

COMPARATIVE RESEARCH OF INTERNATIONAL DISPUTE RESOLUTION MECHANISMS: WTO AND ICSID

PESQUISA COMPARATIVA DOS MECANISMOS DE RESOLUÇÃO DE CONTROVÉRSIAS INTERNACIONAIS: OMC E ICSID

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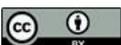
The authors declare that there is no conflict of interest

Abstract

The progress of economic trade and investment naturally necessitates the creation of appropriate laws, and an effective dispute resolution system plays a crucial role in this process. Given the swift advancement of international economic cooperation, it becomes especially critical to ensure the complete and effective resolution of economic disputes. The International Center for the Resolution of Investment Disputes (ICSID) established by the Washington Convention provides a better solution for investment disputes between foreign investors and host governments. The dispute resolution mechanism established by the World Trade Organization (WTO) based on the Understanding on Dispute Resolution Rules and Procedures (DSU) provides a good solution for investment disputes between countries. The WTO and ICSID dispute resolution mechanisms are well-established and effective mechanisms in the world for resolving cross-border disputes. They each have their own advantages and disadvantages in investment dispute resolution. The WTO dispute settlement mechanism has the characteristics of strict procedures and effective implementation, while ICSID has the characteristics of flexible Proper law and final adjudication. Comparing the differences between the two dispute resolution mechanisms can reveal a complementary relationship in resolving international investment disputes. Choosing a reasonable system that is suitable for the parties is not only conducive to protecting their rights and interests, but also to a certain extent guarantees the prosperity and development of the international economy.

Resumo

O progresso do comércio e do investimento econômico exige, naturalmente, a criação de leis apropriadas, e um sistema eficaz de resolução de disputas desempenha um papel crucial nesse processo. Dado o rápido avanço da cooperação econômica internacional, torna-se especialmente crítico garantir a resolução completa e eficaz de disputas econômicas. O Centro Internacional para a Resolução de Disputas sobre Investimentos (ICSID), estabelecido pela Convenção de Washington, oferece uma solução melhor para disputas de investimento entre investidores estrangeiros e governos anfitriões. O mecanismo de resolução de disputas estabelecido pela Organização Mundial do Comércio (OMC), com base no Entendimento sobre Regras e Procedimentos de Resolução de Disputas (DSU), oferece uma boa solução para disputas de investimento entre países. Os mecanismos de resolução de disputas da OMC e do ICSID são mecanismos bem estabelecidos e eficazes no mundo para a resolução de disputas transfronteiriças. Cada um possui suas próprias vantagens e desvantagens na resolução de disputas de investimento. O mecanismo de solução de controvérsias da OMC caracteriza-se por procedimentos rigorosos e implementação eficaz, enquanto o ICSID caracteriza-se por flexibilidade, aplicação da lei aplicável e decisão final. A comparação das diferenças entre os dois mecanismos de resolução de disputas pode revelar uma relação complementar na resolução de disputas internacionais de investimento. A escolha de um sistema razoável e adequado às partes não só



Keywords: International Disputes. Wto Dispute Settlement Mechanism. ICSID.

contribui para a proteção de seus direitos e interesses, como também, em certa medida, garante a prosperidade e o desenvolvimento da economia internacional.

Palavras-chave: *Controvérsias Internacionais. Mecanismo de Solução de Controvérsias da OMC. ICSID.*

1 INTRODUCTION

As the economy grows, international relations have rapidly shifted from being centered around politics and military to being centered around economy and technology. Foreign economic and trade relations have increasingly become an important part of foreign relations among countries. However, the trade wars and trade frictions between various economic trade bloc and trade partners will inevitably emerge in large numbers. International disputes will have far-reaching implications for the international trading environment and the development of economic trade among States, and will threaten political relations between countries. In this context, dispute resolution mechanisms for handling international disputes have also emerged.

The COVID-19 epidemic has significantly impacted foreign direct investment (FDI) in countries worldwide. According to statistics released by the United Nations Conference on Trade and Development (UNCTAD) at the end of 2020, global foreign direct investment (FDI) experienced a notable decline in the same year. A decrease of about 40% from \$1540 billion in 2019, and for the first time since 2005, it has fallen below the \$1 trillion mark¹. At the same time, UNCTAD remains pessimistic about the outlook for FDI in 2021 and indicates that international investment may remain sluggish for a long time². The turbulent economic situation will inevitably exacerbate disputes between countries or between countries and investors. The analysis and comparison of development trends and characteristics of international dispute resolution mechanisms are essential. The WTO dispute resolution mechanism has been in good operation for many years and is a successful model. ICSID has also made significant achievements in

¹ Liu Kaiquan. (2022). Development Trends and Characteristics of Dispute Resolution Mechanisms between States and Investors - Taking ICSID as the Research Object. *Journal of Ningbo Open University* (02), 64-70. Doi: CNKI: SUN: NBGB.0.2022-02-014.

² UNCTAD.2020. World Investment Report 2020-International Production beyond the Pandemic. New York United Nations Publication.

handling disputes between investors and countries³. Therefore, studying these two international investment dispute resolution mechanisms and analyzing their characteristics will help the parties choose the mechanism that suits them and also contribute to the self-improvement of these two mechanisms. By doing so, to create a favorable legal environment for international investment cooperation.

2 WTO DISPUTE RESOLUTION MECHANISM

In the relatively peaceful and stable international environment of the world, governments of various countries have made promoting and ensuring the stable and sustainable development of their own economies their preferred goal. Whether it is a socialist or former Socialist state that has long pursued ideology supremacy and "Class conflict as the key link", or a vast number of developing countries that have striven for national independence and liberation since the 1940s, with the exception of a few countries that are constantly in dispute over race, nationality, tribe, and religion, most governments have taken economic development as the focus of their government's work, Adjust the focus of work to focus on economic development. In the process of party competition, Western countries also use creating good economic development performance and overcoming economic crises as the main means to establish a party image and win the support of voters. The pursuit of economic stability and development has become a common goal pursued by governments of various countries that transcend ideology and social systems.

The World Trade Organization (WTO) is an independent organization. The concept of creating a WTO was proposed at the Bretton Woods Conference in July 1944.⁴ After World War II, the establishment of an international trade organization was envisioned to complement the World Bank and the International Monetary Fund, forming a powerful trio known as the "monetary, financial, and trade" trinity that exerted significant influence over the world economy. The World Trade Organization was established after the United Nations Conference on Trade and Employment adopted the Havana Charter in 1947. But the United States' objection prevented the WTO from being

³ Volova, LI. (2010). International investment controversies settlement mechanism. *TERRA ECONOMICUS* (8):80-86.

⁴ Brewster Rache. 2019. WTO dispute settlement: Can we go back again? *AJIL Unbound* (113):61- 66.

founded. In the same year, the United States initiated the drafting of the General Agreement on Tariffs and Trade (GATT) as a temporary contract aimed at fostering trade liberalization. Subsequently, the Uruguay Round of GATT negotiations was launched in 1986. In 1990, the European Community and Canada formally put forward the proposal for the establishment of the World Trade Organization. The final decision to create the WTO was made during the Ministerial Conference of the General Agreement on Tariffs and Trade (GATT) in April 1994, held in Marrakech, Morocco. As of now, there are 166 member countries (See figure 1).

