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Study on the Transparency and Fairness of International Investment Arbitration Procedures

-- Analysis based on Typical Cases

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ABSTRACT

As an important mechanism for resolving disputes between investors and host states, the transparency and fairness of international investment arbitration are directly related to the credibility of its rulings and the healthy development of the international investment legal system. This article focuses on the lack of transparency and questions about fairness in investment arbitration proceedings. Through an in-depth analysis of typical arbitration cases, it reveals structural flaws in the current system regarding procedural openness, third-party participation, consistency of rulings, and arbitrator independence. The research shows that excessive confidentiality undermines the public's right to know and procedural oversight, while issues such as the arbitrator selection mechanism and inconsistent application of law erode the fairness of rulings. Although reform measures, such as the UNCITRAL Rules on Transparency, have achieved some success, deep-seated conflicts between investor rights and host state regulatory power, and between efficiency and fairness, remain prominent. As a major source of two-way investment, China should actively promote rule improvement, adopting comprehensive measures in areas such as domestic law integration, arbitrator training, and corporate compliance, to enhance its capacity to participate in international rule-making and contribute to building a more open, fair, and transparent international investment governance system.

KEYWORDS

International Investment Arbitration; Transparency; Impartiality; Investor-State Dispute Settlement (ISDS); Representative Cases; Procedural Reform.

1. INTRODUCTION

International investment arbitration, particularly the investor-state dispute settlement mechanism (ISDS), has become a cornerstone of the modern international investment law system. It aims to provide foreign investors with a remedy independent of the host state's domestic courts, protecting their legitimate rights and interests while also theoretically respecting the host state's power to regulate in the public interest. However, with the surge in caseloads and the increasing prominence of public interest issues, traditional investment arbitration procedures have sparked widespread controversy due to their inherent confidentiality and operational practices. Their lack of transparency and questions about impartiality have become core issues undermining the legitimacy and credibility of the ISDS mechanism.

Transparency issues primarily manifest themselves in the non-public nature of arbitration proceedings, the confidentiality of key documents (such as the request for arbitration, the response, the hearing transcript, and the award), and limited public and stakeholder participation. This tradition of secrecy, rooted in commercial arbitration, is incompatible with investment disputes involving significant public policy issues, hindering public oversight and academic discussion and undermining procedural due diligence. Concerns regarding impartiality are more diverse and complex, including potential conflicts of interest among arbitrators and the lack of an appeals mechanism leading to inconsistent awards, potential arbitrator bias toward investors or specific legal traditions, and whether host states possess substantive equality against powerful transnational capital and international arbitration elites.

This article aims to examine, through a selection of landmark cases in international investment arbitration, the manifestations and causes of a lack of transparency and impartiality in specific cases, as well as their profound impact on dispute settlement outcomes and the reputation of the system. Furthermore, it explores the effectiveness and limitations of rule reforms undertaken by the international community in response to the crisis and proposes an optimal path that balances efficiency and fairness, investor protection, and host state regulatory power. This research has important theoretical and practical implications for understanding the difficulties and direction of ISDS reform, enhancing China's ability to participate in global investment governance, and safeguarding my country's overseas investment interests and domestic regulatory space.

2. PRACTICAL DILEMMAS OF LACK OF TRANSPARENCY AND ANALYSIS OF TYPICAL CASES

The tradition of confidentiality in international investment arbitration has been criticized in cases involving significant public interest, sparking public concerns about "backroom dealings." Metalclad v. Mexico is a typical case that early exposed this issue. The case involved a dispute arising from the Mexican local government's refusal to grant a construction permit to a US-owned waste disposal company. The entire arbitration process was highly confidential, with key documents and court proceedings closed to the public. Mexico ultimately lost the case and was ordered to pay substantial compensation. The public's public outcry following the decision sparked strong protests from both domestic and international environmental organizations, who expressed deep dissatisfaction with the inadequate consideration of environmental risks resulting from the closed process. The case highlighted the fundamental conflict between a purely confidential approach and public interest demands [1].

The drawbacks of confidentiality extend beyond the lack of public oversight. Vattenfall v. Germany (I) demonstrated its profound impact on the public's right to know and host-state decision-making. Swedish energy giant Vattenfall initiated arbitration against the city of Hamburg, Germany, for stringent environmental requirements imposed on a coal-fired power plant. Despite the significant environmental policy and energy transition issues involved in the case, initial information on the proceedings was extremely limited, exacerbating public concerns in Germany that the ISDS mechanism threatened domestic environmental regulations and undermined public understanding of and trust in the government's decision-making process. Subsequently, due to significant public pressure, some documents were released on a limited basis.

