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Dynamic Interpretation of International Investment Treaties

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ABSTRACT

The legal regime of international investment treaties (IITs) is an important part of international economic law, designed to provide legal protection for cross-border investment through bilateral investment agreements (BITs) and multilateral investment agreements (MIAs). However, with the changes in the global economic landscape, the current system faces many challenges in terms of investor-state dispute settlement (ISDS) mechanism and other aspects. By sorting out the historical evolution of international investment treaties, analysing the practical problems of the international investment treaty mechanism and exploring the path of institutional reform, we hope to provide reference for the construction of a fairer and more efficient international investment legal system.

KEYWORDS

International investment; Investment treaties; Investment arbitration

1. INTRODUCTION

Since its emergence in the 1950s, the legal regime of international investment treaties (IITs) has become a central tool of global investment governance. However, with the surge in the number of investment disputes and the expansion of the ISDS regime, the current system has revealed obvious deficiencies in balancing the rights and interests of investors with the sovereignty of host countries. Despite China's gradual transformation from a "capital-importing country" to a "capital-exporting country", China has always been in a passive position in the international investment system. The purpose of this paper is to explore the reform direction of the legal system of international investment treaties through historical analysis and case studies. It will help to grasp the development trend of international investment and promote China's economic development.

2. ORIGINS OF INTERNATIONAL INVESTMENT TREATIES

2.1. 1950s - 1970s: The Initial Formation of BITs

After the end of the Second World War, the global economy entered a phase of recovery, and developed countries actively promoted the signing of bilateral investment treaties (BITs) with developing countries in order to protect their overseas investments. At the same time, developing countries, in order to attract foreign investment to promote their own economic development, gradually accepted and signed these agreements, including investment protection provisions. In the context of the Cold War, developed countries wished to protect their overseas assets through investment treaties, while developing countries wished to attract foreign investment through treaties in order to promote economic modernisation, and in 1959, Germany signed the world's first BIT of modern significance with Pakistan, marking the formal beginning of the international investment treaty regime.

However, the BITs of this period have obvious limitations. First, these treaties are overly focused, focusing mainly on the protection of investors' rights and interests and lacking effective constraints on investor behaviour. For example, very few BITs contain specific and clear provisions on investors' obligations in the areas of employment labour relations and environmental protection. This pattern of one-way protection leads to pressure on host countries in terms of environmental protection and labour rights, and eventually they have to make rules to regulate investor behaviour through other means. This unbalanced treaty design reflects to some extent the unequal negotiating position between developed and developing countries at that time, and also exposes the inadequacy of the institutional design of early IITs. [1]

2.2. The 1980s and 1990s: Economic Globalisation and the Rise of the Multilateral Agreement on Investment (MAI)

Since the 1980s, the world economy has entered the era of globalisation, the process of economic globalisation has accelerated and the scale of transnational investment has expanded rapidly. With the free flow of capital, technology, labour and other factors of production on a global scale, investors have an increasing need for legal protection. Against this background, Multilateral Investment Agreements (MAIs) have developed rapidly. For example, the North American Free Trade Agreement (NAFTA) and the Energy Charter Treaty (ECT) emerged as representative MAIs of this period.

Chapter 11 of NAFTA introduced the Investor-State Dispute Settlement (ISDS) mechanism for the first time in a multilateral agreement, allowing investors to sue the host country directly, and this mechanism has become one of the core provisions of the MIA. At the same time, developing countries have begun to re-examine the advantages and disadvantages of BITs, and some have even abrogated a large number of BITs. This phenomenon reflects developing countries' rethinking of the international investment treaty regime, especially on the balance between host country sovereignty and investor rights and interests.

Nonetheless, there are still some problems with international investment treaties of this period. For example, the wide application of the ISDS mechanism has triggered controversy over the limitations of host countries' sovereignty, and some countries are concerned that investors may abuse the mechanism, leading to the risk of high compensation for measures taken by host countries in the public interest. [2] In addition, the provisions of MITs on sustainable development issues, such as environmental protection and labour rights, remain weak and fail to adequately respond to the new demands of global governance.

