

# **The Arab Investment Court: is There Potential for the Innovation of ISDS Mechanism?**

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**Abstract:** This report analyses the possibility of the Arab Investment Court as potential frontier of the Innovation of ISDS mechanism. It is the only investment court in the world, which has a dual function of economic regional integration and dispute settlement. Compared with investment arbitration, the advantages of the Arab Investment Court are fixed institution and two trial levels. In terms of practical experience, the Arab Investment Court is characterized as being greatly influenced by international politics which is a strong binding force on the contracting states and expanding jurisdiction. Based on research of the Arab Investment Court's establishment process and main functions, this report will analyze the reasons for the opposition of Japan and China to the EU's proposal of establishing a multilateral investment court which was expressed in the ISDS reform meeting held by the third working group of the United Nations Commission on International Trade Law: Investor-State Dispute Resolution in October 2019.

## **1. Introduction**

To resolve international investor-state investment disputes, people have tried a variety of solutions. After the Second World War, investment arbitration became the main international investment dispute settlement method. Then since the beginning of the 21st century, investment arbitration has encountered a "crisis of legitimacy", which has been criticized seriously.<sup>[1]</sup> The third working group of the United Nations Commission on International Trade Law has held meetings since 2017 to explore reforms of the ISDS mechanism. Among the reform plans proposed by various countries, the European Union and its member states have proposed the establishment of a Multilateral Investment Court.

For a long time, the idea of establishing a supranational tribunal in the field of investments was a dream.<sup>[2]</sup> Actually, the Multilateral Investment court has never existed before. And although the EU's proposal has not won the support of most countries, the EU is still trying to promote the Bilateral Investment Court as the new direction for the innovation on the ISDS mechanism. In July 2018, Japan and the European Union signed an economic partnership agreement, but Japan refused to accept the EU Bilateral Investment Court's proposal. In the process of China and the EU launching Bilateral Investment Treaty (BIT), the choice of the ISDS mechanism is inevitably an unavoidable topic. Some scholars have advised China to accept the EU's proposal to establish a bilateral investment court.<sup>[3]</sup>

Studying the main functions and operations of the Arab investment court is conducive to enhancing an understanding of the United Arab Republic's political, economic and historical background and recognizing the rules of ISDS mechanism. At the same time, this is also conducive to analyzing the reasons why some countries oppose the establishment of a multilateral investment court and the disputes over the choice of ISDS mechanism in China-European BIT.

## **2. The Establishment and Function of the Arab Investment Court**

The Organization of Islamic Cooperation first proposed the establishment of an investment

dispute settlement agency, but it has not been realized. Instead, the League of Arab States (LAS) successfully established its own investment court. In November 1980, the 11th Arab Countries Summit reached “The Unified Agreement for the Investment of Arab Capital in the Arab States” and clearly required the establishment of a special investment dispute settlement agency: the Arab Investment Court. In 2003, a dispute between the Saudi Arabian real estate magnate Tanmiah and the Tunisian government sought a judicial settlement, which became the first case accepted by the Arab Investment Court. In 2004, the court gave a verdict on this case.

The establishment of the Arab Investment Court is a manifestation of LAS’ compliance with the trend of regional integration. Between the 1980s and 1990s was an important period for the vigorous development of regional integration. From the experience of the European Community, the establishment of specialized courts is one of the effective ways to enhance the cohesion of an integrated organization. At the same time, the Gulf Cooperation Council was established in May 1981, which is the most important regional economic integration organization in West Asia. The LAS fears that it will be replaced and dismembered by the Gulf Cooperation Council. Therefore, the establishment of an investment court is a powerful means to strengthen its own functions and at the same time gives the LAS an advantage in the competition with the Gulf Cooperation Council.

