs from person to person. In addition, if the award is partly or wholly annulled, the parties to the original dispute will have to submit the case to a new ICSID arbitral tribunal, the new tribunal will also decide the case on its own and disregarding the annulment decision, the same issue may come back again to this new tribunal. But generally speaking, the ICSID annulment mechanism has a certain degree of flexibility.

ICSID Annulment deficiencies in the system

Is the Current Practice Regarding the Standard of Review Satisfactory? Based on the Klöckner case, the Amco case and the Vivendi case, had lodged a new arbitration after the first award, and again applied for the annulment of the second award, this situation seems to suggest that the ICSID arbitral awards are easy to annul and apply for a new. We will follow five grounds for annulment, to analyze the defects in ICSID arbitration annulment system.

Ad hoc committees have excessive discretion. There are restrictions on the degrees of "manifestly exceeded its powers", "serious departure from a fundamental rule of procedure", not any exceeded its powers or departure from a rule of procedure would render the award be set aside, also

need to examine the "manifest", whether the rule of procedure is "fundamental", and the departure is "serious". Therefore, the ad hoc committee has a lot of discretion in deciding these matters.

Another reason of excessive discretion is the annulment system itself, because it is not an appeal system, the commissioner arbitrators do not have to take into consideration the previous rulings, and they are not bind by the precedents. Even worse, as the investment disputes are growing, the number of arbitrators take part in the investment arbitration is growing too, as they come from different countries, with different educational background and arbitration philosophy, they will understand the flexible arbitration rules and international laws and regulations differently, thus often resulted in different awards.

Ad hoc committees' insistence in the finality of ICSID awards. The reason for this defect is ICSID annulment system is not an appeal system, thus the ICSID award emphasis finality, and deem the impartiality is met as long as procedural fairness is satisfied, which is also the value of ICSID annulment system. As aforementioned Article 52 of Convention provides the grounds for annulment are focusing on procedural issues, ICSID annulment system can only disregard the substantive issues. This caused the parties have submitted to ICSID annulment, but the ad hoc committees does not review the serious substantial errors, and in the event there is serious procedural error is found in the procedure, it further reviews whether the procedure error has led to the injustice of the substance, and it would refuse the annulment if the procedural error did not lead to the injustice of the ruling of the substantive matters.

So, there are certain cases had entered the annulment procedure, and the ground for annulment is already satisfied, but the ad hoc committee would not be annul them because the award is a just award. Although such practise maintained the correctness and stability of ICSID awards, but it is a departure from the balance of effectiveness and justice of arbitration.

A departure from the value of efficiency of the arbitration. Arbitration should be fair, efficient, and coherent. However, the ICSID annulment system has broken such balance, resulting in a contradiction of justice and effectiveness in the arbitration value. First, from the history of the ICSID practice, the retarded efficiency had already affected the number of cases submitted to ICSID arbitration. Since the term of arbitration itself is very long, if one party is unsatisfied with the award and proposes for an ad hoc committee to set aside the award, once the ruling is overruled, the case shall be heard by a new tribunal, and the parties may also be dissatisfied with the new award and apply for another annulment, which shall be resulting in a cumbersome arbitration "marathon".

According to the history, among the ICSID annulment cases, the Amco case had been through 7 years since the first registration of annulment application in 1985, and ended 19 1992, Klöckner case, 6 years, from 1985 to 1990. Such long term is very troublesome for ICSID and the parties to dispute, and the ICSID system may be a problem of itself, and the resulted the disbelief and avoidance of both investors and the contracting state of ICSID system.

ICSID Annulment Perfection

In summary, as the Convention only provides the ground for annulment on the procedural defects, but it is also difficult to distinct the procedural issues from the substantive issue, and the ICSID is plagued by the defects in the annulment system as well as inconsistency and disregard of substantive justice. We can see that it is urgent to reform the current ICSID arbitration system, in order to ensure the substantive justice of the ICSID award, safeguard the interests of the both parties, to gain the trust of the system.

Improve the interpretation of the Convention. It is advisable to further elucidate on the degree to which the ground for annulment of the award is fulfilled. Among the 5 grounds for annulment in Article 52 of the Convention, the "manifestly exceeded its powers", "serious departure from a fundamental rule of procedure" requires limitations such as the "manifestly", "fundamental" and "serious", the ICSID needs to further explain these criteria. For example, it can be directly provided that if it was agreed by the party to arbitrate in other institutions, but the ICSID ruled on this case, thus it is manifestly exceeded its power. By doing so, not only can excessive discretion of the ad hoc

committee be effectively limited, but it also provides clear guidelines for private investors and the contracting states in applying for annulment of awards.

To set an appropriate arbitration term, and its limitations. Arbitration term refers to the time of duration from the beginning of arbitration to the end. As the ICSID provides nothing about the arbitration term, which is also a reason that the CISID system is inefficient, this is further exacerbated by the annulment system. Because there is no limit on the term, the parties can take advantage of the annulment system to require the annulment and re-arbitration again and again, resulted in a "cycle of annulments and awards". Therefore, we can suggest the strict following of the principle of finality, if there is indeed undue influence on the impartiality on the award and it needs to set aside the award, thus the same case, no matter whatever the reason is, can only be applied for at most twice annulment, and each annulment procedure lasts no more than three years, or other reasonable term which can be universally accepted by the global community.

To establish the ICSID appeal system. Protecting the state sovereignty and public interests of the contracting states, the ICSID should consider to establish the appeal system. First, establishing a unitary appeal mechanism to achieve economic and efficiency, so as to achieve a coherent decision system. Second, the award which is upheld, modified or reversed by the appellate tribunal should be the final and binding award, either party who is dissatisfied with the result could submit the case to a new tribunal which is constituted and operates according to the same rules as the first arbitral tribunal.

We can see from the above mentioned that an appeal mechanism can provide the parties with substantive review of the decision in case of dissatisfaction with the ICSID traditional award, especially the parties that there were serious errors of fact in the ruling party to the arbitration, the annulment of ICSID arbitration system cannot provide them with adequate relief, the parties substantive review of the decision, maintenance ruling substantive justice aspirations and practical needs. And the appeals system runs only if the parties to the dispute are dissatisfied with the arbitration awards, if the parties are satisfied, then such appeal system do not operate in this case. At the same time, if the appeal mechanism is established, the arbitrators will be more prudent in considering the existing award, and thereby avoid different awards in similar circumstances.

Conclusion

In summary, as the sole supervisory system of the ICSID arbitration, ICSID arbitration award annulment system provided five grounds to set aside an award by that the tribunal was not properly constituted, the tribunal has manifestly exceeded its powers, corruption of arbitrator, a serious departure from a fundamental rule of procedure, and the award has failed to state the grounding reasons, in order to maintain the impartiality of the ruling by the center. However, with increasingly frequency of international investment activities, the center annulment system is not sufficient in catering the actual needs of the ICSID dispute resolution, exposed serious shortcomings, such as excessive discretion of the ad hoc committee, conflict understanding on the grounds for annulment, conflicts on application of law; followed by the exclusion of the examination on substantive issues of the award. But as the issue concerning the ICSID involving significant public interest and foreign policy of the host state, the shortcoming in failure to remedy the substantive defects has been criticized by the international community. At last, I think the advantages outweigh its disadvantages for an ICSID appellate mechanism, it maintains the impartiality and consistency of the award, as well as vital public interests of the contracting state. ICSID appellate system helps to solve the issue of excessive discretion for the ad hoc committee, the conflicts between the substantive review and procedural review, and the excessive long annulment term, I think that the building ICSID arbitral appeal mechanism is very positive, worthwhile for a further study.

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