

Thoughts on the Establishment of GMS Dispute Settlement Mechanism

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Abstract: As the Greater Mekong Subregion Economic Cooperation Program (GMS) begins to flourish, one core issue deserves our attention. That is, how can effective GMS dispute settlement mechanism be designed. Firstly, this paper discusses the necessity of constructing GMS dispute settlement mechanism based on the national conditions of GMS member states. Then it analyzes the three main ways of international economic dispute settlement. Finally, by referring to the existing provisions of WTO and the North American free trade area on the dispute settlement mechanism, some thoughts are put forward for the construction of GMS dispute settlement mechanism.

1. Introduction

In 1992, the Asian development bank initiated the Greater Mekong Subregion Economic Cooperation Program (GMS) with six countries in the Lancang-Mekong basin: China, Laos, Myanmar, Thailand, Cambodia and Vietnam. The aim is to strengthen economic ties among member states, promote coordinated economic and social development in the subregions and achieve common prosperity in the region. After more than 20 years of development, the scope of the economic cooperation of GMS has been involved in ten priority areas like transportation, telecommunications, energy, tourism, environment, human resource development, trade, investment, agriculture, drug-control. It has formed a distinctive feature of mutually beneficial cooperation and self-strengthening through unity among developing countries. It has made remarkable achievements. In order to promote the further development of GMS, it is necessary to introduce an effective trade dispute settlement mechanism as soon as possible. It is of great significance to ensure free trade flows within the subregions and ensure the successful implementation of substantive rules such as The Strategic Framework of Action on Trade and Investment Facilitation in the Greater Mekong Subregion and The Strategic Framework for the Next Ten Years of Subregional Development.

2. The Necessity of Building the Trade Dispute Settlement Mechanism of GMS

2.1 The economic cooperation of GMS has entered a new and more pragmatic stage.

The initial objective of GMS economic cooperation was to focus on the development of highway, energy and other infrastructure in order to link the subregions together and promote the common development of production, investment and trade. Since the establishment of GMS in 1992, three important traffic arteries, namely east-west, south-north and south, have been basically completed. The east-west line runs from Vietnam to Myanmar; The south-north line includes the Kunming - Bangkok line, the Kunming - Hanoi line and the Kunming - Vietnam maritime line. The southern route starts in Bangkok, goes through Cambodia and ends in Vietnam. In addition to highway facilities, China, Laos, Myanmar and Thailand have also officially opened international shipping routes along the Lancang-Mekong River. In terms of railways, the greater Mekong sub-region railway connectivity plan under the framework of Pan-Asia railway construction is making steady progress. It is expected that the six countries along Mekong River will realize the connectivity of railway network by 2020. In terms of energy, a number of power generation and transmission facilities have been built in the subregions. In GMS power trade cooperation, China has shifted from one-way electricity export to Vietnam, Laos and Myanmar to both export and import. The subregional power trade and the regional power market construction are actively advancing.

Therefore, the basis of GMS cooperation has been established, and economic cooperation should enter a more pragmatic stage. In order to provide a legal and systematic legal order for the economic and trade exchanges of the member states in the subregions, it is essential to establish a corresponding dispute settlement mechanism. Only a perfect dispute settlement mechanism can provide a solid guarantee for the effective operation of trade in goods, trade in services and investment measures involved in economic integration in the subregions and promote the smooth operation of GMS free trade.

2.2 GMS can't directly apply to the WTO dispute settlement mechanism.

With Laos' accession to WTO on February 2, 2013, as the 158th member of it, all six members of the greater Mekong subregion cooperation are members of WTO. So, for trade disputes occurring in the subregions, can the WTO dispute settlement mechanism be directly applied without setting up a separate GMS dispute settlement mechanism? The answer is no. First of all, as an independent economic cooperation organization, GMS should establish an independent and authoritative dispute settlement mechanism based on its goals and purposes. Second, Laos only joined WTO in 2013. It is quite a short time. Although Myanmar became a founding member of GATT in 1947, its trade was cut off from the world trade system because of the closed economic policy adopted by the military government for 50 years. Therefore, the WTO dispute settlement mechanism is not suitable for trade disputes within the subregions. Finally, as the WTO dispute settlement mechanism system is very perfect, there are a series of complex coordination principles and measures. If it is directly applied by the six member states of GMS, it may complicate the economic and trade issues in the subregions.