Even more concerning is the potential for the lack of transparency in the process to mask potential conflicts of interest or irregularities. In Loewen Group v. United States, a Canadian company alleged that the Mississippi court's trial was severely biased, leading to its bankruptcy. The tribunal ultimately dismissed jurisdiction on procedural grounds (Loewen Group's reorganized entity was now a US company). However, the details of the tribunal's internal discussions on key legal issues and whether there was excessive deference to domestic judicial procedures were not readily available to the public, leading to speculation about the logical rigor and fairness of the ruling. These cases collectively demonstrate that a lack of transparency not only undermines the public's right to know and participate, but also undermines the credibility of the process, making it difficult for the ruling to gain widespread social acceptance and providing fodder for critics to question the fairness of the system.

3. MULTIDIMENSIONAL MANIFESTATIONS OF IMPAIRED IMPARTIALITY AND KEY POINTS OF CONTROVERSY

Impartiality is a core principle of international investment arbitration, but the system is currently facing profound skepticism on multiple fronts, with the independence and impartiality of arbitrators being particularly prominent. Most arbitrators have backgrounds in commercial law, leading to widespread "revolving door" practices and high fees that can also pose risks of biased arbitral awards. While the current system requires arbitrators to fulfill disclosure obligations and allows parties to challenge arbitrators, excessively high standards of proof make such systems difficult to operate effectively in practice.

The International Investment Dispute Settlement (ISDS) system is experiencing a serious legitimacy crisis, with structural flaws significantly impacting the consistency and credibility of its awards. Due to a lack of uniformity in the application of law and an ineffective redress process, cases with similar facts often result in conflicting decisions, leaving parties facing significant uncertainty. For example, in Eli Lilly v. Canada, while the tribunal ultimately dismissed the company's claim of "indirect expropriation," significant disagreements arose over the interpretation of key legal concepts such as "reasonable investment expectations" and the "security exception," reflecting a deep legal schism within the system.

More critically, the arbitration process exhibits a clear bias in allowing third-party participation. When cases involve significant public interests such as the environment and public health, relevant communities and non-governmental organizations often face difficulties in effectively participating in the proceedings. For example, in the Vattenfall v. Germany case, environmental organizations attempted to submit professional opinions as "friends of the court," but were unable to exert any substantive influence due to institutional constraints and high barriers to entry. This closed-door nature not only undermines the procedural rights of stakeholders but also hinders the tribunal's ability to obtain more comprehensive background information[2].

Although the tribunal in Philip Morris v. Uruguay ultimately upheld the host country's tobacco control measures implemented to protect public health, such decisions often rely more on the tribunal's discretionary preferences than on coherent and stable legal reasoning. The uncertainty of the ruling, coupled with the potential for differential treatment of developed and developing countries—such as the exceptional deference shown for US judicial procedures in the Loewen case—further undermines international trust in the neutrality and impartiality of the ISDS mechanism.

4. REFORM OF INTERNATIONAL RULES TO ENHANCE TRANSPARENCY AND EFFECTIVENESS EVALUATION

Improving the transparency of investment arbitration has become an international consensus, with the core initiative being the Rules on Transparency in Treaty-based Investor-State Arbitration, led by the United Nations Commission on International Trade Law (UNCITRAL). These Rules entered into force in 2014 and were later incorporated into the United Nations Convention on International Settlement Agreements Resulting from Mediation to expand their scope of application. These Rules establish a new paradigm of "openness as the principle, confidentiality as the exception," mandating the disclosure of key information such as the Notice of Intent to Arbitrate, Notice of Arbitration, Statement of Claims, List of Exhibits, Hearing Records, and the Award. They also clearly define the conditions and procedures for non-disputing parties and third parties to submit written observations.

ICSID, as the most prominent arbitral institution, also revised its arbitration rules, aligning them with the Rules on document disclosure, third-party participation, and open hearings. The Philip Morris v. Uruguay case is a benchmark for transparency practices under the new rules. The case was conducted with high levels of public transparency. The tribunal not only accepted multiple, detailed amicus curiae briefs submitted by the World Health Organization and a multinational public health coalition, but also unprecedentedly live-streamed the proceedings to the public. This openness has greatly facilitated public understanding and discussion of the case involving tobacco control policy, a significant public health issue, and enhanced the credibility of the ruling upholding Uruguay's right to regulate public health[3].

