CONSTRUCTING AN OPTIONAL ICSID APPEALS FACILITY IN SUSTAINABLE DEVELOPMENT PERSPECTIVE

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Abstract – Given the growing interconnection between international investment and sustainable development, there's an escalating need to rebalance interests in international investment relations. Currently, the International Center for Settlement of Investment Disputes (ICSID), one of the most effective investor-state investment dispute resolution tools, has an internal arbitral award annulment procedure that fails to achieve a balance between the values of fairness and efficiency in arbitration. This article aims to propose ideas for establishing an ICSID arbitration appeals mechanism, employing qualitative methodologies like desk and literature research. The findings highlight the difficulty of mandating an ICSID appeal facility. Thus, a practical approach involves introducing an optional ICSID appeals mechanism with increased procedural flexibility for state parties. Such an approach is more likely to garner consensus among ICSID members and contribute to ensuring security and predictability in a new international investment framework geared towards sustainable development.

Keywords: Sustainable Development; International Investment Arbitration; ICSID Annulment Procedure; Optional ICSID Appeals Facility; Bilateral Investment Treaties

INTRODUCTION

In 1992, the United Nations Conference on Environment and Development, held in Rio de Janeiro, referred to the concept of sustainable development and recognized investment as a key element. Investment was recognized as a key element.[1] The international community has largely reached a policy consensus on the view that foreign direct investment is a necessary component of sustainable development, and almost all UN member states are involved in the policy-making process related to sustainable development. Accordingly, it is of great research value to analyze the relevant issues of international investment disputes from the perspective of sustainable development. Since the 1990s, the number of cases received by the ICSID Investment Arbitration Center has been increasing, which has played a huge role in resolving disputes between host countries and foreign investors.[2] More and more investment treaties have been incorporated into the jurisdiction clauses of ICSID. At the same time, various problems existing in ICSID arbitration have become increasingly prominent and intensified. Some countries expressed extreme dissatisfaction or distrust towards ICSID arbitration. Some countries even announced their withdrawal from the ICSID Convention and completely rejected ICSID arbitration.[3]

The international community has questioned ICSID arbitration on various fronts, such as the prolonged delay of cases, the arbitrary extension of jurisdiction by arbitral tribunals, the favouring

[1]UN (United Nations) (1992) Agenda 21. URL (accessed 28 June 2023): https://sustainabledevelopment.un.org/content/documents/Agenda21.pdf

[2]Luo F. On the construction of a "selective" ICSID appeal mechanism. Western Law Review. 2017; (1): 124-132.

[3] Huang SX. Innovation of international investment dispute settlement mechanism from the perspective of sustainable development. Contemporary Law Review. 2016; (2): 24-35.

of investors' interests and the disregard for the will of state parties.[4] Among them, the conflicting and inconsistent decisions have led to a serious distrust of the substantive fairness of ICSID awards, which has been criticized. Although the ICSID Convention has set up a procedure for the annulment of arbitral awards, the Ad Hoc Committee does not review the substantive content of the awards, which makes it difficult to play a role in safeguarding the substantive fairness of the awards. Despite the tendency in the practice of certain Ad Hoc Committees to expand their powers of review, it appears from the provisions of the Convention itself that the grounds for annulment are limited to procedural issues. In order to enhance the substantive fairness and consistency of ICSID awards, the international community has begun to explore the possibility of establishing an international investment appeals facility.

LITERATURE REVIEW

The idea of establishing an appeals facility was proposed by the ICSID Secretariat as early as 2004 and was reflected in the Possible Improvements of the Framework for ICSID Arbitration (hereinafter referred to as the Proposed Draft). At present, the discussion on the establishment of an ICSID arbitration appeals facility focuses on three aspects. First, whether an ICSID arbitration appeals facility should be established. Secondly, the problems that may be brought about by the ICSID appeals facility. Third, the defects of the proposal proposed in the Proposal Draft and the specific proposal for establishing an ICSID arbitration appeals facility.