3. ISSUES FACING INTERNATIONAL INVESTMENT RULES

3.1. International Investment Treaties are Heavily Influenced by Politics and Lack Standards of Legal Rules

The "depoliticisation" of international investment rules is reflected in two dimensions: first, transnational investment is protected by specialised, internationalised rules, thus insulating transnational investment from domestic political risks in the host country; and second, international investment disputes are resolved in accordance with the pre-set obligations of investment protection and dispute settlement procedures in international investment agreements (IIAs). [3] But at present, this traditional logic of "depoliticisation" has been greatly challenged. The United States has an important position in international investment rules, and its diplomatic relations with other countries directly affect the pattern of international investment treaties. For example, successive U.S. presidents have repeatedly used "human rights issues" to block Sino-U.S. BIT negotiations, and most U.S.

economic sanctions against Chinese companies are due to political factors. The US-China relationship is an important part of the world pattern, and the US political policy towards China will directly affect the construction of international investment rules. Currently, the relevant international law does not regulate the economic sanctions and blockade of big powers, and the international investment rules are increasingly affected by politics, hindering the development and recovery of the global economy.

3.2. The Predominance of BITs and the Accelerated Fragmentation of the Rules Regime

The current system of international investment rules is dominated by bilateral investment treaties (BITs), which are huge, overlapping and interacting with each other, lacking uniform standards, and presenting a "multilayered" character. Secondly, there are different historical backgrounds and large differences in the level of economic development between countries. Each economy seeks different interests, on investment protection standards and investment liberalisation and investment regulation and regulatory capacity requirements and other issues there are differences, resulting in countries in the process of seeking foreign investment cooperation, most of the "one case, one discussion" principle, that is, separate negotiations with different countries to form a bilateral investment agreement. [4]Although this approach is sound and feasible, and facilitates the signing and implementation of treaties, the limitations of bilateral investment treaties themselves will result in trade barriers in the long term, fragmenting the international investment market and accelerating the fragmentation of the international investment rules system.

The fragmentation of the international investment rule system can bring about a series of problems, creating obstacles to the facilitation of investment by investors on a global scale, increasing the costs for investors, and being detrimental to the free flow of capital. At the same time, the fragmentation of international investment rules will bring about a series of regulatory difficulties, the rules of investment treaties have different standards, international arbitration tribunals are faced with difficulties in obtaining evidence and many other difficulties, and their arbitration results lack accountability and are not fully binding on the parties to the dispute. The current fragmentation of the system of investment rules makes it unrealistic to establish an investment dispute settlement body of a global nature.

3.3. Imbalance between the Interests and Rights and Obligations of Developed and Developing Countries

Taking the United States' revision of the model bilateral investment and protection agreement (BIT) as an example, it requires the host government not only to take on the task of investment protection, but also proposes restrictions on domestic policy transparency, government behaviour and state-owned enterprises. This shows that when signing BITs with developing countries, developed countries, in addition to seeking most-favoured-nation (MFN) treatment, also intervene in the business environment of developing countries in order to remove obstacles to the entry of foreign capital and to seek to maximize their interests. At the same time, developed countries use environmental standards, security reviews and other measures to impose restrictions on developing countries and even discriminate against investors from developing countries. [5] For example, the Committee on Foreign Investment in the United States (CFIUS) can review any foreign investment transaction. Huawei and other Chinese companies' acquisitions in the United States have been frequently blocked due to CFIUS reviews. Developed countries use their dominant position to forcefully reverse trade balances and force developing countries to accept their investment propositions, causing turmoil in the economic development of developing countries.

When developed countries signed investment treaties with developing countries, they would have an impact on the domestic environment of developing countries, and the additional obligations imposed on developing countries by the investment treaties made it possible for developing countries to temporarily trade off economic and social security and a green environment for the stimulation of their economies by foreign investment. The impact of investment treaties sometimes spilled over into the domestic affairs of developing countries, causing developed countries to intervene in the internal affairs of developing countries, which exacerbated the conflict between developed and developing countries. Transnational corporations from developed countries sometimes pursued economic interests to the exclusion of developing countries, directly implanting the investment operation models of developed countries, interfering with the space for autonomous development of developing countries and causing damage to the interests of developing countries, which, coupled with the inadequacy of communication and dialogue, had undoubtedly exacerbated the conflict between developed and developing countries.

3.4. Dilemmas in International Investment Dispute Settlement Mechanisms

The settlement of international investment disputes is an important part of international investment activities. At present, the Investor-State Dispute Settlement Mechanism (ISDS) takes international arbitration as its main means, and international arbitration has the advantages of neutrality, autonomy and finality, but many drawbacks and dilemmas have arisen in the course of its development and application. The first is the lack of transparency provisions for the arbitration process. [ ] International investment disputes mostly involve issues of public interest, which creates a need for transparency. Increased transparency in international investment treaty arbitration can also prevent improper arbitration procedures and maintain the normal development of international investment activities. Secondly, although international investment treaty arbitration is legally binding, some countries may refuse to recognise and enforce the award on the grounds that the award has been set aside, and the arbitration does not have the effect of enforcement.

