

The Legal and Practical Issues of Environmental Protection Provisions in International Investment Law

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Abstract. International investment is an important form of cooperation between countries. International investment mainly in the form of investment agreements, through the signing of treaties to effectively protect the interests of investment importing countries and host countries. However, environmental problems are inevitable during the process of economic development. The deterioration of the environment will bring harm to the country and the whole world. This paper focuses on the legal and practical issues on environmental protection provisions in the area of international investment law, by means of analysing previous cases. Conclusively, these legal issues include vacancy in the specific context of environmental protection clauses, ambiguity of application and lack of legally binding force. As for practical issues, lack of evidence, lack of supervision and defeat in the evidence on compliance with environmental regulations are discussed in this paper. In closing, this paper also offers some suggestions to solve the issues mentioned above.

Keywords: Environmental protection; host country; international investment law; environmental regulation.

1. Introduction

With the development of the economy, the global environmental condition is deteriorating at an unexpectable speed. In the middle of the 20th century, the main purpose of the international investment agreement was to protect the interests of overseas investors and for the better export of domestic capital. At the beginning of the 1970s, a series of investments led to catastrophic environmental damage, such as the North American Dead Lake incident¹, the Cadiz oil tanker incident², and the Gulf of Mexico blowout³. Therefore, environmental issues have always been the focus of the international community. From the concept of sustainable development proposed in 1972 to the adoption of the Paris Agreement in 2015 and the implementation of the concept of sustainable development in the way of emission reduction, the international community has constantly sought sustainable development in a deteriorating environment [1]. With the increasing awareness of environmental protection and the emphasis on environmental protection, the host country is also constantly introducing various environmental regulations. At the same time, with the deepening of globalization, the scale of international investment is also increasing, and international investment has become one of the important factors causing environmental problems in host countries, and then become the object of environmental regulation in host countries.

2. The Importance of Environmental Protection for International Investment

2.1. Cases Concerning Environmental Interests of the Host Country

In recent decades, the International Center for Settlement of Investment Disputes (ICSID) and the North American Free Trade Agreement (NAFTA) Dispute Settlement Body have heard a number of

¹ Since the 20th century, acid rain has increased in industrially developed areas of the United States and Canada, resulting in the acidity of many lakes in these areas, which has led to the near-total death of life in some lakes.

² On March 24, 1978, the "Amoco Cadiz" oil tanker incident caused serious environmental pollution and ecological damage that is difficult to recover, and brought serious threats to the Marine ecological environment.

³ It was the largest underwater oil well blowout in U.S. history. The accident occurred in the Macondo field in the Gulf of Mexico on April 20, 2010. The deepwater horizon, a mobile offshore drilling ship owned by Transocean, exploded as a result of an explosion at a well leased to BP at the time of the jet.

cases concerning host country environmental regulation disputes [2]. Many cases of ISDS based on international investment agreements have been brought against measures related to environmental protection. According to the IIA Issues Note of 2022, what can be seen from the results of the closed environmental ISDS cases (Figure 1) is that 40 per cent of the judgments were in favour of the State (denial of jurisdiction or dismissal of claims on the merits) and 38 per cent were in favour of the investor (award of damages). The remaining cases were stayed, settled with an unknown outcome, or the arbitral tribunal found a violation of the IIA but did not award monetary damages (violation but no damages).