2.3 The GMS dispute settlement mechanism should be independent of CAFTA

China and ASEAN Free Trade Area (CAFTA) is one of the three largest regional economic cooperation zones in the world. On November 29, 2004, the signing of Agreement on Dispute Settlement Mechanism of China-ASEAN Free Trade Area provided a legal guarantee for the operation of the free trade area. All six members of GMS are signatories to the agreement, as well as members of the China-ASEAN free trade area, so the CAFTA dispute settlement mechanism can be binding on the GMS6. However, as GMS is another form of regional cooperation which is independent of CAFTA and different from CAFTA in terms of content and scope of cooperation, GMS cannot directly apply the dispute settlement mechanism of CAFTA. The main content of CAFTA is cooperation in the fields of trade in goods, trade in services, investment and opening up, etc. Besides the above four fields, GMS also involves energy, transportation, tourism and other aspects. The trade covers a broader range. Besides, in addition to China and Thailand, the economic conditions of four other GMS6 member states (Cambodia, Laos, Myanmar and Vietnam) are somewhat backward compared with those of Singapore, the Philippines, Malaysia and Indonesia in CAFTA, and their internal differences are also greater. Therefore, a dispute settlement mechanism that conforms to the character and content of subregional cooperation should be established according to the national conditions of GMS member states.

3. Main means of settlement of international economic disputes

With the signing of a series of international law documents, the main mode of international economic dispute settlement has changed from violence to peace and from power orientation to rule orientation. Peaceful settlement of international economic disputes has become a basic principle of international law. The main ways of international economic dispute settlement can be divided into political settlement, legal settlement and mixed settlement.

3.1 Political settlement

Political settlement means the economic disputes between countries will be solved by means like consultation, mediation, investigation and reconciliation. In the process of negotiation or seeking compromise, this approach will directly or indirectly rely on the power of the countries involved, so

it is also called “power-orientated” dispute settlement. Political settlement does not set up a special and permanent dispute settlement institution, nor presuppose fixed dispute settlement procedures. It emphasizes the settlement of disputes rather than the adherence to established rules. Political settlement is characterized by high flexibility and can be applied to different types of disputes. It also gives the countries involve in disputes greater discretion and allows their sovereignty to be fully respected. However, this approach has an obvious shortcoming, that is, it must be based on the power of the countries involve in disputes. When disputes occur between two countries with relatively large differences in power, there may be malicious pressure from big powers, resulting in unfair consequences of power politics.

3.2 Legal settlement

The approach of legal settlement mainly refers to the settlement of economic disputes by an independent third party, such as an arbitration institution or a judicial institution. Due to the fact that legal settlement is mainly conducted in strict accordance with established rules, which is less affected by factors such as power comparison between countries and can resolve disputes fairly, it is called “rule-oriented” dispute settlement. Legal settlement is the most objective and fair way of dispute settlement. Due to its perfect organizational structure and fixed procedural rules, the arbitration award and judicial judgment are binding, which is the final way to settle disputes. The parties to the dispute will not resort to any other means after they have adopted the method of legal settlement. However, the legal settlement approach also has the disadvantages of limiting the sovereignty of the parties concerned, relatively fixed procedures, relatively long time consuming and relatively high cost of dispute settlement.

3.3 Mixed settlement

The mixed dispute settlement mechanism combines the characteristics of political settlement and legal settlement. This kind of dispute settlement is generally divided into two stages. In the first stage, political settlement is adopted to resolve conflicts through consultation, mediation and conciliation. When political settlement fails to resolve the dispute, the second stage is entered. The parties to a dispute may request the establishment of an arbitral tribunal or panel of experts. A binding adjudication of the merits of a case will be made by an independent third party based on a treaty signed by the parties. The ultimate means of the mixed settlement is arbitration or panel decision. The establishment of arbitral tribunal and expert panel is temporary, so the degree of legalization cannot reach that of European Court of Justice. Nevertheless, mixed settlement adopts diplomatic means and judicial means, which complement each other, and resolve disputes without damaging the friendly relations between the parties to the greatest extent.

4. Thoughts on constructing GMS dispute Settlement Mechanism

4.1 An independent judicial dispute settlement mechanism must be established

In the long run, the success or failure of regional economic organizations depends largely on the effectiveness of its dispute resolution mechanism. In the field of international trade law, which is quite politically sensitive, a mechanism that can resolve disputes and promote compliance with legal obligations can make a great achievement in regional economic integration. On the contrary, a weak and ineffective dispute settlement mechanism will only undermine the legitimate status of regional economic organizations and impede the process of regional integration. Therefore, in order to realize GMS subregional integration and promote the economic and social development of the region, it is of great significance to establish an independent and judicial dispute settlement mechanism of GMS. Only by establishing GMS dispute settlement mechanism can investors' doubts and concerns about the prospect of regional cooperation environment be removed and the good operation of regional trade agreements be ensured.