### **2.1 The Arab Investment Court Has a Dual Function: Promoting Regional Economic Integration and Resolving Investment Disputes within LAS.**

(1) Promoting regional economic integration within the LAS. The Arab Investment Agreement is the basic treaty of the investment court. The parties in the agreement are firmly convinced that: a strong investment protection system will promote the emergence of “Arab economic citizens” and it is necessary to grant any investors from LAS enjoying the same treatment.

(2) Resolving internal investment disputes in LAS. From the perspective of the relationship between public law and private law, public law factors dominate the disputes between foreign investors and the host country. The duty of the Arab Investment Court is to review the legality of the host country’s administrative actions and this is the category of administrative litigation. Jurisdiction of the Arab Investment court comes from the transfer of sovereignty made by member states in the Arab Investment Agreement.

### **2.2 The Arab Investment Court Has the Advantages of a Fixed Institution and Two Trial Levels**

As an ISDS mechanism, compared with investment arbitration, the Arab Investment Court has two advantages.

(1) A fixed institution is used to resolve investment disputes to ensure the consistency of judgments. The lack of consistency of investment arbitration awards would lead to defects such as unpredictability of results, which constitutes the contention of the “legitimate crisis”. When the Arab Investment Court was established, the legislators had a clear goal: to establish a consistent and comprehensive international investment legal system. The goal of LAS is not only to resolve disputes, but also to coordinate the foreign investment policies and regulations of its member states and promote regional integration. After analyzing the first judgment of the Arab Investment Court, some scholars found that the court presented three characteristics in the trial: a strict interpretation of the concept of “Araber investor”, insisting on the goal of regional integration and using the theory of public law adjudication to review the administrative measures of the host country.<sup>[4]</sup>

(2) The Arab Investment Court closes the case in the first instance apparently but in fact there are two levels of trial. According to the Arab Investment Agreement, among the Investment Court participants, the only person to resolve disputes is the judge. In the process of trial, the case is concluded in the first instance; the judgment is final and no appeal is allowed. In actual operation, in order to avoid errors, the LAS has added the procedure of commissioner review based on the consent of member states and judges. Court activities are divided into two stages.

The first stage is the process of commissioner review. This procedure is not a consultation, but a substantive examination of the case. The Secretary-General of the League of Arab States appoints a committee member to conduct a comprehensive trial of the dispute and give the committee's

opinion. If the plaintiff and the defendant agree, the case can be closed. If one of the parties has objections, the lawsuit will continue.

The second stage is the trial procedure by the judge. Theoretically, he/she should conduct a comprehensive review of the case. But in practice, he/she only focuses on hearing the parties' objections to the members' opinions. Several judges form a collegiate panel to judge the members' review opinions, the plaintiff's request, and the defendant's replies. On this basis, the judgment is made through a public trial and a simple majority decision.

Compared with investment arbitration, the advantages of the investment court are short trial period, high transparency, high consistency of judgment, fast execution and good effect. However, because arbitration is not adopted, European and American investment arbitration scholars have criticized this kind of procedure.<sup>[5]</sup>

### **3. The Main Experience of the Arab Investment Court as an Innovation of the ISDS Mechanism**

#### **3.1 The Arab Investment Court is Heavily Influenced by International Politics**

The establishment and operation of the Arab Investment Court cannot be ideally independent of the overall activities of the Arab League. Limiting the investment courts to resolve disputes was the norm at the beginning of the establishment of the Court. But with the contradictions among Arab countries, the search for possible dispute resolution has activated the rule elements in pan-Arab politics and has also awakened the long-dormant Arab investment court.<sup>[6]</sup>

The operation of the Arab Investment Court generally follows the rule of law. Court proceedings are indeed affected by international political forces, which is embodied in the relationship between the CAEU and the Arab Investment Court. CAEU represents the interests of member states, which is one of the reasons why Arab investment court judgments tend to protect the host country. Therefore, the ability of the court to operate independently needs to be strengthened.