Figure 1

Distribution Map of WTO Members



Source: WTO Members and Observers (2023)

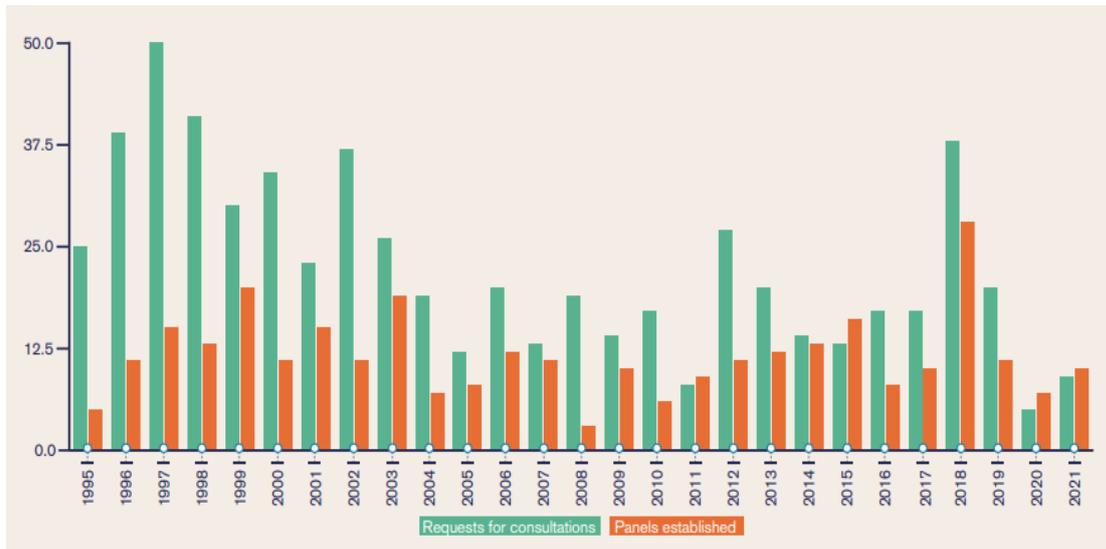
GATT has a dispute settlement mechanism, but this set of rules suffers from such shortcomings as overly coarse content and weak operationalization, that is why member States decided to create a new dispute resolution mechanism for the newly created WTO, more harmonized and more binding. Following the multilateral trade negotiations of the GATT Uruguay Round, which took place from 1986 to 1994, the fundamental legal framework for the WTO's dispute settlement mechanism was established. This

framework, known as the Understanding on Dispute Settlement Rules and Procedures (DSU), was finalized during that period⁵.

The DSU basically specifies the scope of application, management structure, general principles, as well as basic and special procedures, etc. The WTO dispute settlement mechanism is applicable to the Uruguay Round agreements, including GATT, the Agreement on the Establishment of the WTO itself and all the goods trade agreements attached thereto, the General Agreement on Trade in Services (GATS), etc. To overcome the limitations of the GATT dispute settlement mechanism, the WTO dispute settlement mechanism has intelligently incorporated several successful aspects of the former system while daringly implementing enhancements and innovations. This approach aims to create a more effective and efficient dispute resolution process that can better address the complexities of international trade disputes. The primary trading nations worldwide are members of the World Trade Organization (WTO), and their trade volume constitutes the overwhelming majority of global international trade. What provides reliable guarantees for the safe operation of such a global trade organization is its dispute resolution mechanism. After years of practice, WTO dispute settlement mechanism, has been continuously revised and supplemented, and has become a unique, innovative, and complex dispute settlement system in contemporary international economic organizations⁶. From January 1, 1996 to December 31, 2022, there were a total of 615 cases requesting dispute resolution from the WTO, as shown in Figure 2. From this, it can be seen that WTO dispute resolution mechanism has handled a large number of cases since its establishment, indicating that WTO dispute resolution mechanism is operating well.

⁵ Schleyer, Glen T. 1997. Power to the people: Allowing private parties to raise claims before the WTO dispute resolution system. *Fordham Law Review* 5(65):2275 – 2310.

⁶ Yang Xicheng & Zhang Wangping. (2021). Construction of international investment dispute mechanism under the vision of the "the Belt and Road" *Journal of Mudan River University* (07), 13-22 Doi: 10.15907/j.cnki.23-1450.2021.07.003.

Figure 2*Number of disputes initiated and original panels established (1995 – 2021)*

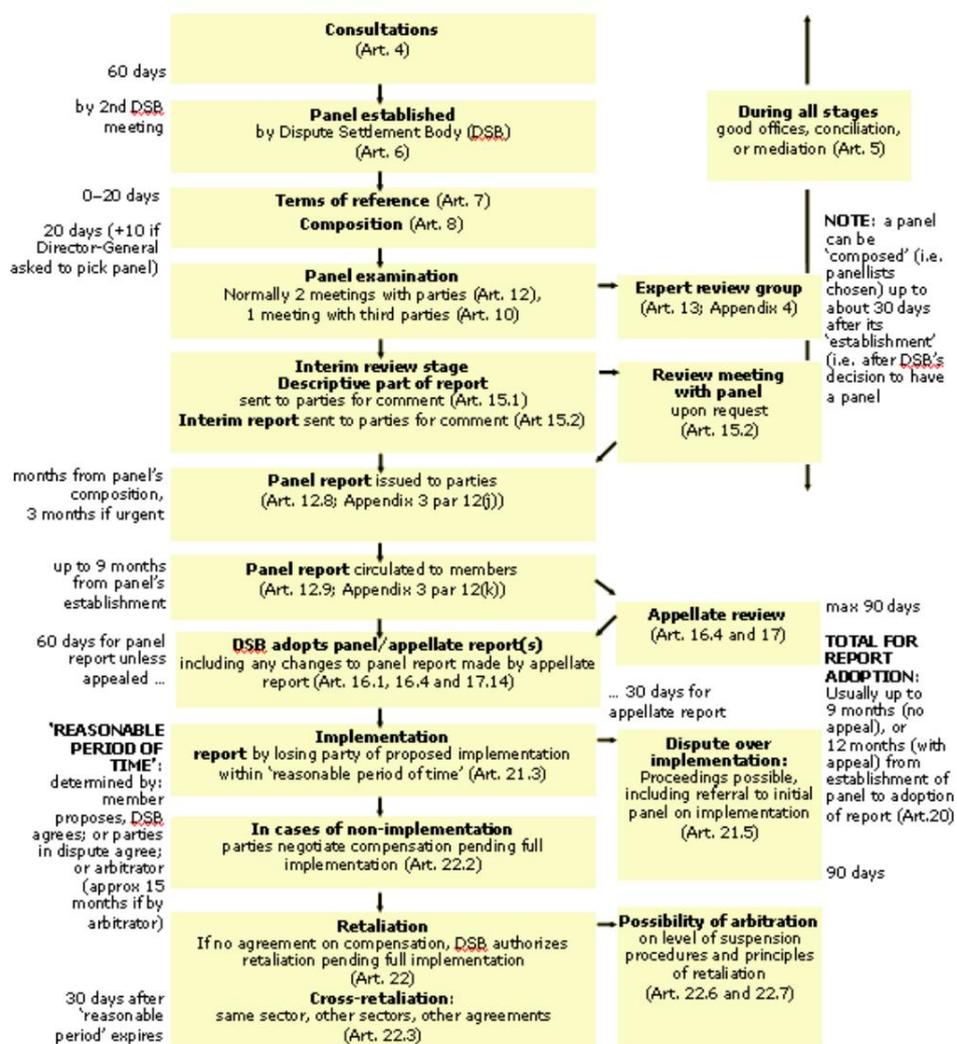
Source: WTO (2022)

When the WTO handles international disputes through its established dispute settlement body, the Dispute Settlement Body (DSB). After an international dispute arises, using the WTO dispute settlement mechanism to handle it requires some steps and procedures, as shown in Figure 3.

