

Research on Environmental Protection Clauses in International Investment Agreements

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Abstract

With the development of economic globalization, international investment has promoted global economic growth, but it has also brought about issues such as environmental pollution. In recent years, influenced by the concept of sustainable development, international investment agreements have gradually strengthened environmental protection clauses to eliminate the negative impacts of investment on the environment and promote green development. The United States and European countries have respectively promoted green investment by setting up environmental chapters and integrating investment clauses, forming unique models. These models have effectively promoted the mutual reinforcement between environmental protection and economic development, providing experiences for the world to address environmental challenges. However, there are still deficiencies in the environmental clauses of China's existing international investment agreements, such as the lack of systematicness, ambiguous wording, and incomplete specific provisions, which make it difficult to meet the requirements of sustainable development. Therefore, China should draw on the experiences of the United States and Europe, improve the environmental clauses, ensure that the principles of environmental protection are clear, strengthen the specific provisions, establish a sound dispute settlement mechanism, and promote cooperation in resolving environmental disputes.

Keywords

International Investment Agreement; Balance of Interests; Environmental Protection Clause

1. The Necessity of Incorporating Environmental Protection Clauses into International Investment Agreements

Since the concept of sustainable development was put forward, its connotation has been continuously expanded and deepened. In 1987, the Brundtland Commission provided a more explicit definition of "development" in the report "Our Common Future". In the Rio Declaration on Environment and Development and the subsequent Agenda 21, economic, social and environmental protection were clearly identified as the three interdependent core elements of sustainable development.

Sustainable development has four meanings: First, fairness, which includes not only spatial fairness among various regions and groups of people, but also implies temporal fairness between the present generation and future generations. Second, sustainability, which emphasizes that the environment and resources for human survival and development should be maintained for a long time. Third, commonality, as sustainable development is a goal pursued jointly by the whole world and requires the joint efforts of the global community. Fourth, coordination, which emphasizes the comprehensive harmony and coordination among the economy, the environment, society and all social strata.

In 1962, the Declaration on Permanent Sovereignty over Natural Resources officially recognized that countries enjoy permanent sovereignty over natural resources and emphasized the importance of sustainable development. In 1972, Article 21 of the Stockholm Declaration comprehensively expounded the principle of national environmental sovereignty for the first time, and this principle was further confirmed in the Rio Declaration later. These two provisions jointly declare the principle of national environmental sovereignty and clarify two inseparable core elements of it: On the one hand, a country has the right to manage the environmental resources within its territory; on the other hand, a country should also bear the responsibility of not causing damage beyond its jurisdiction.

In the initial stage of the principle of national sovereignty, it was believed that a country could exercise absolute sovereignty over its environmental issues. However, this absolutism of environmental sovereignty is not only unfavorable for solving transboundary environmental problems, but also may affect the development of the freedom of international investment, which runs counter to the objectives of international investment agreements. At the same time, if a country does not assume responsibility for transboundary environmental damage, it may lead to the transfer of environmental pollution from one country to another, reducing its own environmental burden and thus violating the environmental sovereignty of other countries. These two elements complement each other and jointly form the foundation of the principle of national environmental sovereignty.

Therefore, when a country exercises its environmental sovereignty, it must take into account the global environmental interests and fulfill the corresponding international environmental responsibilities. When solving global environmental problems, although environmental sovereignty is of vital importance, the common interests of human society and the long-term goals of sustainable development should not be ignored. At the same time, overemphasizing global environmental problems may weaken the importance of national sovereignty. The core of the principle of environmental sovereignty lies in balancing the sovereignty over natural resources with the responsibility of avoiding transboundary environmental damage, ensuring the promotion of sustainable development while protecting natural resources.

Therefore, we should view the relationship between national sovereignty and envi-

ronmental protection from a dialectical perspective, ensuring that countries can not only fully exercise their sovereignty over environmental resources, but also fulfill their obligations of environmental protection in international cooperation.