With regard to the first argument, proponents argue that ICSID arbitration is playing an increasingly important role in international investment, but that its practice has revealed many problems that are difficult to resolve with existing remedies. For example, ICSID arbitral tribunals hear the same or similar cases and apply the same or similar legal provisions, but the final awards are very different or even contradictory. In addition, ICSID also has the problem of one-sidedly focusing on the protection of investors' interests and neglecting the public interests of the host country, etc. The construction of the ICSID arbitration appeals facility can make up for the inherent defects of ICSID. The construction of the ICSID arbitration appeals facility can make up for the inherent defects of ICSID, improve the existing international investment environment, and promote the sustainable development of the global economy.[5] According to Wang Junjie, the traditional arbitration concept of "final arbitration" can no longer satisfy the desire of investors and host countries for substantive justice in arbitration results. In the context of ICSID launching a new round of reform, to promote the ICSID consensus members to formulate the "Appeal Additional Facility Rules", to give the appeals facility "fact and law" double adjudication power, will be conducive to make up for the shortcomings of the arbitration supervisory review system, and to restore people's confidence in ICSID. This will help to make up for the shortcomings of the supervisory review system of arbitration, promote the consistency of arbitral awards, and restore people's confidence in the ICSID.[6] Opponents argued that there was no need to establish a permanent arbitration appeals facility and that the shortcomings of the existing arbitration system could be addressed in other ways. Xie Baochao is of the view that the establishment of the ICSID appeals facility does not necessarily bring about consistency and accuracy of decisions, and that the legitimacy crisis of international investment arbitration can be overcome by consolidating hearings and increasing the participation of third parties in the existing institutional framework, so the need

[4]Gong BH, Zhu JC. Research on recent reform of ICSID investment arbitration mechanism and China's position. Shanghai Economy. 2022; 6(5): 57-73.

[5]Du YQ, Huang ZL. Re-examination on the construction of appeal mechanism in international investment arbitration. Journal of Sichuan Normal University (Social Sciences Edition). 2021; (1): 97-104.

[6]Wangle JJ. The legal basis and system selection of ICSID appeal mechanism. Social Science Journal. 2018; (5): 150-155.

for the establishment of such a mechanism has not yet been able to break the principle of finality, which is the cornerstone of investment arbitration.[7]

Regarding the second discussion, numerous scholars have expressed their concerns and proposed solutions. For example, Jaemin Lee points out that an appealing party may use its right of appeal to abuse the ICSID arbitration appeals facility, and in response to this problem, the author proposes to set up a matching security system to prevent the appealing party from abusing its right of appeal by making it pay a certain amount of deposit.[8] For example, Adam Raviv pointed out in his article that the establishment of an appeals facility for ICSID arbitration would be beneficial for maintaining the consistency of awards, correcting errors in the application of the law and possible serious factual errors, and compensating for the shortcomings of the current award review mechanism, but it also has the disadvantage of contradicting the principle of finality in arbitration, increasing the number of cases to be resolved, and leading to the politicization of the dispute settlement system. After analyzing the various aspects of the ICSID procedure, he attempted to avoid the impact of the introduction of an appeals facility on the efficiency of the original arbitration mechanism from a procedural point of view.[9]

Regarding the specific design options for the ICSID appeals facility, the international community has been looking for ways and means to make an international investment arbitration appeals facility a reality, but no substantial progress has been made so far. The following is the analysis of the problems with the existing arrangements from some scholars. According to scholar Chen Wenzhu, the Proposed Draft goes some way to addressing the difficulty of amending the ICSID Convention by "unanimous consent" by devising an option to implement an appeals facility through an extra-conventional arrangement and by providing a detailed procedural design for the appeals process. Unfortunately, while there was much support and opposition to this idea, there was also a minority of opposition. The differences between the state parties were too great for the idea to become a reality. This option suffers from the following problems: Firstly, the recognition and enforcement of the award. If an appeals facility is introduced by the BIT between specific Contracting States, the agreement is only valid between the specific Contracting States and the other Contracting States are still bound by the ICSID Convention. Because the ICSID award is final and must be recognised and enforced by the Contracting State as a final judgment of its own courts unless it is set aside. Thus, even if an appeal procedure has been introduced between particular Contracting States and a party initiates an appeal procedure to obtain an appeal decision overturning the original award, the successful party to the original award may still seek recognition and enforcement of the original award in other Contracting States under the Convention. In this way, the purpose of the appeals facility will be defeated, and the appeals award will coexist with the original award, resulting in confusion in recognition and enforcement.[10] David A. Gantz's analysis of the establishment of the ICSID appeals facility in his article is approached from both a temporal and a legal perspective. He envisaged in detail the specific system of the ICSID appeals facility, such as selection of personnel, choice of venue, scope of cases, standards and procedures of review, applicable laws, effectiveness of decisions, etc., and emphasized that the ICSID appeals facility is

