New Developments of Settlement of Cross-Border Trade and Investment Disputes

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Definition of Concepts

• The term “cross-border” as used in this talk is not only referred to cross-border in its ordinary sense, but also referred to cross-separate customs territories.

• The term “trade and investment disputes” is not only referred to cross-border commercial disputes, but to trade and investment disputes between private sectors and States and among States.
Challenges Faced by the Settlement of Trade and Investment Disputes

• Today's world is undergoing unprecedented changes in a century. “Black Swan” and “Grey Rhino” incidents, such as the Brexit, the US withdrawal from international institutions, the Iranian nuclear crisis, the influx of illegal immigrants into Europe, unilateralism, isolationism, populism, extremist, nationalism, trade protectionism, can be found to occur frequently.
Challenges Faced by the Settlement of Trade and Investment Disputes

• Those situations add to the instability and uncertainty, lesser momentum of the economic development of the world, increasing polarisation between the poor and the rich, and intermittent regional hotspot issues, emergence and spreading of non-traditional security issues such as terrorism, cyber security, major contagious diseases, climate change and trade war. As such, these are the common challenges that the mankind has to face.
Challenges Faced by the Settlement of Trade and Investment Disputes

- It is the unprecedented changes, which are set to lead to great turmoil in the international community, major reshuffle of the international pattern, and derailing and major adjustments in the international order, that have inevitably led to more extensive, more diverse, more complicated and more difficult cross-border trade and investment disputes. Accordingly, the method, means, the approach and way to the settlement of cross-border trade and investment disputes have been in constant change.
Challenges Faced by the Settlement of Trade and Investment Disputes

• Among the traditional cross-border trade and investment dispute settlement mechanisms, some seem to make ends meet, the rest have proven to be unprepared and incapable. Some (for example, the WTO dispute settlement mechanism) are being calculated and even paralysed, and some others have been emerging as a result of innovative exploration and development. For example, many countries have established international commercial courts.
Challenges Faced by the Settlement of Trade and Investment Disputes

• During the second World War, In the most difficult times of the Anti-Japanese War, Chairman Mao, Chinese leader of the day, given a remark that boost Chinese people’s spirits:
  • “In difficult times, we the people should see achievements, see light, and improve our courage.”
  • The unprecedented changes: challenges or opportunities
Challenges Faced by the Settlement of Trade and Investment Disputes

• We should be fully aware that peace and development remain the theme of the times.

• The general trend of peaceful development has not changed; international law still embodies a recognised code of conduct of the international community, and the international community’s demand for international rule of law has not changed; The UN Charter is the fundamental law of the United Nations. The conviction of the countries on the purposes and principles of the UN Charter has not changed. The peaceful settlement of international disputes remains the fundamental principle of international law, and our determination to uphold this fundamental principle has not changed.
Several New Developments of Cross-Border Trade and Investment Dispute Settlement

1. Interface and combination of a prevention and settlement of disputes
2. Interaction and integration of dispute settlement mechanisms
3. Judicialisation of International Investment Arbitration
4. Cross-border enforcement of international settlement agreements resulting from mediation
5. International circulation of civil and commercial judgments
1. Interface and combination of a prevention and settlement of disputes

- Chinese traditional culture attaches great importance to stopping litigation and avoiding litigation. Confucius once said, “Listening to case hearing, I am not smarter than others; the most important is how to avoid disputes”.

- Of course, it is not easy to do this. But this is an ideal, a pursuit of value.
1. Interface and combination of a prevention and settlement of disputes

• Settlement of disputes is referred to the activities to resolve the disputes via negotiation, mediation, arbitration and litigation after the disputes have arisen.

• Prevention of disputes refers to the activities and effective measures that are designed to mitigate and even avoid the disputes. As either macro or micro measures, they are engaged in to address and eliminate the causes and factors, and to prevent and redress in advance the subject matters that would possibly give rise to disputes.
1. Interface and combination of a prevention and settlement of disputes

• The legal circle tends to focus more on the settlement of disputes, and less attention has been paid to the prevention of disputes. Although dispute prevention and dispute resolution are different in that the former primarily focuses on preventing problems before they occur, while the latter focuses on resolving the contradictions that have already occurred, the fundamental purpose of the two is actually the same, that is, avoiding and eliminating disputes, and maintaining normal social order.
1. Interface and combination of a prevention and settlement of disputes

- Dispute prevention is also different from dispute resolution in that the former is in itself a complex system engineering. There are various ways to and means of dispute prevention. As far as the world as a whole is concerned, dispute prevention can be carried out at the international level as well as at the domestic level. For a specific country, it can be promoted by the government, or it can be actively pursued by enterprises, and non-governmental organisations can also play their role.
1. Interface and combination of a prevention and settlement of disputes

- The key to the question now is how dispute prevention and dispute settlement can be organically docked and connected with each other, rather than leaving them separated.
1. Interface and combination of a prevention and settlement of disputes

• "Opinions on Establishing the International Commercial Dispute Resolution Mechanism and Institutions for the ‘Belt and Road’” issued by Chinese Government in 2018.

• The Opinions specifically require relevant institutions to work with the “relevant trade associations and non-governmental organisations of the countries participating in the “Belt and Road” in the establishment of the International Commercial Dispute Prevention and Resolution Mechanism.