4. PROPOSALS FOR IMPROVING INTERNATIONAL INVESTMENT RULES

4.1. Establishment of Mechanisms for "De-fragmentation"

4.1.1. Harmonisation and Unification of Treaty Standards

As countries have different national conditions, they have different understandings of international investment treaties, which is one of the reasons for the "fragmentation" of the system of investment rules. In this context, it is important to harmonise and unify treaty standards. At a superficial level, it is important to set up a unified standard in terms of the format, language and key provisions of the treaty, so as to reduce misunderstanding and differences in the interpretation of the treaty by all parties to the investment process. At a deeper level of analysis, invoking the prevailing standards in the specific rules of international investment treaties is crucial to overcoming differences between different economies in the process of negotiating and applying treaties.

4.1.2. Regional Economic Organisations Play a Role

Foreign scholars have found, through a study of more than 1,600 BITs, that a multilateral investment treaty (MIT) with 27 basic provisions can replace 50 per cent of BITs. Although regional investment treaties are specific to a certain region, they play an important role in the consolidation of BITs and the multipolarity of the world economy, and also play a certain transitional role in the evolution of the "de-fragmentation" of the international investment rules system.

Regional economic organisations have the capacity to incubate large free trade agreements. An example is the North American Free Trade Agreement (NAFTA) under the North American Free Trade Area (NAFTA). The agreement consolidates overlapping and redundant bilateral investment treaties in the region, and the content of the agreement extends from the area of investment and finance to a wide range of areas such as the environment, energy and education. Second, the working mechanisms of regional economic organisations also have advantages. For example, the annual APEC Leaders' Meeting provides a platform for communication and dialogue and consensus-building among the leaders of individual countries, and the political commitments they make at the meeting propel APEC member countries to act together to eliminate unilateral acts in the region.

Effective implementation of IITs is partly a function of mutual trust between countries and trust in the future of the treaty. If a BIT is concluded, the behaviour of one of the countries is likely to trigger a crisis of confidence between them, making it difficult for the BIT to move forward properly. However, in a regional multilateral framework, a country's unilateral behaviour is subject to the control of regional economic organisations, and even if a country acts in violation of a regional economic agreement, the regional economic treaty can still continue and will not lead to a crisis of confidence among member countries. The establishment of more RITs through REOs, in order to eliminate the "fragmentation" effect of BITs, is the best transition path to promote the development of the world's investment economy towards multipolarity.

4.2. Developing Countries Making an Impact

Most of the existing international investment treaties are dominated by developed countries and focus on protecting the interests of developed countries, which can easily lead to an imbalance between the interests of home and host countries. Developing countries should use their influence to create a fairer international investment environment.

4.2.1. Improving Domestic Investment Governance Capacity

When developed countries invest in developing countries, they have to take into account the political environment, the level of the rule of law, the quality of labour and other factors in the developing countries. Therefore, developing countries should endeavour to improve themselves in order to attract more foreign investment and gradually increase their influence. Developing countries should improve investment-related legal mechanisms, raise the level of foreign investment protection, consciously accept supervision, and achieve a good linkage between domestic and foreign supervision. The domestic investment policies of developing countries should not deviate from the general direction of international investment, but should be actively integrated into the system of international investment rules.

4.2.2. Introduction of Corporate Social Responsibility Provisions

In view of the environmental and social crises brought about by transnational corporations, developing countries can refer to the OECD Guidelines for Transnational Corporations and the United Nations Global Compact when signing investment treaties, and introduce CSR clauses in the negotiation of international investment treaties, [6]balancing the rights and obligations of investors in home and host countries, and at the same time, it will be beneficial to the improvement of the domestic investment environment and the enhancement of the international image of developing countries. At the same time, it will be beneficial to the improvement of the domestic investment environment of developing countries and the enhancement of their international image.

4.2.3. Towards an Efficient Multilateral Investment System

There is still much room for developing countries to explore FTAs, and under the new challenges of the new era, developing countries should unite and collaborate, intensify international cooperation, expand exploration of the multilateral investment system and reduce trade barriers. Only with greater openness and inclusiveness can developing countries have more and more influence on the international investment landscape in order to win a more favourable international environment for themselves.