[7]Du YQ, Huang ZL. Re-examination on the construction of appeal mechanism in international investment arbitration. Journal of Sichuan Normal University (Social Sciences Edition). 2021; (1): 97-104.

[8]Lee J. 'Introduction of an Appellate Review Mechanism for International Investment Disputes: Expected Benefits and Remaining Tasks', in J. E. kalicki, A Joubin-Bret (ed.), Reshaping the Investor-State Dispute Settlement System (Brill | Nijhoff: Leiden, 2014) 474-495.

[9]Raviv A, 'Achieving a Faster ICSID', in J. E. kalicki, A Joubin-Bret (ed.), Reshaping the Investor-State Dispute Settlement System (Brill | Nijhoff: Leiden, 2014) 653-717.

[10]Chen WZ. Study on the reform of the ICSID arbitration mechanism. Knowledge Economy. 2010;(9): 18-21.

different from the WTO appellate body.[11] Yi Shuling analyzes the four most fundamental variables in the design of an appeal facility: venue, hierarchy, procedure and cost, which reflect the four pairs of tensions between permanent and ad hoc bodies, general or limited review, alternative or supplementary to existing rules, and the right to request an appeal and the sharing of costs of an appeal and reveal the four dimensions of time, hierarchy, procedure, and cost, respectively. The balance of these four issues frames the institutional boundaries of the appeals facility.[12]

Through the review and analysis of the literature, the researcher found that although there have been a lot of research results on the construction of ICSID arbitration appeals facility, the problem of constructing an ICSID appeals facility is mainly analyzed from the level of jurisprudence, and the literature analyzed from the level of the practice of sustainable development is comparatively less. This is one of the reasons why this study is of theoretical and practical significance.

METHODOLOGY

This section describes the research methods used in this study. The researcher adopts a qualitative research approach. Basically, the methodology to be employed in conducting this study is analytical in nature. The analytical approach is employed to utilize the facts and/or information that is available to evaluate the materials in finding all possible evidence as the answer to the research question.[13] Hence, the method taken of this study is basically guided by the experience of the researcher and not solely based on theories. When proposing a specific design scheme for the establishment of an ICSID arbitration appeals facility, taking into account the different interests of state parties and private investors, it is necessary to thoroughly analyze the current negative impact of ICSID arbitration on host countries or investors in practice and the shortcomings of the scheme proposed in the Draft Proposal.

Theoretical legal research involves both primary and secondary sources of law. The former are authoritative statements of legal rules by government agencies, including legislation, administrative regulations, etc. The latter are materials about the law used to explain, illustrate, develop, position, etc. The primary secondary sources are law reviews, treaties, etc. The legal resources relied on for this study are legislation, journal articles, and law reports. Some other research resources are online databases such as Kluwer Arbitration and Jus Mundi.

FINDINGS

In terms of existing treaty practice and theoretical studies, the establishment of an appeals facility is generally regarded as an important option for reforming the international investment arbitration system. However, after more than a decade of deliberation, this proposal is still at the stage of consideration and recommendation, which indicates that countries are still doubtful about the establishment of an additional appeals facility and are still wavering between the values of substantive justice and efficiency, and have not yet reached a real consensus. The result of the article is that to solve the legitimacy crisis of international investment arbitration, the establishment of an appeals facility is the way to go. The following analyzes the necessity and rationality of establishing the ICSID appeals facility and puts forward the specific establishment scheme. It is also a response to the discussion raised in the literature review.