• China supports the establishment of an integrated mechanism for the prevention and settlement of international commercial disputes.
2. Interaction and integration of dispute settlement mechanisms

• Negotiation, mediation, arbitration and litigation, which are relatively independent dispute settlement mechanism, are operated in their own ways.

• In the course of establishing multi-facet dispute settlement mechanism, the integrated dispute settlement mechanisms are quietly advancing both on the domestic front and on the international front.
2. Interaction and integration of dispute settlement mechanisms

• The integrated development of the dispute settlement mechanism means that under the premise of maintaining their relative independence, various dispute settlement mechanisms lend support to each other with coordinated, mutually leveraging efforts, with an aim to resolving disputes effectively, conveniently, quickly, and at low cost.
2. Interaction and integration of dispute settlement mechanisms

- In 2018, in order to implement the Opinions on Establishing International Commercial Dispute Settlement Mechanism and Institutions for the "Belt and Road", the Supreme People's Court established the International Commercial Court and the International Commercial Expert Committee, and formulated the rules for the international commercial dispute settlement. This is an international commercial dispute settlement mechanism, which integrates litigation with mediation, arbitration, so-called "three-in-one" or "one-stop" mechanism.
2. Interaction and integration of dispute settlement mechanisms
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- The integrated international commercial dispute settlement mechanism established by the Supreme People's Court and based on the International Commercial Court actually incorporated the dispute settlement mechanisms of mediation, arbitration, and litigation into a platform to meet the needs of the parties for diversified dispute resolution.
2. Interaction and integration of dispute settlement mechanisms

• According to the design, in addition to the establishment of the International Commercial Expert Committee, the Supreme People's Court will also select qualified international commercial mediation institutions and arbitration institutions to jointly establish a multi-facet international commercial dispute settlement mechanism in collaboration with the International Commercial Court. Within this mechanism, in addition to independently handling international commercial disputes, the International Commercial Court will also provide legal support for international commercial arbitration institutions in terms of property preservation and evidence preservation, and enforce arbitral awards in light of the principles of convenience and quick judicial review.
2. Interaction and integration of dispute settlement mechanisms

- The International Commercial Court will also give full play to the role of mediation in resolving international commercial disputes. The parties may, according to their autonomy, entrust members of the International Commercial Expert Committee or international commercial mediation institutions to mediate disputes, thus helping the members of the International Commercial Experts Committee and international commercial mediation institutions to play their roles in international commercial mediation. The International Commercial Court will review the settlement agreements, which result from mediation, in accordance with the law, and validate such settlement agreements with enforceability in the form of mediation document or judgment.
3. Judicialisation of International Investment Arbitration

• The ongoing reform on international investment arbitration features a return to judicial mechanism. The original international investment arbitration, which draws lessons from international commercial arbitration, has been guided towards a mechanism with the judicial traits.
3. Judicialisation of International Investment Arbitration

- Judicialisation of International Investment Arbitration is manifested in the following three aspects:
  - The introduction of the transparency principle thus forming an alteration to the principle of confidentiality
  - The establishment of external appellate review system, thus making a breakthrough against the principle the finality of arbitral awards
  - The establishment of a judicial referee appointment mechanism, thus reforming the traditional party-led arbitrator designation mechanism.
4. Cross-border enforcement of international settlement agreements resulting from mediation

• As the value of mediation as a means to commercial dispute settlement for international trade is becoming more visible, mediation is increasingly used in international and domestic commercial practices as an alternative to litigation and the significant benefits arise from the use of mediation to resolve commercial disputes, the United Nations Convention on International Settlement Agreements Resulting from Mediation was adopted the General Assembly of the United Nations on 20 December 2018. This Convention was signed by 46 countries at Singapore Convention Signing Ceremony on 7 August 2019.
4. Cross-border enforcement of international settlement agreements resulting from mediation

- As is known to all, the settlement agreement based on mediation is a new contractual document that the parties have reached on dispute settlement, and the parties should automatically perform it. If one party does not perform, the settlement agreement will not be able to be enforced smoothly, and it is subject to new dispute resolution. The Singapore Mediation Convention aims to promote international commercial mediation and establish a set of mechanisms for the direct enforcement of international commercial settlement agreements resulting from mediation.
4. Cross-border enforcement of international settlement agreements resulting from mediation

• The Singapore Convention on Mediation is a landmark instrument in the history of international dispute resolution, especially mediation development. It is equivalent to the New York Convention in the field of mediation in the eyes of the legal profession.
5. **International circulation of civil and commercial judgments**

- From June 18 to July 2, 2019, the Hague Conference on Private International Law (hereinafter referred to as the “Hague Conference”) held the 22nd Diplomatic Conference in The Hague, the Netherlands, and adopted the Convention on the Recognition and Enforcement of Foreign Civil and Commercial Judgments.
5. International circulation of civil and commercial judgments

- The Convention is the first international instrument to establish comprehensive and uniform rules for the international circulation of civil and commercial judgments. It systematically stipulates the scope and conditions for the recognition and enforcement of foreign civil and commercial judgments, and has far-reaching implications on judicial cooperation in the international civil and commercial fields.
5. International circulation of civil and commercial judgments

• The Convention aims to provide better, more effective and lower-cost judicial safeguards for international civil and commercial activities and to promote rules-based multilateral trade and investment.

• The Convention shall apply to the recognition and enforcement of civil and commercial judgments made by a court of one Contracting State in another Contracting State, but matters of vast controversy such as intellectual property rights and privacy shall be excluded from its application.
Thank you for your attention!
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