2. The Deficiencies of Environmental Protection Clauses in International Investment Agreements

2.1 The legislative model of environmental protection clauses lacks systematicness

The lack of systematicness in the legislative model of environmental protection clauses in China's international investment agreements is mainly manifested in the scattered distribution and the complex legislative model. It is undeniable that the main purpose of international investment agreements is to protect investment interests, so the clauses related to environmental protection therein are usually rather scattered. Specifically, in China's bilateral investment agreements with other countries, environmental protection clauses may appear in the preamble of the agreement, or they may be embedded in clauses such as expropriation exceptions and general exceptions in the main text. For example, the Agreement between the Government of the People's Republic of China and the Government of Canada for the Promotion and Reciprocal Protection of Investments involves environmental measures in the general exception clause, while the Agreement between the Government of the People's Republic of China and the Government of the Republic of Uzbekistan on the Promotion and Protection of Investments links environmental clauses to indirect expropriation. In addition, some agreements mention environmental issues in the cooperation clauses. For instance, the Free Trade Agreement between the People's Republic of China and the Swiss Confederation emphasizes sustainable development in the field of economic and technological cooperation. These phenomena indicate that the environmental protection clauses in China's international investment agreements usually act as "soft constraints", that is, environmental protection is considered to a certain extent, but there is no mandatory requirement that investment development must be premised on environmental protection. It can be said that the effectiveness of these scattered environmental clauses is relatively limited, and they are more of a compromise, aiming to strengthen the environmental regulatory power of the host country rather than promoting investment development with environmental protection as a priority.

The legislative model of environmental protection clauses in China's international investment agreements is complex and lacks systematicness, which is mainly reflected in two aspects: the differences in the language used for environmental protection in the preamble and the mixture of types of environmental protection clauses. The former means that in the investment agreements signed by China with different countries, there are differences in the expressions of environmental protection in the preamble. Some agreements clearly state the purpose of environmental protection. For example, the China-Turkey Investment Agreement promises in the

preamble to maximize resource utilization to encourage investment on the premise of maintaining environmental stability. Some take sustainable development as the goal. For example, the China-Costa Rica Free Trade Agreement emphasizes improving living standards and promoting sustainable development. There are also some that mention both environmental protection and sustainable development at the same time. For example, the China-Pakistan Investment Agreement clearly states that the promotion of sustainable development should be consistent with environmental protection. As for the latter, the environmental protection clauses in China's international investment agreements have various forms and have not formed a unified model. Some agreements adopt a single legislative model of exception clauses; some combine the models of the preamble, environmental measures, and indirect expropriation exception clauses. With the advancement of the concept of sustainable development, China has gradually introduced special environmental chapters in free trade agreements, aiming to achieve a balance between investment and environmental protection, but this also leads to a further mixture of the legislative models of environmental protection clauses.

2.2 The lack of procedures for resolving environmental protection disputes

In the international investment agreements signed by China, there is a lack of clear provisions on the establishment of specialized institutions to handle environmental disputes. Currently, only the China-ROK Free Trade Agreement has established a specialized institution to resolve environmental disputes. In most cases, when China and other contracting parties deal with environmental disputes, they usually rely on the establishment of liaison points and resolve the issues through consultations. Matters related to environmental protection, especially those involving issues such as environmental pollution assessment, usually require the participation and research of professionals. However, currently, in China's international investment agreements, there is no explicit requirement to introduce professionals in the field of environmental protection when resolving environmental disputes. This indicates that in the environmental dispute resolution mechanism, there is still a lack of professionalism and effectiveness.

There are certain deficiencies in the dispute resolution mechanism of the environmental protection clauses in China's international investment agreements, and these mechanisms are usually not applicable to the dispute resolution provisions in the agreements. Therefore, environmental disputes often rely on inter-governmental dialogue and coordination, such as being handled through consultations or by expert panels composed of senior officials. Taking the China-ROK Free Trade Agreement as an example, it specifically excludes the application of the agreement's dispute resolution mechanism to environmental disputes, and environmental disputes can only be resolved and supervised through consultations and the Committee on Environment and Trade. In the China-EU Comprehensive Agreement on Investment,

a mediation mechanism is adopted, stipulating that environmental disputes are to be resolved through consultation and expert panel procedures.