The Necessity and Rationality of Establishing the ICSID Arbitration Appeals Facility

[11]Gantz DA. The United States-Mexico-Canada Agreement: settlement of disputes. Arizona Legal Studies Research Paper Series. 2019; 5: 1-12.

[12]Yi SL. Analysis on the appeal mechanism of international investment arbitration. Gansu Social Sciences. 2007; (6): 111-114.

[13]Rubin RB, Rubin AM, Haridakis PM, Piele LJ (2009) Communication Research: Strategies and Sources. Boston: Cengage Learning.

The necessity and rationality of establishing the ICSID arbitration appeals facility are as follows. Firstly, the establishment of an international investment arbitration appeals facility can restore trust in international investment arbitration, promote consistency and predictability in arbitral awards, reduce the risk of inconsistent awards and give the facility continuity and legitimacy.[14]In recent years, ICSID arbitrations have produced widely divergent decisions on issues such as the applicability of most-favoured-nation clauses to the rules of dispute settlement procedure and the interpretation of security exceptions, and the inconsistency of decisions has been a central criticism of ICSID.[15] The ICSID's current annulment procedure is inadequate in correcting erroneous decisions and clearly does not serve the purpose of safeguarding the consistency of awards.[16] On the one hand, the ICSID arbitration annulment procedure deliberately avoids substantive justice and only gives the Ad Hoc Committees the competence to review procedural issues of the award, rendering them powerless in the face of substantively erroneous arbitral awards; on the other hand, the practice has proven that ICSID Ad Hoc Committees are so indecisive in their annulment and appeal functions that some Ad Hoc Committees, unable to resist the temptation of being an appeals facility, have lowered the threshold for annulment review,[17] turning the institutional annulment procedure into a de facto appeal procedure, using various interpretative tools to review the substantive content of ICSID awards. Therefore, based on the objective of enhancing the consistency of decisions, instead of leaving it to the Ad Hoc Committee to arbitrarily transform the annulment procedure into an appeals facility, an appropriate, reasonable and realistic appeals facility should be set up directly through a top-down system designed by the States Parties through a convention on the basis of consultation.

Secondly, the recent practice of international investment arbitration shows that in the game between the public interests of the host country and the interests of investors, the latter gets more attention and protection, which leads to the dissatisfaction of the host country towards international investment arbitration. How to balance public interest and private interest has become an important issue worth paying attention to. The liberalization of international investment treaties, the excessive discretion of the arbitral tribunal in the interpretation of international investment clauses, and the lack of authoritative interpretation are important reasons. The more favourable the arbitral award is to foreign investors, the more foreign investors will bring the arbitration, and the larger the market for international investment arbitration will be; and the more biased the arbitrator is in favour of the foreign investor, the more options he or she will be given, which will likely result in the arbitral award becoming increasingly biased in favour of the foreign investor, thereby seriously undermining the fairness of the award.[18] The use of an appeals facility to restrain the discretion of the arbitral tribunal and to provide proper scrutiny of the content of the award to prevent abuse by the arbitrators is therefore necessary.

Finally, it has been argued that the appeals facility has been challenged as being in breach of the principle of finality of arbitration. However, this challenge is not valid. International investment dispute cases between foreign private investors and host countries often involve many aspects of

[14]Frank SD. The legitimacy crisis in investment treaty arbitration: privatizing public international law through inconsistent decisions. Fordham Law Review. 2004; 73(4): 1521-1625.

[15]Luo F. On the construction of a "selective" ICSID appeal mechanism. Western Law Review. 2017; (1): 124-132.

[16]Frank SD. The legitimacy crisis in investment treaty arbitration: privatizing public international law through inconsistent decisions. Fordham Law Review. 2004; 73(4): 1521-1625.

[17]Cui Y. Functional improvement of the ICSID arbitration oversight mechanism: a sustainable development perspective based on the international investment regime. China Price. 2015; (9): 22-25.