Figure 3

Several stages a dispute can go through in the WTO

Note: some specified times are maximums, some are minimums, some binding, some not



Source: Understanding the WTO (2023)

3 CONSULTATION

In the process of international bilateral and multilateral trade, the negotiation process specifically refers to the process in which both parties to a dispute resolve specific matters during the dispute process through negotiation or negotiation in a relatively harmonious atmosphere. This resolution process is clearly defined in Article 4 of DSU⁷.

⁷ DSU Article 4.2023. https://www.wto.org/english/docs_e/legal_e/28-dsu_e.htm [11 July 2023].

The peaceful handling and resolution of disputes arising from international trade through consultation and negotiation is an important provision in current international law. In the DSU agreement, the negotiation process is a crucial process. Typically, the Requested Party is required to respond to a request for a negotiated agreement in 10 days and is required to begin negotiations within thirty days (or ten days in the case of an emergency or other special circumstance). If the requested party does not engage in negotiations with the requesting party within the aforementioned time period, the requesting party may apply to start the panel resolution process. At the same time, if a third party other than the negotiating parties determines that there is a real trade and interest relationship between the above-mentioned negotiation matters and them, the third party can apply to the DSU with the consent of both trading parties, thereby participating in the specific process of the aforementioned dispute negotiation⁸.

4 MEDIATION, RECONCILIATION, AND GOOD OFFICES

Mediation means that the mediator participates as a qualified third party in the process of negotiation and consultation amidst the parties involved in the dispute. Conciliation specifically refers to the submission of a dispute issue or event by both parties to a third party, with both parties providing detailed factual information and providing specific suggestions for resolving the dispute to the third party, thereby helping to achieve reconciliation of the aforementioned dispute issues. Mediation refers to the involvement of a mediator as a third party in a dispute, other than the parties involved in the case, to mediate between the parties and promote the resolution of the dispute. Overall, mediation, reconciliation, and good offices are logical supplements to ordinary negotiation methods in the process of consultation and negotiation. The above process is detailed in Article 5 of the DSU⁹. Mediation, reconciliation, and good offices are very common ways of handling and resolving disputes in the international trade process. And, it is usually a voluntary dispute resolution and resolution process based on the agreement of both parties in the dispute. In the actual process of responding to and handling disputes,

⁸ Zhu Yue. (2023). Paths and Methods for Linking the Effectiveness of WTO Dispute Resolution Mechanism and ISDS Mechanism. *Pacific Journal* (04), 25-33. doi: 10.14015/j.cnki.1004-8049.2023.04.003.

⁹ DSU Article 5.

mediation, reconciliation and mediation are a very flexible dispute resolution process. The third party can initiate mediation at any time or terminate mediation at any time¹⁰.

5 PANEL

The WTO dispute settlement mechanism thus achieved a crucial shift from 'diplomacy-oriented' to 'law-oriented'. DSU Articles 6-16 systematically stipulate the powers, composition, and working procedures of the panel.¹¹ The core powers of the panel include: accepting disputes referred by the DSB, conducting investigations and gathering evidence to support the DSB's rulings and recommendations, interpreting issues related to the application of relevant agreements, and obtaining necessary authorization after consulting with the parties involved.¹²

Regarding composition, Article 8 of the DSU establishes strict qualification standards. Experts should be high-ranking government officials or non-governmental individuals with extensive experience to ensure their independence and professionalism, and they should work independently in their personal capacity. Citizens of the parties involved, or stakeholders are generally excluded, unless there is unanimous consent from all disputing parties. If a developing country is involved in the dispute and requests it, the panel must include at least one member from that country.¹³

The DSB Secretariat and the Director-General are respectively responsible for the nomination and appointment of panel members. Panels usually consist of three members, and their working procedures, time limits, and reporting authority are clearly specified by the DSU. Report adoption follows the 'negative consensus' principle, meaning that unless there is a unanimous objection or an appeal within 60 days, it is automatically adopted. This unique mechanism is the fundamental reason why panel rulings are authoritative and have a deterrent effect.

¹⁰ Ye Xingping. (1997). Analysis of good offices and mediation in international dispute resolution. *Journal of Wuhan University (Philosophy and Social Sciences Edition)* (02), 18-23 Doi: CNKI: SUN: WSLD.0.1997-02-006.

¹¹ DSU Article 6-16.

¹² DSU Article 8.

¹³ Tang Guanyu. (2022). Research on the WTO Dispute Settlement Mechanism. *Qin Zhi* (10), 146-148. doi: CNKI: SUN: QINZ.0.2022-10-048.

6 APPELLATE

To ensure proper handling of cases, the DSU has established an appellate procedure. The standing Appellate Body consists of seven members with a term of four years, renewable once. Cases are reviewed by a rotating panel of three members, and the body's authority is greater than that of the panel, allowing it to uphold, modify, or reverse the legal issues and interpretations in reports. The appellate procedure has strict time limits, typically requiring a ruling within 60 days (which can be extended to 90 days in special circumstances). The ruling automatically becomes adopted by the DSB 30 days after being circulated to members, unless there is a "negative consensus." Whether it is a panel report or an appellate ruling, recommendations are strictly limited by Article 19 of the DSU: when a measure is found to be inconsistent, the recommendation only advises bringing it into conformity with WTO rules and may not add to or diminish the rights and obligations of members.

7 SUPERVISION OF THE PROCESS OF RECOMMENDATIONS AND ENFORCEMENT OF RULINGS

According to the regulations of the DSU, the relevant members shall convene a corresponding dispute resolution body working meeting in 30 days after the approval of the final report, and shall notify the dispute resolution body of the request and intention to make suggestions or execute rulings during the meeting. For example, immediate compliance with or failure to enforce the content of the ruling. At the same time, a more reasonable enforcement period should be proposed for the above ruling. There are usually three different ways to achieve this reasonable execution deadline. The DSB is obliged to implement the recommendations and to monitor the award on an ongoing basis. Relevant implementation issues should be included in the detailed agenda of DSB meetings within a clear and reasonable period of six months¹⁴.

¹⁴ DSU Article 21.

8 SUSPENSION OF CONCESSION AND COMPENSATION

To ensure that the recommendations and rulings of a panel or appellate body are effectively implemented, the DSU establishes conditional retaliatory measures. If the losing party fails to comply with a ruling, the winning party cannot immediately take retaliatory action but should first negotiate a compensation plan with the other side. If negotiations fail to reach an agreement, the winning party may, under Article 22 of the DSU, request authorization from the DSB to take temporary measures such as 'suspension of concessions or other obligations' (i.e., retaliation). The initiation of such measures must meet strict conditions: first, retaliation must be explicitly authorized by the DSB, and unilateral action is prohibited; second, the level of retaliation must be proportionate to the damage suffered and must not be excessive¹⁵. Regarding the scope of retaliation, although previously limited by GATT Article 23 to the same sector in principle, the DSU enhances its deterrent effect by expanding the authorized scope of retaliation to cross-sector retaliation.¹⁶

9 ICSID DISPUTES SETTLEMENT MECHANISM

The International Centre for Settlement of Investment Disputes (ICSID) is one of the most important institutions under the Investor-State Dispute Settlement (ISDS) mechanism and is the world's first permanent institution established specifically to resolve international investment disputes. It mainly provides dispute resolution methods including mediation and arbitration.¹⁷ After the World War I, the emerging developing countries gradually strengthened the supervision of foreign investment in order to fundamentally get rid of the control of foreign capital over their own economic sovereignty and to develop their national economy. In the 1950s and 1970s, there was a large-scale expropriation and nationalization movement of foreign investment, which

¹⁵ Li Jianfei & Song Jin. (2020). The application of WTO "cross retaliation" under the concept of the "the Belt and Road" initiative. *Journal of Shaanxi University of Administration* (04), 84-87 Doi: 10.13411/j.cnki.sxsx.2020.04.017.