4.2 The GMS dispute settlement mechanism can be constructed in a mixed way

Throughout the current dispute settlement mechanisms of regional trade organizations,

diplomatic approaches are still an important way to resolve regional trade disputes. However, with the development of regional trade arrangements, the transition from diplomatic approaches to legal approaches has become a trend. The success of both WTO and NAFTA is due to the way of dispute settlement that mainly relies on the combination of political means and legal means, which enables regional trade disputes to be solved quickly and effectively. In view of the national conditions of the six member states in the GMS subregion, a mixed dispute settlement mechanism that takes into account the political influence of member states and is legally binding can be established. GMS dispute settlement mechanism can learn from the mechanism design of WTO and NAFTA. The dispute settlement mechanism can be divided into two stages. The first stage is to settle the dispute through political consultation and negotiation. If a satisfactory settlement can't be reached within a certain period of time, the second stage will be entered. In the second stage, GMS can learn from NAFTA's arbitration model. An arbitration tribunal shall be established upon the application of the parties and the arbitration tribunal shall make an arbitral award on the dispute. In order to ensure the impartiality of the arbitration tribunal, strict requirements should be made on the qualification of arbitrators. For example, they must be legal experts in international trade and trade, and they must not come from the parties to the dispute, so as to ensure the objectivity and reliability of the arbitration award.

4.3 The dispute settlement relationship between GMS and CAFTA should be handled properly

As mentioned above, the six GMS members are also members of CAFTA, and the GMS serves as a pilot demonstration zone for CAFTA. Therefore, if the GMS establishes an independent dispute settlement mechanism, it will definitely form the issue of jurisdictional competition and cooperation with the dispute settlement mechanism of CAFTA. It becomes an unavoidable problem in dealing with the relationship between them. NAFTA has set a good example. Since NAFTA members are also WTO members, NAFTA provides that when a dispute involves both NAFTA and WTO rules, the disputing parties may settle the dispute according to either the rules of NAFTA or rules of WTO unless there's accordingly relevant regulations. NAFTA gives the parties to the dispute a free choice to apply the dispute settlement mechanism. However, the freedom of choice is not unlimited. According to NAFTA, it is mandatory to use NAFTA dispute settlement mechanism when one party chooses WTO dispute settlement mechanism and the other party chooses NAFTA dispute settlement mechanism for specific matters such as plant quarantine, health quarantine. This is to protect the special areas of the trade zones and to stop the parties to the dispute countries from choosing a dispute settlement mechanism which may be conducive to their own interests in the special areas.

GMS can learn from NAFTA. GMS members can choose the GMS dispute settlement mechanism or CAFTA dispute settlement mechanism for consultation. If no agreement can be reached through consultation, the GMS dispute settlement mechanism shall be compulsorily applied.

5. Conclusion

The GMS economic cooperation has entered a new and more pragmatic stage. The focus of the cooperation has shifted from the hardware aspect such as infrastructure to the software aspect such as trade and investment facilitation. The establishment of an independent dispute settlement mechanism in line with the development of GMS is an inevitable requirement of the subregional economic development. The improvement of GMS dispute settlement mechanism is of great practical significance to realize the effective operation of various trade agreements in the subregions and ensure the realization of the objectives and purposes of regional trade agreements.

References

- [1] Wei Liu. Report on Greater Mekong Subregion Cooperation and Development (2011-2012)[M].

Beijing:Social Sciences Academic Press(CHINA),2012.

[2] Min Li. Study on Legal Issues of Greater Mekong subregion Economic Cooperation [M]. Beijing:University of International Business and Economics Press,2006.

[3] Xiaodong Zhang. Principles of International Economic Law [M]. Wuhan:Wuhan University Press,2005.

[4] Benzhi Shi, Jie Dai. Construction of Lancang-Mekong Sub-regional Cooperation and China-ASEAN Free Trade Area [M]. Beijing:China Commerce and Trade Press 2005.

[5] Yu Chai, Jianren Lu, Xianming Yang. Study on Greater Mekong Subregion Economic Cooperation [M]. Beijing:Social Sciences Academic Press(CHINA),2007.