[18]Xu CL. Fair and equitable treatment: an interpretation of the true meaning. Studies in Law and Business. 2010; 27(3): 59-68.

the host country's significant public interests and the formulation of national policies, and therefore, the principle of finality of arbitration should, in a certain sense, also reflect substantive justice in terms of the social and public interests behind the state, and between efficiency and fairness, international investment arbitration should be more concerned with fairness and substantive justice of the award, rather than In between efficiency and fairness, international investment arbitration should be more concerned with fairness and substantive justice of the award, rather than giving absolute priority to efficiency and adhering to the rule of finality.[19] Finality should not be seen as an absolute merit of international investment arbitration, nor should it be its absolute principle. The finality of arbitration is not unchangeable compared to the value objective of better ensuring the substantive and procedural fairness of arbitral awards.[20]

Proposal for the Establishment of the ICSID Arbitration Appeals Facility

The existing ICSID arbitration needs to be reformed to give greater consideration to the needs of developing countries and to better balance the interests of investors with those of host countries from a sustainable development perspective. As mentioned above, it is not practical to establish a mandatory appeals facility in the general sense under the ICSID framework based on the consent of all state parties, and leaving the decision to the parties is the most appropriate option. It would certainly be more acceptable to state parties if the appeals procedure were set up as an optional procedure, with state parties free to decide on its exclusion or inclusion, allowing them to retain sufficient initiative over the actual use of the appeals procedure, in line with their desire to increase their control over the arbitration procedure.[21] The so-called optional appeals facility, which is a statutory part of the ICSID arbitration procedure, is set up within the framework of the ICSID Treaty, but it is up to the Parties to negotiate whether the procedure applies to a particular party, or to a specific investment dispute.

As mentioned above, sustainable development has become a general principle of international investment policy in recent years. So far, however, the ICSID Convention has not incorporated the principle of sustainable development into its amendments. In view of this, it is necessary to include provisions related to the sustainable development of international investments in future amendments to the ICSID Convention. First, the amendments should outline how sustainable development principles will be incorporated into the Convention. This may include specifying that investment disputes should be evaluated in the context of their impact on sustainable development. Second, one of the challenges in incorporating sustainable development principles into the Convention is striking a balance between protecting the rights of foreign investors and promoting sustainable development goals. This balance must be carefully articulated in the amendments. Third, the amendments should specify the mechanisms for enforcing sustainable development provisions and the consequences for violations. It's important to note that the process of amending an international treaty like the ICSID Convention can be complex and time-consuming, as it involves multiple sovereign states with varying interests and perspectives. The incorporation of sustainable development principles would require careful consideration of the specific language and provisions to ensure their effective implementation while preserving the core objectives of the Convention, which is to provide a fair and neutral platform for resolving investment disputes.

[19]Zhang G. On the equity of public interests and investors' interests in the international investment arbitration. Science of Law(Journal of Northwest University of Political Science and Law). 2011; 29(1): 109-114.

[20]Xiao J. Feasibility study on the establishment of an appeals facility for international investment arbitration: from the negotiation of bilateral investment treaties between the United States and China. Studies in Law and Business. 2015; 32(2): 166-174.

[21]UNCTAD (United Nations Conference on Trade and Development) (2015) World Investment Report 2015. URL (accessed 1 July 2023): https://unctad.org/system/files/official-document/wir2015_en.pdf

The model to be adopted for an optional appeals facility may refer to the relevant systems in international commercial arbitration in various countries. Optional appeal procedures in international commercial arbitration can be divided into two basic models. One is the agreed exclusion model, which defines the appeal procedure as a legal objection procedure and allows the parties to agree on exclusion. For example, in the international commercial arbitration system of Argentina and the United Kingdom, the appeal procedure under this model will be based on the principle of application and the exception of non-application. The other is the agreed introduction model, which legally excludes the appeal process but allows the parties to agree to introduce it, such as the New Zealand international commercial arbitration system. Considering the different acceptance degrees of each contracting party, the agreed introduction model may be easier to be recognized by all contracting parties. Therefore, the following design is mainly based on the agreed introduction model.