¹⁶ Wang Xiangxiu & Sun Jian. (2018). On the Cross Retaliation System in Dispute Resolution of the World Trade Organization. *Knowledge and Action* (01), 126-134. doi: 10.19309/j.cnki.zyx.2018.01.025.

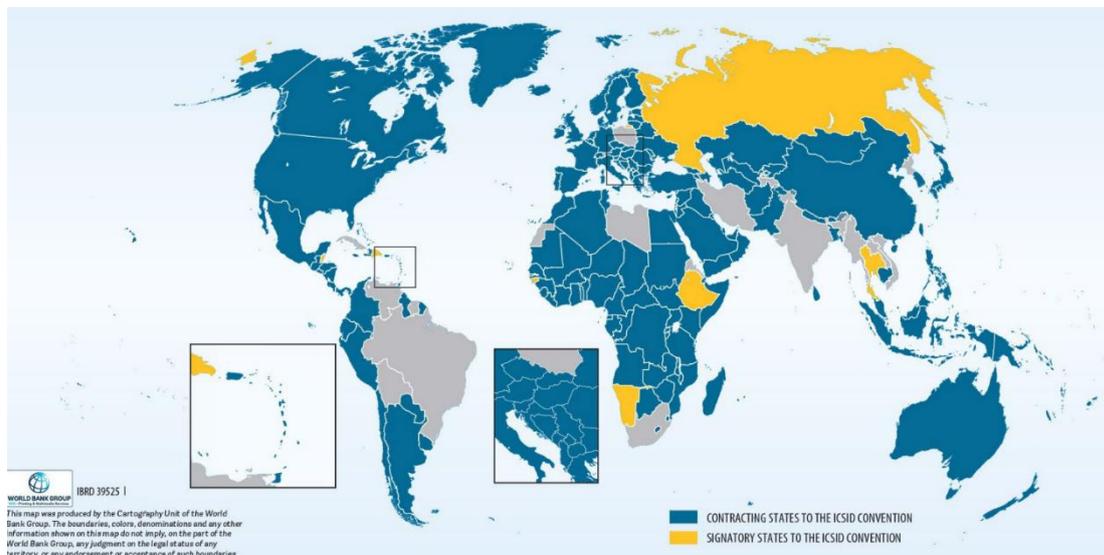
¹⁷ Supnik, Kate M. (2009). Making amends: Amending the ICSID Convention to reconcile competing interests in international investment law. *Duke Law Journal* 59(2), 343 – 376.

fundamentally violated the vested interests of developed countries, resulting in four international investment disputes¹⁸.

With the support of the World Bank, two major categories of countries, North and South, underwent arduous negotiations and finally reached the Washington Convention in 1965, establishing the ICSID. ICSID is designed to foster the cross-border movement of private investment through its dispute resolution services. Thereby, it shields foreign investors from the jurisdiction of host states and protects them from potentially unjust judgments in local courts. On the other, for the host country, it effectively eliminates the abuse of diplomatic protection and other remedies by foreign investors. As of 2025, the distribution map of ICSID contracting countries is shown in Figure 4. From this, it can be seen that most countries around the world are parties to the ISDS Convention and can apply ICSID to resolve international disputes.

Figure 4

Map of ICSID States Parties and other Signatories



Source: The ICSID Caseload Statistics (2025)

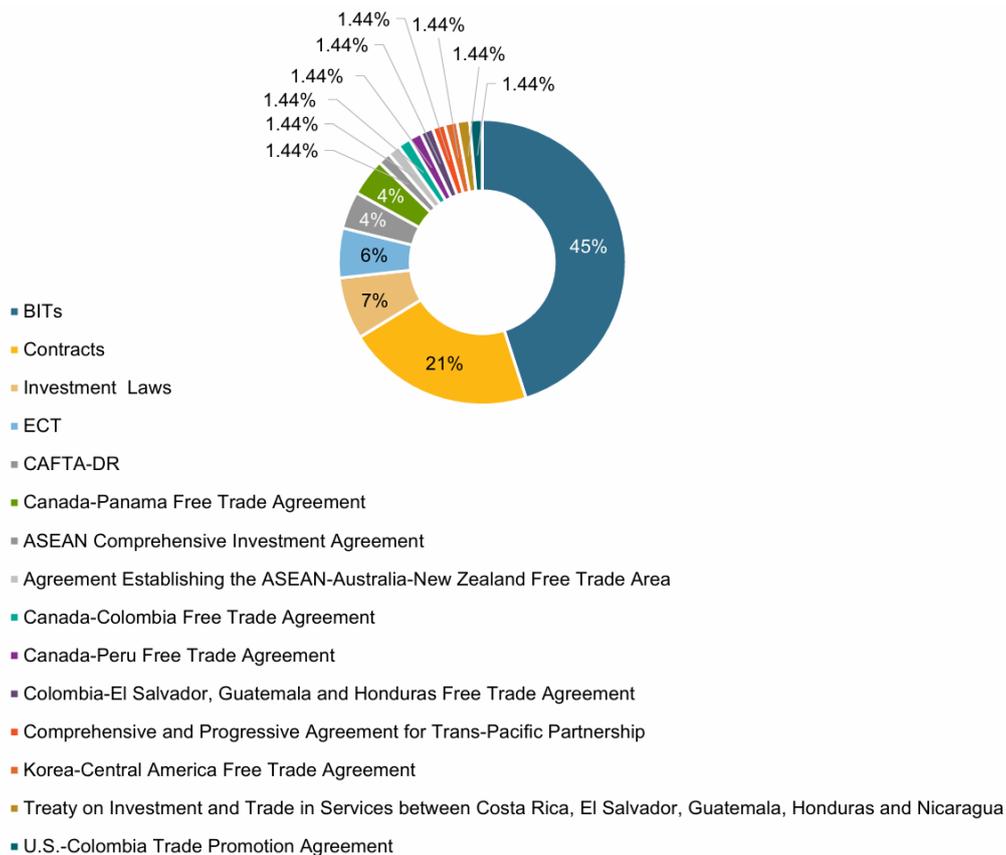
Chaired by the World Bank President, the ICSID Board comprises directors appointed by member countries. However, ICSID does not rule on substantive legal rights, and key terms like "investment" are defined not by the Convention but by external

¹⁸ Gantz, David A. (2012). Resolution of investor-state controversies in developing countries. *Law and Development Review* (2) 5,83-127. Doi:10.1515/1943-3867.1153.

BITs or MAIs. These agreements, as shown in Figure 5, form the primary basis for ICSID's jurisdiction in registered cases.

Figure 5
Basis for ICSID jurisdiction of ICSID Cases

Chart 8: Basis of Consent Invoked in ICSID Cases Registered in FY2025



Source: ICSID Caseload Statistics (2025)

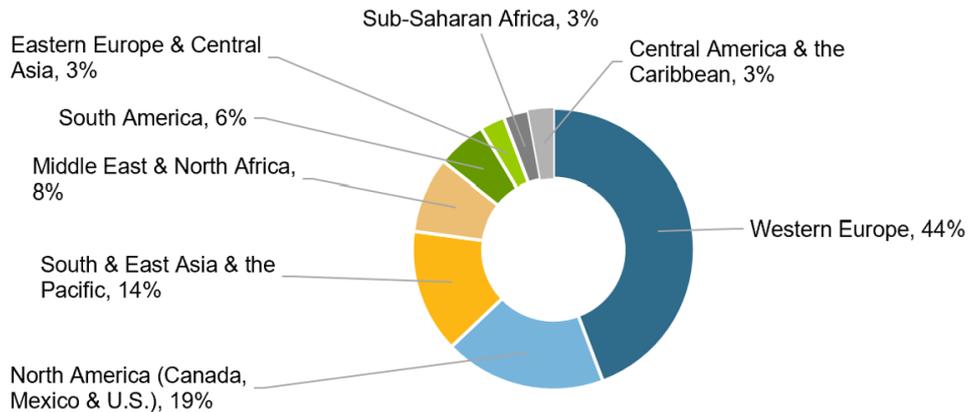
According to the "ICSID Case Statistics" report, as of June this year, ICSID has handled a total of 1,058 cases. Among them, 347 cases were processed throughout 2025, setting a record for the highest number of cases in a single year. In terms of jurisdiction, 45% of the new cases are based on BITs, while the remainder invoke other international treaties or are based on contracts between the host state and investors, or on the host state's domestic investment laws. In terms of geographical distribution, see figure 6 investors from Western Europe account for the highest proportion, followed by those from North America. This data fully demonstrates that the ICSID mechanism is operating well and

has become a stable and mature platform for resolving international investment disputes.¹⁹