However, the effectiveness and widespread adoption of the reforms still face significant limitations. First, the application of the Rules on Transparency and the Mauritius Convention relies on explicit inclusion in investment treaties or subsequent consent by the contracting parties, and their coverage has not yet been extended to cases under all existing treaties. Second, the specific boundaries and review standards for confidentiality exceptions involving sensitive commercial secrets or national security information remain ambiguous in practice, potentially leading to abuse. Furthermore, developing countries face practical difficulties in effectively participating in transparent proceedings due to limited resources. Furthermore, with regard to the arbitrator selection mechanism, efforts could be made to establish a more transparent candidate pool and disclose meeting minutes during the selection process. Regarding third-party participation, the timeline and format for submitting comments could be further clarified to improve the operability of the process. Therefore, while the reforms are moving in the right direction and have achieved important breakthroughs, the full realization and uniform application of transparency still requires continued effort and broader support from treaty practice.

5. DEEPENING REFORMS ON IMPARTIALITY AND THE DEEPER CONTRADICTIONS

Improving transparency is fundamental, but ensuring impartiality requires deeper institutional reforms. Current reform explorations are primarily focused on arbitrator codes of conduct and mechanisms for consistency in awards. Strengthening standards for disclosing conflicts of interest, refining codes of conduct, and establishing more transparent and efficient challenge procedures are common approaches. While addressing the "revolving door" issue is a hotly debated topic, establishing a truly effective isolation mechanism still faces industry resistance.

The establishment of a permanent appellate body or a multilateral investment court is seen as the ultimate solution to the persistent problem of inconsistent awards. The EU-promoted Multilateral Investment Court (MIC) concept is the most revolutionary, aiming to replace ad hoc arbitrators with permanent, full-time judges assigned to randomly assigned cases and establishing a unified appeals mechanism. However, this proposal faces significant political resistance, complex institutional design challenges, and compatibility issues with the vast existing treaty network, making it unlikely to be implemented in the short term. ICSID's proposed permanent appeals mechanism has also stalled due to a lack of consensus among member states. These efforts to improve fairness touch upon deep, irreconcilable contradictions inherent in the international investment arbitration system:

The balance between investor protection and the host state's regulatory power (policy space): How can arbitral tribunals precisely define flexible standards such as "fair and equitable treatment" to avoid excessive interference with the host state's sovereign right to enact laws in the public interest? The Philip Morris case supports regulatory power as progress, but its boundaries remain fuzzy [4].

The tension between efficiency and fairness: Introducing stricter arbitrator recusation procedures, allowing for extensive third-party participation, and even establishing an appeals mechanism will inevitably increase procedural complexity and time costs, conflicting with the efficiency value pursued by arbitration.

Legitimacy crisis and path dependence: The existing ISDS mechanism, centered on ad hoc arbitration, is plagued by numerous problems but remains deeply entrenched. Radical reform requires unprecedented political consensus and resource investment from the international community, and the path dependence effect is significant.

North-South disparities and capacity gaps: Developing countries face systemic capacity gaps with developed countries in navigating complex arbitration procedures, selecting highly qualified arbitrators/agents, and influencing rulemaking, hindering their ability to effectively safeguard their rights and interests. These deep-seated contradictions mean that fairness reform will inevitably be a long and fraught process.

6. CHINA'S PRACTICAL REVIEW, CHALLENGES, AND RESPONSE STRATEGIES

China, as a major capital importer and exporter, is deeply involved in international investment arbitration. As a respondent, early cases such as Ekran Berhad v. China, involving land expropriation, highlight the potential tension between domestic procedural transparency and international arbitration requirements. As an applicant, cases such as Ping An Group v. Belgium and Beijing Urban Construction v. Yemen demonstrate how Chinese companies are using ISDS to safeguard their overseas interests. China's cautious approach to joining the Mauritius Convention also reflects its emphasis on sovereignty considerations. These practices provide rich examples for China to examine the transparency and fairness issues of ISDS.

China faces multiple challenges:

Inadequate coordination with domestic laws: The current Arbitration Law primarily regulates commercial arbitration, lacks clear provisions on transparency rules for investment arbitration, and the procedural basis is vague. Weak professional talent pool: There is a severe shortage of high-level, multi-disciplinary professionals proficient in international investment law, with extensive practical experience, and capable of serving as arbitrators, counsel, or expert witnesses, impacting China's voice and influence in arbitration proceedings.

Corporate risk awareness and capabilities need to be improved: Some Chinese companies lack understanding of international investment rules, treaty protection mechanisms, and arbitration risks, and their ex ante compliance and ex post rights protection capabilities need to be strengthened.

Insufficient participation in rule-making: China's voice and leadership in shaping the next generation of international investment rules need to be enhanced [5].