The Proposed Draft gives too much freedom to Contracting States and investors and tends to fragment the appeals facility.[22] Therefore, while respecting the freedom of the parties, the optional ICSID appeals facility should also limit the freedom of the parties in accordance with the objectives of the design of the system. Optional appeals must be based on the unanimous consent of the parties to apply to a specific investment dispute, which can be given by the host country, the investor's home country and the investor through investment treaties, domestic investment legislation and investment contracts for inclusion in the ICSID appeals facility. To be specific, first, to the extent that a multilateral investment treaty contains a provision agreeing to opt for ICSID jurisdiction over investment disputes, a Contracting State that further agrees to include an ICSID appeals procedure may do so expressly in the investment treaty. Of course, if the ICSID appeals procedure is not included in the investment treaty between the Contracting States, the two States may subsequently include it by supplementary agreement.

Second, international investment practice also allows States parties to the ICSID Convention to provide for general consent to the jurisdiction of the ICSID Centre by way of domestic legislation in their domestic investment legislation, and this also applies to consent to the appeals process. If the host State and the investor's home State agree to include an ICSID appeals procedure, this option will bind the investor and either the host country or the investor will have the right to initiate an appeals procedure to challenge the award in an ICSID arbitration proceeding.

Third, if the BIT between the host country and the investor's home country is not included in the appeal procedure, the appeal procedure between the host country and the investor may also be included through the investment contract. From the perspective of the host country and the investor, the inclusion of an ICSID option clause for an appeal procedure in the investment contract implies that the parties have strong concerns regarding the substantive justice of the arbitral award, and allowing the parties to include an appeal procedure in the contract is both a recognition of the parties' free will and a respect for the value of fairness. From the perspective of the investor's home country, the introduction of an appeal procedure for specific disputes between the host country and the investor, where the parties will bear all the time and economic costs, does not result in any detriment to the interests of the investor's home country, but rather ensures the substantive justice of the award through an appeal and enhances the consistency of the application of the BIT provisions.

The ICSID appeals facility would also need to limit the option of the parties. Firstly, if an appeal procedure has been included in a BIT between the Contracting States, it may not be excluded by way of an investment agreement between the host country and the investor and, at the same time, the option will bind the investor. In the course of an ICSID arbitration, the disputing party would have to challenge the ICSID award by way of an appeal and would not be allowed to resort to annulment proceedings again or to exclude the application of the ICSID appeals procedure by way

[22]Luo F. On the construction of a "selective" ICSID appeal mechanism. Western Law Review. 2017; (1): 124-132.

of an investment agreement. From the perspective of the host country, a sudden change of intention to the contrary is neither necessary nor meaningful. From the investor's perspective, the ICSID appeals process will cover all the functions of the annulment process and will not diminish the investor's right to object. Secondly, in order to ensure a stable and consistent exercise of the appeals facility's mandate, the host country, the investor's home country and the investor would not be allowed to make arbitrary changes or adjustments to the appeals facility's procedural rules. The Proposed Draft gives the Contracting States the right to amend the rules of procedure of the appeals facility. This idea, if put into practice, would lead to the fragmentation of the appeal process unless ICSID Contracting States unanimously agree to amend the ICSID appeal rules.

In terms of the scope of review and the manner in which the appeals tribunal should adjudicate, the appeals tribunal's terms of reference should be based on the values of both fairness and efficiency and be consistent with the overall objectives of the appeals facility. The Proposed Draft (2004) defines the scope of review of the ICSID appeals tribunal as "manifest errors of law" and "serious errors of fact", and consequently considers that the appeals tribunal should decide by upholding, varying or setting aside the original arbitral award, as well as by remanding it. This design is open to question. As the ICSID appeals facility aims to enhance the consistency and predictability of international investment arbitration awards and is concerned with consistency in the application of treaties, the scope of review should focus on questions of law, leaving questions of factual determination to the arbitral tribunal (Given the character and qualifications of arbitrators under the Convention, it is highly unlikely that an arbitral tribunal would make a serious error of fact, except in the case of bribery of an arbitrator. This is one of the matters for which an application for quashing is provided in the Convention).