Although consultations provide a communication platform for the parties to the dispute, the final result often depends on the game of interests among the parties. This means that during the consultation process, the party that violates the agreement is often not punished for the environmental damage it causes, and the consultation procedure lacks legal binding force, making it difficult to effectively resolve environmental disputes. Therefore, it can be seen that although some agreements of China's international investment agreements have established specialized environmental clauses, the dispute resolution mechanism is not complete. And in many investment agreements without specialized environmental clauses, environmental disputes are usually also excluded from the dispute resolution mechanism. For example, the Free Trade Agreement between the Government of the People's Republic of China and the Government of Australia clearly stipulates that measures taken for public interest purposes such as environmental protection shall not be the subject of a claim in the dispute resolution mechanism.

It should be noted that the dispute resolution mechanism can serve as a guarantee and driving force for ensuring the implementation of the agreement clauses. Therefore, if environmental disputes are excluded from the dispute resolution mechanism, it may become an excuse for the contracting parties not to fulfill the environmental clauses. Since environmental disputes cannot be resolved through formal mechanisms, it means that violators may not be sanctioned, and in this way, economic interests may override environmental protection. As environmental disputes usually involve potentially risky fields such as chemicals and energy, when the dispute resolution mechanism in the agreement is directly applied, it may still not be able to effectively solve environmental problems.

3. Improvement of Environmental Protection Clauses in China's International Investment Agreements

3.1 A systematic model of environmental protection clauses

At present, the environmental protection clauses in China's international investment agreements face fragmented problems such as scattered distribution, diverse types, and lack of systematicness. Moreover, they have not completely got rid of the tendency of excessively protecting the private interests of investors in traditional international investment agreements. Therefore, in order to optimize the environmental protection clauses in China's international investment agreements, it is necessary to base on China's national conditions, draw on the experience and characteristics of the environmental protection clauses in international investment agreements of Europe and the United States, and adhere to the basic principles that should be followed when constructing the environmental protection clauses. On this basis, promote the systematic design of the clauses, and complement it with the hierarchical construction of procedural clauses to form a unified rule model, compre-

hensively expound China's attitude and position, and thus optimize the overall structure of the environmental protection clauses.

The principle of national sovereignty is of great significance in the fields of economy, resources and environment. Especially against the backdrop of the wave of globalization and the increasingly fierce international competition, this principle must be adhered to in order to effectively safeguard national interests. Introducing environmental protection clauses into international investment agreements is an important way to embody the principle of national sovereignty. This measure can prevent each contracting party from compromising in the negotiation process in order to obtain financial and technical support, avoid setting overly high environmental standards or too low environmental requirements, and ensure that these standards are in line with their own development needs and sustainable development goals. When optimizing the environmental protection clauses, the principle of national sovereignty must be adhered to. On the one hand, at China's current stage of economic development, promoting investment and economic growth remains the primary goal. Therefore, adhering to the principle of national sovereignty can protect China's economic interests to the greatest extent and reserve room for independent decision-making for China in international negotiations, avoiding other countries using environmental protection as an excuse to interfere in China's legislation or restricting China's economic development with environmental standards. On the other hand, this is also an important manifestation of respecting the sovereignty of other countries, which helps to win the recognition and trust of the negotiation counterparts, thereby promoting the smooth conclusion of the investment agreement.

The principle of peaceful development emphasizes international cooperation, advocates solving environmental problems through joint efforts, and at the same time provides a fair competitive environment for investment. When optimizing the environmental protection clauses, this principle must be adhered to. Firstly, environmental problems are global in nature, and environmental impacts often cross national borders, indicating that these problems cannot be solved independently by a single country. Therefore, in the negotiation of environmental clauses in free trade agreements, China needs to, based on fairness and rationality, take into account the interests of the contracting parties and promote peaceful and friendly international cooperation. Secondly, peaceful development also requires the resolution of environmental disputes in a peaceful manner. Since environmental disputes usually involve economic interests, if not properly handled, they may have a serious negative impact on the economic cooperation among all parties. Therefore, taking the principle of peaceful development as the basis, China should adopt peaceful means such as consultations and dialogues to properly resolve relevant disputes.