Figure 6

Distribution of ICSID Cases Registered in 2025

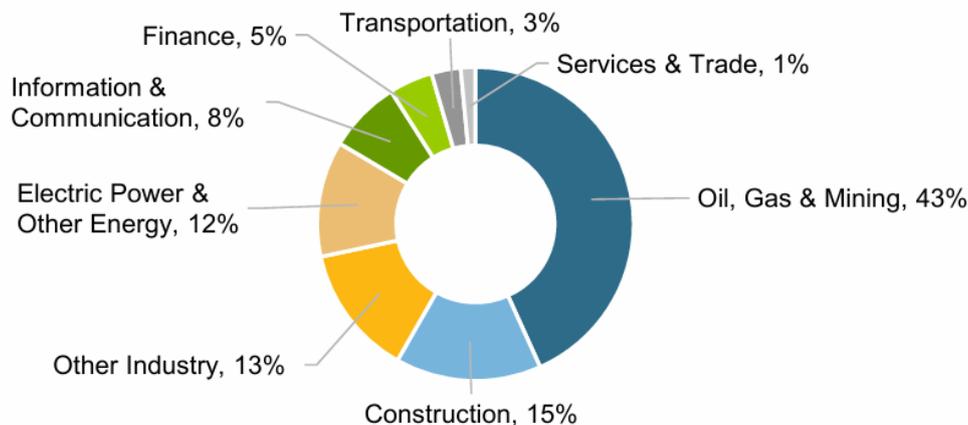
Distribution of ICSID Cases Registered in FY2025, by Investor Party Involved



Source: ICSID Caseload Statistics (2025)

Specifically, the disputes handled by ICSID mainly include four aspects. The first is the controversy caused by the host country's adoption of nationalization policies or administrative expropriation. The second is the disputes caused by the host country's exercise of administrative power. The third is disputes arising from the host country's interference in the commercial activities of enterprises. The fourth is damage to investors' interests caused by domestic political unrest, revolutions, wars, etc. in the host country. As shown in Figure 7, in 2025, 43% of newly registered cases originated from the oil, gas, and mining industries, of which the mining sector represented the largest share with 19 cases. It can be seen that the scope of ICSID cases is still very broad, basically covering most economic industries.

¹⁹ The *ICSID_Caseload_Statistics*. 2025. ICSID. <https://icsid.worldbank.org/news-and-events/comunicados/icsid-releases-caseload-statistics-2025-fiscal-year-expanded-data> [27 August 2025].

Figure 7*Distribution of All ICSID Cases by Economic Sector***Chart 15: Distribution of ICSID Cases Registered in FY2025, by Economic Sector**

Source: ICSID Caseload Statistics (2025)

When a dispute occurs, the specific resolution procedure is as follows:

10 MEDIATION

Mediation begins when one party applies²⁰. The initiation of mediation requires a joint commitment from all parties. This commitment can be established either by a pre-existing agreement or by subsequent consent. Specifically, if one party submits a request, mediation will commence only if the other party accepts the offer within 60 days (or another agreed timeframe). A refusal or lack of response within this period renders mediation impossible.²¹ All mediation-related information is, in principle, confidential. The process is initiated by electronically applying through the designated portal. This application must detail the state of the involved or REIO, the specific investment, and the nature of the dispute. Upon review, if the request is found to fall within ICSID's jurisdiction, the case will be registered, and the parties may then proceed to appoint a mediator.²²

²⁰ ICSID Mediation Rule 2.

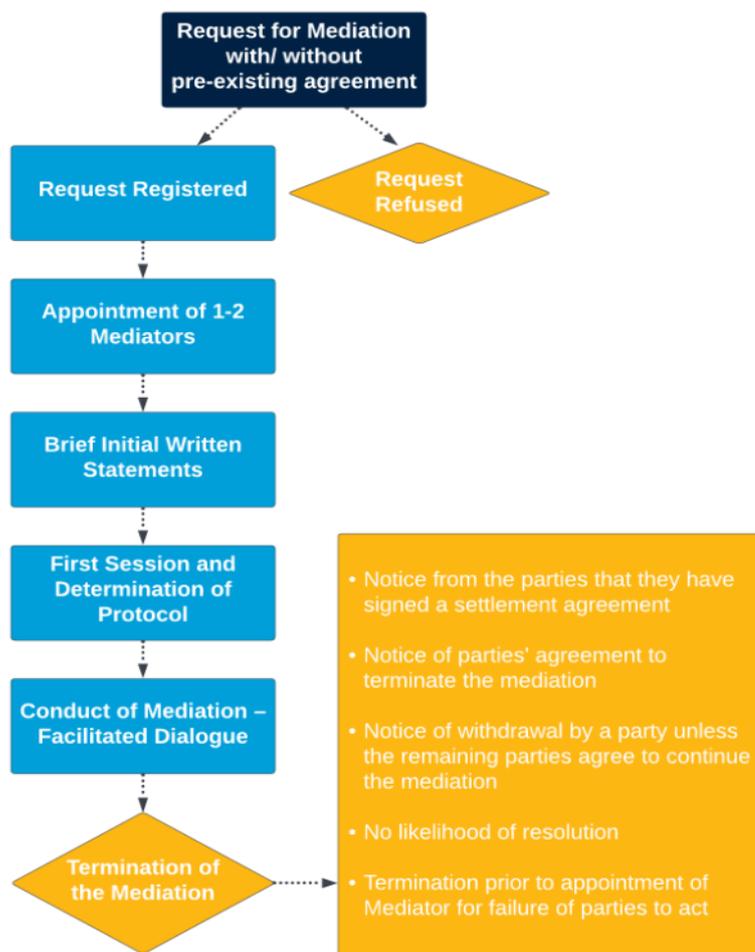
²¹ Peng Kun & Liang Shihui. (2011). Analysis of the Application of Law in the ICSid Dispute Settlement Mechanism. *Scientific and Technological Information* (19), 817. doi: CNKI: SUN: KJXX. 0.2011-19-652.

²² ICSID Mediation Rule 12.

The mediation procedure commences with the appointment of one or two mediators, selected by the parties. If a party fails to make an appointment within 60 days, the Secretary-General may intervene upon request. Throughout the process, the mediator may interact with the parties jointly or separately but possesses no power to mandate a resolution. Termination occurs upon the signing of a settlement or upon determination of an impasse, with any resulting agreement being non-binding and unenforceable.²³ The ICSID mediation process may be visualized as Figure 8.

Figure 8

ICSID mediation process



Source: ICSID Mediation Rules (2025)

²³ ICSID Mediation Rule 22.