In the appeal process, parties may appeal on the grounds set out in Article 52 of the ICSID Convention, and may also appeal on the basis of an error in the interpretation and application of an investment treaty by an arbitral tribunal. In view of the fact that jurisdiction has always been one of the points of contention in ICSID arbitrations and that in practice there have been conflicting decisions made by various arbitral tribunals in this regard, the appeals facility should be given the right to review preliminary rulings in order to prevent a waste of resources. As the appeal tribunal does not review questions of factual determination, the appeal tribunal may, based on the results of its review of questions of law, render an award upholding, setting aside or varying the original arbitral award, and it is not appropriate to remand.

As regards the legal effects of the choice of appeals facility, it is necessary to clarify the impact of the introduction of an optional appeals facility on annulment proceedings and the enforcement system, as well as on recognition and enforcement proceedings. In the framework of the ICSID Convention, annulment and appeals, as two different types of challenge, can also be pursued in parallel, at the choice of the parties. However, in relation to a specific ICSID decision, parties cannot initiate both types of challenge proceedings simultaneously or sequentially. If the parties have opted by mutual consent to include an appeal procedure, the parties may only use the appeal procedure to challenge an ICSID decision and may not initiate further annulment proceedings.

First, the review function of the appeal procedure has fully covered the review function of the annulment procedure, and replacing the annulment procedure with an appeals facility based on the agreement of the States Parties will not result in any derogation from the rights of the parties; second, if the parties are allowed to freely choose between the two types of objection methods, given that the States Parties have agreed to include an appeal procedure, it may result in the parties initiating separate objection procedures, resulting in a waste of resources. In light of the above analysis, although the appeal procedure and the appeal procedure have been agreed upon by the parties, the parties may not be able to choose between them.

Based on the above analysis, although appeal procedures and annulment procedures should co-exist under the framework of the ICSID Convention, in order to prevent parties from abusing the procedure by initiating adversarial opposition procedures, once an appeal procedure has been included by agreement of a Contracting State or an investor, the appeal procedure takes precedence over the annulment procedure, and after an ICSID award has been rendered, the

disputing party can only raise an objection by way of appeal and cannot resort to the annulment procedure again.

Each State Party is required to provide assistance to the proper functioning of the body and to the parties in the exercise of their right to appeal. Firstly, if, after an ICSID arbitral award has been rendered, a party files an application for appeal on the basis of an agreement containing the parties' consent to be included in the appeal proceedings, the other Contracting States shall refuse the application for recognition and enforcement of the original award for the duration of the appeal proceedings on the basis of the objections of the appealing facility. Secondly, if, within the statute of limitations for appeals, a successful claimant applies to the other Contracting State for recognition and enforcement of an ICSID award, and the respondent raises an objection to that Contracting State that the award is not final, a declaration will be made those appeal proceedings will be initiated and the country against which enforcement is sought shall suspend the recognition and enforcement proceedings until the decision of the appeals tribunal has been rendered and then, upon application of the parties, terminate or resume the recognition and enforcement proceedings. Finally, although the appeal procedure is incorporated on the basis of the consent of the Contracting States, there is also the possibility that the parties may initiate the appeal procedure at will and abuse the resources, and the Convention may require the appealing party to post a bond or an appeal fee to prevent the parties from resorting to the appeal procedure at will.

CONCLUSION

Constructing a specialized appeals facility for international investment arbitration is an effective option for reforming international investment arbitration. Firstly, consistent provisions should be made under the framework of the ICSID Convention on the operation mode of the appeals facility, the composition of the appeals tribunal, its terms of reference, and the validity of appeal decisions. Secondly, it should be left to the discretion of Contracting States to decide among themselves, through the BIT and other means, whether to introduce an appeals process in their ICSID arbitrations with investors. The current practice of investment arbitration suggests that in the future the parties initiating appeals proceedings will be predominantly host countries, which may use the appeals process to delay the enforcement of arbitral awards against them, to the detriment of the interests of the winning investor. This issue could be addressed by limiting the statute of limitations for appeals, the period of review, and the provision of security by the appealing party.

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