#### **3.2 The Arab Investment Court is Strongly Binding and Its Jurisdiction Continues to Expand**

Compared with investment arbitration, the jurisdiction of the Arab Investment Court is broader and tends to expand even more. It not only handles investment disputes between member states of the Arab League, investment disputes between public institutions of one member state and another member state, or between public institutions of different member states, but also handles disputes between private investors in one country and another member state. This is unique among judicial institutions at the international level.

The LAS actively supports the jurisdiction of the Arab Investment Court. It once required member states to take actions to ensure economic integration and fair rule of law, respect and enforce the judgment of the investment court.<sup>[7]</sup> In addition to the Arab Investment Agreement, the LAS has further confirmed that any investment-related international agreement concluded under the auspices of the Arab League, as long as the agreement involves investment arbitration or judicial settlement, can be resolved by the Arab Investment Court. This provision has effectively expanded the jurisdiction of the Arab Investment Court.

The member states of the Arab League also support this jurisdiction. The Bilateral Investment Treaty between Syria and Jordan, Syria and Egypt, Bahrain and Jordan, Yemen and Oman clearly stipulated that the Arab Investment Court is one of the alternative institutions for the settlement of bilateral investment disputes. Examples of this are the Syrian Investment Law of 2000, the Yemen Investment Law of 2002, and the Sudan Investment Law of 2003.<sup>[8]</sup>

### **4. Can the Arab Investment Court Be a Potential Frontier of the Innovation of ISDS Mechanism?**

Judging from the experience of Arab investment courts, multilateral investment courts will have the following two effects on sovereign states.

(1) The phenomenon of judicial law-making (Rule Making). International law mainly relies on

international treaties concluded by consensus among nations. In addition to international treaties, another important source is customary law. International judicial institutions cannot only dig out customary rules in related fields, but also interpret and apply existing international treaties. Professor Hersch Lauterpacht called this phenomenon “judicial law-making” and pointed out that it is inevitable for any judicial institution and is beneficial to the progress of human society.<sup>[9]</sup>

The Arab Investment Court has a significant law-making function. Its judgments have great influence and binding force on member states, and its acceptance of judgments is higher than that CAEU’s documents. Some judgments exceeded the expectations of the Arab League Secretariat, and made the member states puzzled.<sup>[10]</sup> It successfully promoted the economic integration of the Arab League. Regardless of the judgment, it is undeniable that the investment court poses a potential threat to the sovereignty of member states and the power to manage social affairs.

(2) Bringing the “chilling effect”. Unrestricted protection of investors when dealing with investment disputes, although creating an investment climate conducive to attracting foreign investment, will also bring about negative effects. The Arab Investment Agreement previously explicitly prohibited investors from taking actions that may violate public order, morals, or may obtain illegal benefits. However, the Agreement deleted this provision in 2013 because it was not conducive to capital flows within the LAS.

Professor Chen An calls such clauses in international investment agreements a safety valve, and believes that they should not be easily removed. He added that if the safety valve is opened rashly, it will bring unpredictable risks to the host country. Therefore, once a country joins the investment court, the right to open and close the safety valve is no longer in the host country. This kind of risk is not necessary to attract foreign investment and Argentina’s investment arbitration at the beginning of the 21st century is worthy of vigilance.

Joining the investment court or concluding a judicial protection mechanism for foreign investment means that the host country must be very careful in the field of public governance to avoid legal governance measures as a reason for foreign investors to resort to the investment court. This is called the chilling effect in the field of public governance.<sup>[11]</sup>

## **5. China-EU Bilateral Investment Treaty and Japan-EU Economic Partnership Agreement Should Avoid Investment Court as an ISDS Mechanism**

As for the choice of ISDS mechanism in the China- EU investment agreement, the EU's position is clear: Investment court should be adopted in bilateral agreements, because this has been adopted in the bilateral economic and trade agreements between EU and Canada, Vietnam, Singapore and Mexico. However, from the experience of Arab Investment court, Japan and China should avoid using the bilateral investment court as an innovative way of ISDS mechanism.