3.2 Improve a comprehensive and integrated mechanism for resolving environmental protection disputes

Environmental disputes are highly urgent and professional, and it is often difficult to

effectively deal with them by relying on general dispute settlement mechanisms. Therefore, there is an urgent need to establish a specialized institution composed of experts with environmental expertise to handle relevant issues. International investment agreements of the United States and Europe already contain clauses regarding specialized institutions for environmental disputes, and China is gradually following up in this area and has made relevant provisions in its international investment agreements. China should draw on the practices in the international investment agreements of the United States and Europe on the premise of fully considering its national conditions and safeguarding national interests. Specifically, first of all, China should further improve the establishment model, composition of personnel, and scope of functions of the specialized institution. In negotiations, according to China's actual situation, the scope of functions of the specialized institution can be appropriately limited to avoid conflicts caused by differences in national conditions. Such a setting can not only provide consulting and supervision functions for the implementation of environmental clauses for the members of the agreement but also provide a professional and friendly dialogue platform for each contracting party to promote the resolution of environmental issues. Secondly, when dealing with environmental disputes, the specialized institution can actually serve as an information exchange platform to promote the sharing of environmental information among all parties and facilitate environmental cooperation, thus providing an efficient and peaceful way to resolve environmental disputes and contributing to the achievement of global environmental protection goals.

China has approved and acceded to some international treaties involving obligations of environmental impact assessment, such as the United Nations Convention on the Law of the Sea, the Convention on Biological Diversity, and the United Nations Framework Convention on Climate Change, etc. These international treaties include the content of transboundary environmental impact assessment. On this basis, China can draw on the experience of European and American countries, pay more attention to the prevention of environmental disputes in international agreement negotiations, advocate the introduction of an independent environmental impact assessment and monitoring mechanism, and promote the contracting parties to establish a cooperation framework for environmental impact assessment and monitoring, so as to urge all countries to conduct a comprehensive assessment and monitoring of the possible environmental impacts of investment, promote scientific decision-making, and reduce or avoid adverse environmental impacts. If a contracting state fails to fulfill its commitments, the prevention mechanism can provide a non-confrontational approach to urge it to comply with the treaty. This approach, to a certain extent, avoids the intense confrontation between countries or between a country and investors during the process of resolving environmental disputes and also reflects the principle of international environmental cooperation. Therefore, China should continue to adhere to the approach of resolving environmental issues

through consultations. The advantage of consultations is that through negotiations, all parties can make compromises and concessions based on their respective interests, and resolve environmental issues amicably, avoiding the intensification of international relations due to confrontation and affecting the resolution of environmental issues.

To this end, we can refer to the environmental chapters in the international investment agreements of Europe and the United States, further improve the applicable conditions and time framework of consultations, and explore whether to use it as a pre-procedure for dispute resolution. For example, it can be stipulated that when environmental disputes occur, the contracting parties should give priority to consultations through institutions specialized in handling environmental affairs to avoid conflicts and confrontations caused by directly entering the dispute resolution procedure. In addition, we can also draw on the practice in the USMCA and conduct hierarchical handling of consultations: in the first round of consultations, the contracting parties should conduct comprehensive consultations on environmental disputes in investment within the specified time and reach a solution acceptable to both parties. If no agreement is reached in the first round of consultations, representatives of the environmental committee will initiate higher-level consultations, collect relevant information from government and non-government experts to promote the resolution of environmental disputes. If the dispute is still not resolved in the second round of consultations, it will enter the ministerial consultation stage, and actively seek a solution on the premise of not harming the interests of the contracting parties.

This progressive consultation model, on the one hand, prompts the early resolution of environmental issues through time constraints and avoids the deterioration of problems due to the delay of consultations; on the other hand, continuous consultations and the participation of government and civil information can deepen the understanding of the demands of the other party, help maintain the peaceful and friendly cooperative relationship among all parties, and provide the possibility for flexibly resolving disputes, thus maximizing the balance between investment and environmental interests.

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