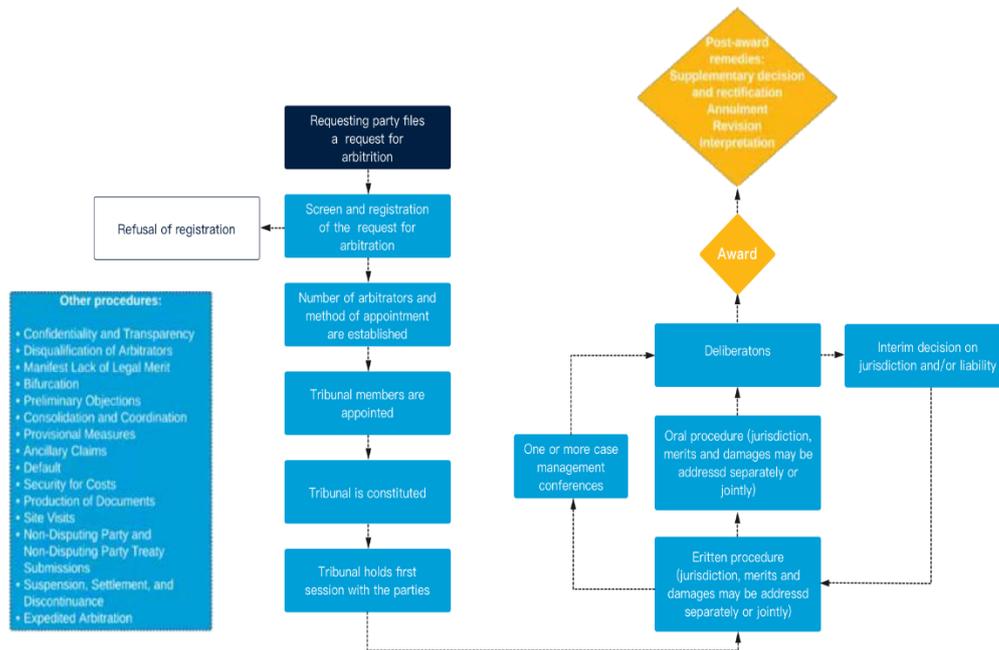
11 ARBITRATION

ICSID arbitration jurisdiction requires three essential elements: qualified parties, a qualified legal dispute, and mutual written consent. The process begins when a party files a request with the Secretary-General containing comprehensive details—including party information, dispute facts, specific relief claims (with amount estimates), and demonstration of a direct investment-linked legal dispute. Following review, if the application adheres to ICSID arbitration rules, it is registered, thereby formally initiating the arbitration proceedings.²⁴

Once arbitration proceedings are initiated, ICSID publishes essential case information on its website. The parties are then required to constitute the arbitral tribunal promptly. Pursuant to the ICSID Convention and Arbitration Rules, the standard tribunal comprises three arbitrators: each party selects one within 90 days, and these two arbitrators then collaborate with the parties to appoint a third presiding arbitrator. Finally, subject to the parties' mutual agreement, ICSID may publish the full text or an edited version of the final award.²⁵ The ICSID arbitration process may be visualized as Figure 9.

²⁴ Xiang Yan. (2009). Legal Application Issues in the ICSID Dispute Resolution Mechanism. *Knowledge Economy* (07),15-17.

²⁵ ICSID Convention Article 62.

Figure 9*The ICSID arbitration process*

Source: ICSID Arbitration Rules (2025)

12 RECOGNITION AND ENFORCEMENT SECTION

Regarding the recognition and enforcement part, according to the ICSID Convention Article 53, all parties to the litigation shall abide by and execute the arbitral tribunal's award, and must comply with the award in accordance with its terms. Article 54 of the ICSID Convention stipulates that if one party do not enforce the award, the other party may recognize and enforce monetary obligations in the courts of any ICSID member country, just like the final judgment of that country's court²⁶. Due to the relationship between ICSID and the World Bank, it will be more convenient to urge the losing party to fulfill their monetary payment obligations. However, However, although member states must recognize and comply with the ruling, according to ICSID Convention Article 55, countries may exercise immunity in certain aspects related to sovereignty²⁷.

²⁶ ICSID Convention Article 54.

²⁷ Li Siqu. (2004). Commentary on Dispute Resolution Mechanisms of ICSID, MIGA, and WTO. *Yunmeng Academic Journal* (04), 49-51. doi: CNKI: SUN: YMXK.0.2004-04-020

13 COMPARISON AND ANALYSIS OF WTO DISPUTE RESOLUTION MECHANISM AND ICSID

13.1 Jurisdiction system

The jurisdiction of ICSID is based on voluntary jurisdiction. Under ICSID Convention Article 25 (1), legal disputes arising from investment, if between nationals of one contracting state and another contracting state, can be governed by ICSID. It can be seen that the jurisdiction of the investment dispute submission center should meet three conditions. Firstly, the parties must be one is a state party and one is a national of another State party. Second, dispute nature must as a result of the investment and must be a legal dispute. In addition, when both parties agree to the jurisdiction of ICSID, neither party shall unilaterally revoke their consent. Therefore, for disputes that have already been accepted by ICSID, the host country generally cannot seek other remedies²⁸.

When conducting arbitration and mediation of disputes, ICSID must obtain the consent of both parties. Although in practice, there is a tendency to extend jurisdiction beyond the consent of the parties involved. But overall, it still needs to be based on involved parties' consent. So, the jurisdiction of ICSID is based on voluntary jurisdiction. The jurisdiction of ICSID, especially arbitration jurisdiction, is based on the essential requirements of arbitration and should be a voluntary jurisdiction. Violations of the will of both parties and other situations that expand jurisdiction should be prohibited from the perspective of rule requirements. If compulsory jurisdiction is required, it is generally difficult to be reasonable in terms of rules and practice. Especially regarding the issue of sovereignty that undermines the jurisdiction of the host country. If the jurisdiction agreement between the parties is clear, there is rarely a delay in the efficiency of arbitration or mediation regarding jurisdiction issues²⁹.

The jurisdictional conditions in WTO dispute resolution mechanism are different and the WTO is actually a compulsory jurisdiction. Firstly, there are differences in the main elements. The WTO dispute resolution mechanism is only applicable between two contracting parties, and the people are not eligible to join. It can be seen that two

²⁸ Tang Shumei. (2004). *Theory and Practice of International Investment Law*. Beijing: China Social Science Press, 302-303.

²⁹ Lv Junfeng & Ma Huyun. (2008). On the Relationship between WTO Dispute Resolution Mechanism and ICSID. *Journal of Yulin University* (01), 42-44+48 Doi: CNKI: SUN: YLGD. 0.2008-01-013.

mechanisms nature is not the same. ICSID is a dispute resolution mechanism between individuals and countries, while under the WTO framework, there is only a dispute resolution mechanism between countries. Secondly, The WTO Dispute Settlement Mechanism (DSM) may also govern whether or not the parties agree. According to DSU Article 23, if one member considers that a measure taken by other member is not complying with its obligations under WTO agreement, cause losses to their own interests, or affect the achievement of the objectives of the agreement, the member shall not take unilateral actions to safeguard their own interests, but shall rely on the DSU. In other words, all members have agreed and accepted, upon accession to WTO, to be subject to the WTO dispute settlement mechanism, which includes all agreements, including the Dispute Settlement Understanding, and also includes disputes arising out of the Appendix I.

Therefore, WTO dispute resolution mechanism has compulsory jurisdiction over disputes raised within the WTO system, without the need to obtain prior member declarations or written consent to its jurisdiction. And for the resolution of investment disputes within its scope of application, it also has a certain degree of exclusivity³⁰. The enforceability of jurisdiction and the superiority based on voluntariness cannot be generalized. The establishment of the DSB expert group to adopt the principle of reverse consensus is founded upon the consideration of the efficiency of international law enforcement, and is an improvement made to change the low efficiency of traditional international law and GATT dispute resolution mechanisms. Therefore, the actual compulsory jurisdiction generated is conducive to improving the corresponding efficiency.