(1) The bilateral investment court is greatly influenced by international politics. As mentioned earlier, the institution responsible for setting up the investment court will have the greatest impact on the investment court. This logic also applies to the bilateral investment court advocated by the EU. For example, the post-trial activities of the bilateral investment court established by the EU and its trading partners will take turns between Brussels and the capital of another country. The establishment and operation of the bilateral investment court will be full of diplomatic activities. It is easy to drag ISDS mechanism back to the era of diplomatic protection. Similarly, the advantage of investment arbitration is that it can effectively eliminate diplomatic intervention, so as to achieve “depoliticized” dispute settlement. Therefore, it is not a historical progress to abandon investment arbitration and choose bilateral investment court instead.

(2) The establishment and operation of the investment court need similar legal cultural foundation. The Arab Investment court is set up by the Arab League, and its member states have similar legal and cultural foundation. Most of the member states of the Arab League used to be colonies of European countries with similar foreign legal culture. They all take Islamic law as the traditional law and Arabic as the local language and all have experienced the process of prosperity to decline of nationalism and pan Arabism.<sup>[12]</sup>

## 6. Conclusion

In conclusion, Japan and China should dare to innovate mechanism and reduce the influence of complex factors. Under the background of Western Europe and NAFTA's efforts to promote investment arbitration, it is not easy for the Arab investment court not to be afraid of Western criticism and accusations and adhere to their own concept of rule of law. Moreover, It is necessary to insist on the diversification of dispute settlement methods. The ISDS mechanism provided by the Arab Investment Agreement includes mediation, arbitration and investment court. At the same time, it gives the foreign investors the right to choose and the host country the right to agree. Therefore, the EU, China and Japan should respect the national conditions and choices of their economic and trade partners, comply with the requirements of mechanism construction of civilization diversity, and take into account both immediate and long-term interests.

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## References

- [1] FRABCK S D. The Legitimacy Crisis in Investment Treaty Arbitration Privatizing Public International Law Through Inconsistent Decisions. *Fordham law review*/edited by Fordham law students, pp.1521-1625, 2005.
- [2] HAMIDA W B. The First Arab Investment Court Decision. *Journal of World Investment & Trade*, vol. 7, No.5, pp. 699-721, 2006.
- [3] Zhang Jiao, Li Chuanlong and Zheng Shuqin. The design of investor-state dispute settlement clauses in the China-EU Investment Agreement-based on the value of the clauses. *European Studies*, No.2, pp. 104-123, 2020.
- [4] HAMIDA W B. The First Arab Investment Court Decision. *Journal of World Investment & Trade*, pp.714-721, 2006 .
- [5] NAJJAR N. *Arbitration and International Trade in the Arab Countries*. Leiden: Brill Nijhoff, 2017, pp.35.
- [6] RODRIGUEZ R M. *The Success and Failures of the Arab League*. Morrisville: Lulu Press, 2015, pp.13.
- [7] Egypt: The Arab Investment Court, [online] Available: <https://www.iflr.com/Article/3539341/Egypt-The-Arab-Investment-Court.html>.
- [8] HAMIDA W B. The First Arab Investment Court Decision. *Journal of World Investment & Trade*, pp.710, 2006.
- [9] LAUTERPACHT H. *The Development of International Law by the International Court* (Reissue Edition). Cambridge: Cambridge University Press, 2011, pp.156.
- [10] Chen An. The four “safety valves” in Sino-foreign bilateral investment agreements should not be removed rashly. *Journal of International Economic Law*, pp.3-37, 2006.
- [11] TIENHAARA K. *Regulatory hill and the Threat of Arbitration A View from Political Science Evolution in Investment Treaty Law and Arbitration*. Cambridge: Cambridge University Press, 2011, pp.606-628.
- [12] Amer Mohsen, Mark Bevir. *Encyclopedia of Governance*, Los Angeles: SAGE Publications, 2006, pp.25-26.