China's response strategy should be systematic and pragmatic:

Improve the domestic legal framework for investment arbitration: Amend the Arbitration Law or formulate specialized rules as appropriate to clarify transparency standards (scope of disclosure, exceptions) for investment arbitration proceedings (especially in cases involving states), third-party participation mechanisms, and alignment with the UNCITRAL Rules on Transparency and the Mauritius Convention, providing clear legal guidance for practical application. Build a high-caliber team of arbitrators/attorneys: Integrate resources from the government, law firms, and universities to establish a talent pool; strengthen professional training and international exchanges; encourage and support Chinese experts to serve in major international institutions; and actively recommend Chinese arbitrators in bilateral and multilateral negotiations.

Strengthen corporate compliance and dispute prevention: The government should strengthen overseas investment risk warnings and legal training; guide enterprises to establish and improve overseas investment compliance systems and prioritize the use of protective clauses in investment treaties; and encourage the use of alternative dispute resolution mechanisms such as mediation.

Deepen participation in global rule-making governance: When signing or upgrading BITs/FTAs, proactively incorporate higher transparency clauses and explore feasible models for accepting "friends of the court" briefs; actively participate in discussions on ISDS reform within frameworks such as UNCITRAL and ICSID, proposing constructive "Chinese solutions"; and leverage the Belt and Road Initiative to promote the establishment of dispute resolution mechanisms that better meet common needs. Through these multiple measures, China can effectively safeguard its own interests and contribute Eastern wisdom to the global process of enhancing the transparency and fairness of investment arbitration.

7. CONCLUSION

The international investment arbitration system is experiencing a profound legitimacy crisis, centered on insufficient procedural transparency and widespread doubts about the impartiality of its awards. By analyzing a series of landmark cases, including Metalclad, Vattenfall, Loewen, Eli Lilly, and Philip Morris, this article clearly reveals how the tradition of confidentiality deprives the public of their right to information and oversight, and how deficiencies in arbitrator independence, consistent application of law, and third-party participation rights undermine the system's foundational credibility. While reforms, such as the UNCITRAL Transparency Rules and the revision of the ICSID Rules, have established a new paradigm of openness as a principle and broadened channels for third-party participation, demonstrating positive results in cases like the Philip Morris case, the reform process is far from complete. These measures are limited in terms of treaty coverage, the confidentiality of sensitive information, and the capacity of developing countries to participate. Furthermore, they fail to address deeper contradictions of impartiality, such as inconsistent awards and conflicts between investor protection and host state regulatory authority. While the EU's proposal for a multilateral investment court is revolutionary, it faces significant political and institutional obstacles. As a significant global investment player, China faces challenges that are both universal-such as gaps in domestic legal coherence, a shortage of high-end talent, and the need to enhance its voice in rule-making-and unique. China must balance its sovereignty concerns in attracting investment with its rights and interests in going global. The solution lies in addressing both internal and external challenges, addressing both the symptoms and the root causes. Domestically, China urgently needs to improve the legal framework for investment arbitration, clarify transparency rules, and cultivate a professional arbitration team with a global perspective and expertise. Externally, China should encourage businesses to strengthen compliance and risk management, while also actively participating in global investment governance. China should proactively embed high-standard transparency and fairness clauses in new-generation bilateral and multilateral investment agreements, and contribute Chinese solutions to building a more balanced, inclusive, and trustworthy new order for international investment dispute settlement in key platforms such as the United Nations Commission on International Trade Law and the International Centre for International Trade and Investment Dispute Settlement (ICSID). Only through sustained international cooperation and domestic reform can the "trust deficit" in international investment arbitration be bridged, making it a reliable foundation for promoting cross-border investment flows, balancing public and private interests, and upholding the rule of law internationally.

REFERENCES

[1] Sun Nanshen. Application and Development of the Principle of Transparency in International Investment Arbitration [J]. Research on Modernization of the Rule of Law, 2022, 6(05): 68-83.

[2] Zhao Yu. Research on the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration [D]. Wuhan University, 2017.

[3] Yu Haiou. Research on the Legitimacy of the Investment Arbitration Mechanism (ISDS) from the Perspective of Global Administrative Law [D]. Wuhan University, 2015.

[4] Guo Zihui. Research on the System for Guaranteeing the Impartiality and Independence of Arbitrators under the ICSID Rules [D]. East China University of Political Science and Law, 2022. DOI: 10.27150/d.cnki.ghdzc.2022.000968.

[5] Liu Qianqian. Research on the Issue of Transparency in International Investment Arbitration [D]. Shandong University of Political Science and Law, 2018.