4.3. Promoting Reform of Dispute Settlement Bodies

The legal mechanisms for investment disputes are not consistent across countries, so that the settlement of host country-investor disputes will always be influenced and constrained by the laws of other countries. The development of the system of international investment rules urgently requires reform of investment dispute settlement institutions.

4.3.1. Exploring a Combination of Arbitration and Mediation

Currently, the Investor-State Dispute Settlement (ISDS) mechanism is dominated by international arbitration, with mediation being applied relatively rarely. However, while arbitration procedures are complex, time-consuming and costly, mediation is flexible and less costly, and can make up for the shortcomings of arbitration. The combination of arbitration and mediation is conducive to promoting the reform of dispute resolution mechanisms. For example, the 2018 Cooperation Agreement on the Establishment of a Belt and Road Diversified Dispute Resolution Mechanism Converging Arbitration and Mediation stipulates that after an international commercial dispute has arisen, the parties to the dispute may prioritise the application of mediation procedures for the undisputed portion of the dispute, and then apply the arbitration procedures for the disputed portion. [7]This is conducive to resolving the dilemma posed by arbitration, improving the efficiency of dispute settlement institutions and stabilising the international investment rules system.

4.3.2. Construction of a Permanent Appeal Mechanism for ISDS

The construction of an appeal mechanism in international investment arbitration is an issue that has been mentioned repeatedly in recent years. In practice, arbitral awards are sometimes inconsistent, and it is essential to construct a mechanism for correcting errors and strengthening the supervision of arbitration. After the conclusion of the first instance award, if the disputing parties do not appeal, the result of the first instance award shall be final. If the disputing parties disagree with the award, they may appeal to the arbitral tribunal within a specified period of time. During the period of appeal, the validity of the first instance award is suspended. The outcome of the appeal is one of two things: first, the first instance award is confirmed as correct, in which case the appeal shall be dismissed and the original award shall be enforced. Secondly, if the first instance judgement is wrong, the original judgement should be modified or overturned, and the result of the appeal judgement is final. The establishment of the appeal mechanism can promote the reform of ISDS in a fairer and more reasonable direction, and has a certain degree of practicality.

4.3.3. Establishment of Implementation Monitoring Measures

In international investment disputes, the State has immunity, and the State, whether as a plaintiff or voluntarily as a defendant, may not impose enforcement against its property without its consent. [8] ISDS therefore does not have the ability to enforce the outcome of an arbitration, and the establishment of an official, semi-official enforcement body is not realistic in the current international investment framework.

Concluding investment treaties is based on mutual trust and future confidence, and the implementation problem can be dealt with through the idea of establishing a "bad faith list", in which countries that refuse to honour arbitration outcomes are included. If a country is included in the "bad faith list", its international investment image will be greatly damaged, and its future investment will also be affected. For this reason, the State will honour the arbitration result as far as possible. The "bad faith list" could serve as a monitoring mechanism for enforcement.

5. SUMMARY

As an important part of global economic governance, the development and improvement of the international investment rules system is of great significance in promoting cross-border investment, safeguarding the rights and interests of investors and balancing the interests of host and home countries. However, the current system of international investment rules faces many challenges, including the fragmentation of rules, the imbalance between the rights and obligations of developed and developing countries, the interference of political factors and the limitations of the dispute settlement mechanism. The existence of these problems not only affects the fairness and effectiveness of international investment rules, but also poses a potential threat to the stability and development of the global economy.

In order to address these challenges, the international community needs to take multifaceted measures. First, it should promote the "de-fragmentation" of the international investment rules system through the harmonisation and unification of treaty standards and the role of regional economic organisations. Secondly, developing countries should enhance their voice in international investment rules and create a fairer international investment environment by improving their domestic investment governance capacity, introducing corporate social responsibility provisions and exploring the multilateral investment system. Finally, the international investment dispute settlement mechanism is in need of urgent reform, and exploring the combination of arbitration and mediation, building a permanent appeal mechanism for ISDS, and establishing enforcement and monitoring measures will help improve the efficiency and fairness of dispute settlement.

In the future, the improvement of the system of international investment rules should pay more attention to balancing the rights and interests of investors and the sovereignty of host countries, reduce the interference of political factors and promote the development of the rules in the direction of greater transparency, inclusiveness and sustainability. Only through international cooperation and joint efforts can a fairer and more efficient system of international investment rules be constructed to provide a solid legal guarantee for the prosperity and stability of the global economy.

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