13.2 Legal application

Regarding the legal application, the Washington Convention Article 42 stipulates that a verdict will be issued following the legal principles that the disputing parties mutually concur upon. If an applicable agreement is absent, the regulations of the involved Parties and any relevant regulations of international law will be applicable. It

³⁰ Zhang Jian. (2016). Legal Application Issues in ICSID Investment Arbitration - Centered on the Understanding and Application of Article 42 of the Washington Convention. *Journal of Anyang Normal University* (01), 20-26 Doi: 10.16140/j.cnki.1671-5330.2016.01.006.

can be seen that ICSID first grants the parties the right of autonomy in the application of law, subsequently, the arbitral tribunal employs the domestic legislation of the host nation along with potential regulations of international law. Finally, the arbitral tribunal may also base its decision on the principles of good faith and fairness without having to comply with the law, as long as all parties agree. It is thus clear that ICSID has some latitude in applying the law in specific cases.

However, ICSID application rules can easily cause controversy. The choice and application of host country law and international law is also a double-edged sword. After all, the disputes faced by ICSID are mostly investment disputes in developing host countries and developed foreign investors. The background of this dispute inevitably leads to two major factions in the application of law, with developing countries advocating for the application of the host country's laws, while developed countries are the opposite. Developing countries generally believe that domestic laws should be given priority, and international law should be in a supportive position. Even if international law can be applied, it must be restricted. Developed countries, on the other hand, hold another view that when the laws of the host country do not comply with international law principles in certain areas, international law should correct these inconsistencies, that is, when the provisions of the host country's laws on the issues involved are missing, international law plays a supplementary role. And under the interpretation Washington Convention Article 42, it is also clearly believed that the application of domestic law should prevail, and only in cases where there is a deficiency in domestic law or a conflict with international law, international law should be applied in a supplementary manner. However, at the practical level, Forms of prioritized application of international law identified. As can be seen, ICSID tends to favor the maximum application of international law and to review, correct or negate the domestic laws of the host country in accordance with international law³¹. This is not a good thing for the interests of the host country.

In terms of the WTO, Article 3 (2) of the DSU states that laws applicable to WTO dispute resolution are limited to the applicable agreements listed in the DSU, while the interpretation of relevant rules is governed by the customary interpretation of international public law. In practical situations, the practice of interpreting international

³¹ Zhang Jian. (2016). Legal Application Issues in ICSID Investment Arbitration - Centered on the Understanding and Application of Article 42 of the Washington Convention. *Journal of Anyang Normal University* (01), 20-26 Doi: 10.16140/j.cnki.1671-5330.2016.01.006.

public law can also serve as a method of interpreting treaties. It is not difficult to find that compared to the relevant rules of ICSID, WTO DSM has clearer requirements in terms of legal application, and also has strong predictability in the application of specific disputes.

13.3 Procedural rules

Firstly, there is the issue of third-party participation. The WTO dispute resolution procedure prohibits individuals, companies, or non-governmental organizations from participating as third parties in disputes, and only members can initiate the dispute resolution procedure. It is an issue not to allow interested individuals or non-governmental organizations to participate in WTO dispute resolution. For example, in intellectual property (IP) rights disputes, neither IP owner nor non-governmental organizations can participate in the case, and the national views represented by the parties at the national level may not necessarily reflect the concerns and interests of the true rights holders. From the practice of WTO dispute resolution, a large number of cases are settled through settlement. DSU also provides many opportunities for consultation, mediation, arbitration, and mediation. This dispute settlement arrangement is rooted in the diplomatic culture of the DSU system, and Secretariat, the DSB, the Panel, the Appellate Body etc. are dominated by diplomats. Behind the scenes, an agreement was reached on dispute settlement through a diplomatic conference, which excluded the third parties who had legitimate interests in the outcome of dispute settlement. It means that there is a lack of due process, paternalism and Arbitrariness in decision-making³².

In international investment arbitration, some mechanisms stipulate that "Amicus curiae" are the third parties approved to accede in the arbitration proceedings to assist arbitral tribunal in some aspects. However, allowing amicus curiae to participate in arbitration does not actually mean making a third party a party to the arbitration. Third parties can provide the court with key facts or expertise related to the dispute, which may be crucial for the decision made. However, this form of participation can also raise concerns about confidentiality. Some arbitral institutions have introduced amicus curiae

³² Li Xiaoling. (2009). Thirteen Years of Practice in WTO Intellectual Property Dispute Resolution: Review and Comments. *International Economic and Trade Exploration* (11), 70-75. doi: CNKI: SUN: GJTS.0.2009-11-017

systems in the investment arbitration. For instance, ICSID Arbitration Rules article 37(2) state that subject to the permission of the arbitration tribunal, third parties other than the parties to the dispute may submit written materials that are relevant to the disputed matter, after having asked the parties for their views. In deciding whether to allow the submission of such a statement, the arbitral tribunal should think about whether the party not involved in the dispute is in a position to present a point of view, especially if their understanding or viewpoint differs from that of the parties in dispute. Aiding the arbitral tribunal in resolving inquiries concerning matters of fact or law linked to the arbitration. Alternatively, the non-disputing party may resolve issues in the scope of the dispute.

13.4 Error correction procedure

In terms of setting up the appeal procedure, the two mechanisms are different. ICSID does not allow disputing parties to appeal their decisions. The effectiveness of ICSID arbitration is not the same from the provisions of the New York Convention. The court of the place of enforcement can conduct corresponding reviews of the arbitration award according to the provisions of the New York Convention. The Washington Convention explicitly emphasizes that the courts of each contracting party shall not exercise any form of review power over awards made by ICSID arbitration procedures, whether substantive or procedural. Similarly, the courts of each contracting party cannot refuse recognition and enforcement on the grounds of violating the local social and public order. In other words, an award made through the ICSID arbitration procedure must be enforced without being revoked through the corresponding ICSID procedure. Neither party shall appeal against the central ruling, except in cases where the relevant provisions of the Convention are suspended. The parties and the courts of each Contracting State shall comply with the decisions of the Fulfillment house. The ICSID decisions are equivalent to the final decisions made by the courts of the Contracting States. The cases arbitrated by ICSID are actually final due to the fact that ICSID currently does not establish an appeal mechanism³³.

Unlike the ICSID, the WTO DSM has special Appellate Body to hear appeals against cases considered by the panel. DSU has made provisions in Article 17 on the

³³ Chen An. (2005). *Selected Cases of International Investment Disputes*. Shanghai: Fudan University Press, 501.

establishment of Appellate Body, and has established a corresponding standing Appellate Body to accept appeals. DSU stipulates that any party has the right of appeal. However, the extent of appeal is constrained to the matters covered within the expert panel's report and the interpretation of statutes. The appellate body will make a decision on the conclusion of the panel maintain, modify, or overturn it³⁴. Appellate review and expert panel review together constitute the "two instance final review system" of the WTO DSM. The increase in appellate trials has given the WTO DSM the characteristic of being judicial. The appeal review aims to ensure the accuracy of the expert panel in interpreting and applying WTO legal rules, in order to enhance the protection of the parties' rights and interests involved. Panel reports are generally passed automatically, but panels cannot guarantee 100% that they will not make mistakes in interpreting applicable laws. Therefore, by establishing an appeal hearing to strictly examine the legal issues involved in the expert group's report, errors can be avoided as much as possible. This is another opportunity for the parties to the dispute to seek relief, which can more fully ensure the seriousness and authority of legal rules³⁵.

13.5 Trial time limit

The two mechanisms also differ in terms of trial time limits. Due to the lack of clear time limits, the duration of ICSID review is generally longer. Among them, some cases have a trial time of up to eight to nine years. For example, *Albaniaberg ambient Sh.p.k, M. Angelo Novelli and Costruzioni S.r.l. v. Republic of Albania* (ICSID Case No. ARB/14/26), the case was registered in July 2014 and did not come to an end until May 2022, seven years later. For example, *Global Telecom Holding S.A.E. v. Canada* (ICSID Case No. ARB/16/16), which was registered in June 2016, did not have a lawsuit result until September 2022, which has been 6 years³⁶.

Unlike ICSID, the WTO dispute resolution mechanism sets strict time limits for case hearings. As an example, Article 12 of the DSU outlines all the specified time limits spanning from the establishment of the group as the starting point to the release of the

³⁴ Noemi Gal-Or. (2008). The Concept of Appeal in International Dispute Settlement. *European Journal of International Law* (19):43–65, <https://doi-org.eresourcesptsl.ukm.remotexs.co/10.1093/ejil/chm054>.

³⁵ Liang Ying. (2002). *Research on WTO dispute settlement mechanism* (PhD, Central Party School of the Chinese Communist Party). <https://kns.cnki.net/KCMS/detail/detail.aspx?dbname=CDFD9908&filename=2002081774.nh>.

³⁶ ICSID Case database. 2023. <https://icsid.worldbank.org/cases/concluded> [7 July 2023].

group report as the endpoint. This includes the date of submission of statements by the parties, the date of meetings, the date of submission of arguments, the date of the mid-term review, etc. These time limits give the WTO a significant advantage in the efficiency of dispute resolution. At the same time, strict time limits have been set for each step of the program to avoid delaying time and weakening the effectiveness of the mechanism.

13.6 Execute the program

The true and effective execution of the award has decisive significance for the resolution of disputes. In terms of enforcement of rulings, the provisions of the two mechanisms also differ. According to the Washington Convention, each contracting party need acknowledge the legally binding nature of the award and perform it as if the award were the final ruling of its courts. In general, arbitration awards have strong autonomy in accordance with the Washington Convention, and the contracting party shall not review the award but only assist in its execution. When there is a dispute over the award, the interpretation, modification, and revocation of the award can only be made internally by ICSID. This is different from traditional international arbitration awards that require review by the courts of the executing country, which may not be enforced, providing greater protection for the enforcement of ICSID awards. However, the ICSID ruling may still encounter obstacles during the execution process. On the one hand, the convention emphasizes the recognition of the effectiveness of its rulings and prohibits the pursuit of appeals and other remedies. On the other hand, it provides three measures: arbitration interpretation, amendment, and cancellation, which still affect the smooth execution of the award. In addition, although the Convention stipulates that contracting parties shall be deemed to have waived jurisdictional immunity by agreeing to accept ICSID jurisdiction, it does not require contracting parties to also waive executive immunity. Therefore, in the process of enforcement of rulings, it is still possible for contracting parties to refuse enforcement based on the principle of immunity from enforcement. This has taken into account the positions of countries on Sovereign immunity, but it has also led to reasons that are not conducive to the implementation of the award³⁷.

³⁷ Sun Nanshan & Li Simin. (2021). The Application of State immunity in the Implementation of International Investment Arbitral Awards. *Journal of Shanghai University of International Business and Economics* (06), 99-110 Doi: 10.16060/j.cnki.issn2095-8072.2021.06.008.

Compared to ICSID enforcement rules, the WTO has increased its efforts in enforcing rulings. Firstly, supervising the implementation of recommendations or rulings that have already been passed is one of the responsibilities of the DSB according to DSU Article 21. Issues related to the implementation of recommendations or rulings should be included in the agenda of the dispute resolution body meeting unless resolved. Secondly, according to DSU Article 22, the winning party may then request the DSB to authorize the suspension of concessions or other obligations to that member, provided that no agreement on compensation has been reached after a reasonable period, and may choose areas under other agreements in specific circumstances. This is the "cross retaliation" mechanism adopted by the WTO DSM to urge Urging the losing party to implement the panel decision.

Here is a brief introduction to the differences between ICSID and WTO, as shown in figure 10.

Figure 10

Differences between WTO dispute settlement mechanism and ICSID

Differences	WTO dispute settlement mechanism	ICSID
Jurisdiction	compulsory jurisdiction	Based on voluntary jurisdiction
Applicable Subject	Disputes between countries	Disputes between investors and countries
Application of Proper law	Applicable agreements listed in the WTO International Law Practice	Party autonomy Domestic law of the host country Possible applicable rules of international law
Error correction mechanism	Appeal procedure	No appeal procedure, finality of arbitration
Trial time limit	Strict time limit (About 1year 3month)	No time limit (sometimes need 7 to 8 years)
Method of implement	Featured Cross Retaliation Mechanism	Relying on the conscious performance of the parties involved

14 CONCLUSION

Establishing a reasonable and effective international investment dispute resolution mechanism is a systemic project that requires continuous reform and improvement through long-term practice. The WTO and ICSID have significant differences in

institutional design, jurisdiction, and procedural methods. These differences stem not only from their inherent characteristics in terms of institutional objectives and legal sources but also partly from the immaturity of the current international investment law system in aspects such as rule consistency and enforcement coordination. In the context of rapidly advancing investment liberalization and the absence of comprehensive multilateral investment rules, ICSID, as a specialized investment arbitration institution, plays an irreplaceable role in protecting investors' rights and promoting cross-border capital flow; while the WTO dispute settlement mechanism, relying on its multilateral framework, has unique authority in handling investment measures related to trade and preventing members from abusing policy barriers.

These institutional differences precisely bring valuable diversity to the international dispute resolution system. The coexistence of the two mechanisms provides disputing parties with strategic options based on the circumstances of each case, allowing them to choose the most suitable dispute resolution path according to factors such as the nature of the dispute, the type of agreement involved, desired efficiency of resolution, and enforcement guarantees. This choice not only reflects respect for the parties' autonomy but also creates a positive competitive pressure at the institutional level, motivating both mechanisms to continuously optimize themselves in terms of procedural efficiency, quality of awards, and enforcement effectiveness.

From the perspective of institutional evolution, the characteristics and strengths developed by the WTO and ICSID in their respective development processes provide useful reference points for each other's reform. ICSID's expertise and flexibility in investor protection offer procedural guidance for the WTO in handling trade disputes related to investment; meanwhile, the WTO dispute settlement mechanism's mature practices in transparency, third-party participation, and consistency in legal reasoning point to ways ICSID can enhance the legitimacy and credibility of its rulings. Functionally, the two mechanisms show clear complementarity and synergy: ICSID focuses on resolving investment disputes between private parties and host states, implementing an investment protection logic, while the WTO aims to coordinate conflicts over investment-related trade policies among member states, embodying principles of market access and fair competition.

Against the backdrop of profound changes in the global economic governance system, the interaction between the two mechanisms has gone beyond simple functional

complementarity, showing new characteristics of collaborative evolution. The increasing number of trade clauses in international investment treaty practices, along with increasingly robust investment chapters in regional trade agreements, reflect a trend of convergence between the two mechanisms at the level of substantive norms. Therefore, comparative studies of the WTO and ICSID mechanisms not only have practical value in helping parties make rational choices, but also carry theoretical significance for promoting the overall improvement of the international dispute settlement system. Future reforms of these mechanisms should focus on establishing smoother channels for rule-based dialogue and more effective coordination of rulings, while respecting the unique features of each system. This would provide a more stable and predictable legal environment for international economic and trade activities and truly achieve the modern international rule-of-law goal of 'collaborative governance across different mechanisms.

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Authors' Contribution

All authors contributed equally to the development of this article.

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All datasets relevant to this study's findings are fully available within the article.

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