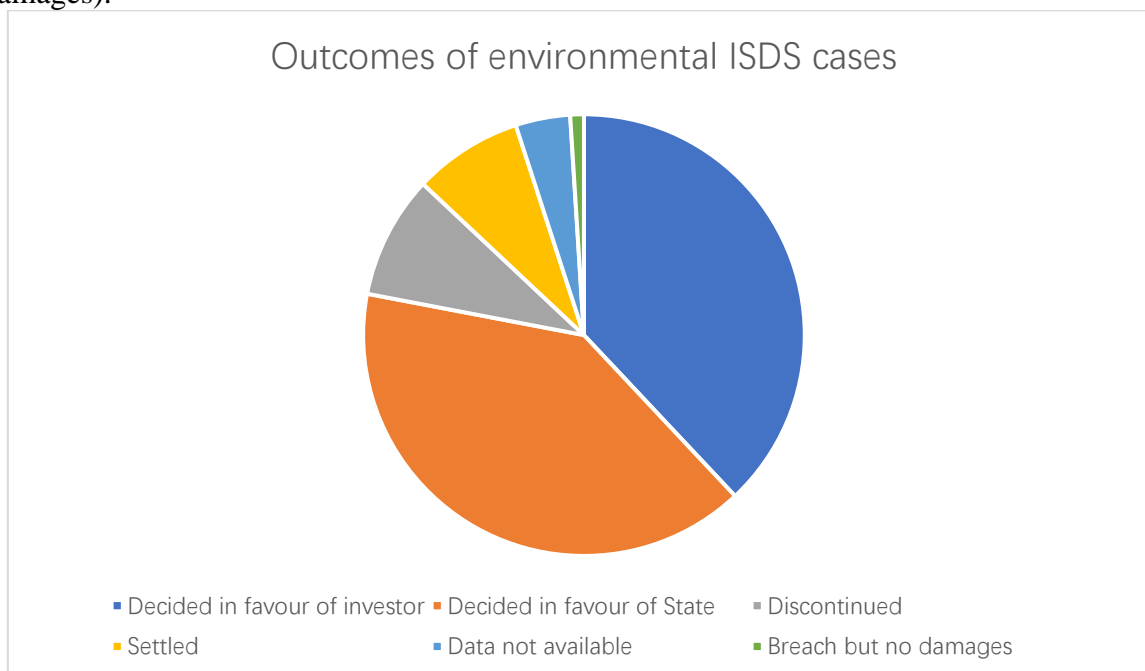


Fig. 1 Outcomes of environmental ISDS cases, 1987-2021⁴(Per cent)
 Source: UNCTAD, ISDS Navigator.

In this section, all the mentioned cases would be classified into two parts according to whether the arbitral tribunal supports the host country or the investor.

2.1.1. In Favor of the Host Country

2.1.1.1. Agarwal and Mehta v. Uruguay (1991)⁵

In this case, the host country engaged in arbitrary and non-transparent conduct with respect to the investor's investment in the Valentines iron ore project, including multiple regulatory changes to the port terminal (which had to be built as part of the project), culminating in the closure of the project. Uruguay has argued that the mine failed due to financial and technical shortcomings caused by investors, who have blamed Uruguay for adopting new mining laws.

2.1.1.2. Chemtura Crop. V. Canada (2010)⁶

In this case, the applicant is Chemtura, a chemical manufacturer registered in the United States, and the respondent is Canada. On March 12, 1998, the U.S. Environmental Protection Agency (EPA), under the "FIFRA" Act, announced that from June 1, 1998, U.S. farmers would be prohibited from continuing to import Lindane processed canola from Canada. On December 2 of the same year, Canada and the US signed a Memorandum of Understanding on agricultural trade, which referred to a request by Canadian canola growers for Canadian registrants to voluntarily agree to remove canola labels containing Lindane from registered canola processing labels by December 31, 1999. After July

⁴ Out of the 175 environmental ISDS cases identified by UNCTAD, 118 cases have been closed (the remaining 57 cases are pending).

⁵ PCA Case No. 2018-04. Investment Policy Hub.

⁶ Chemtura Corp. v. Canada, NAFTA/UNCITRAL, Award, 2 August 2010

1, 2001, all Lindane commercial rapeseed stocks and Lindane treated rapeseed seeds will no longer be used. This is voluntarily withdrawn by the registrant. EPA, PMRA, growers and registrants will continue to work together to facilitate access to alternative products. On March 15, 1999, the PMRA announced a special review under the Regulations for pest control products containing Lindane (the "Special Review"). On October 30 and November 5, 2001, the PMRA announced that it had completed the special review and noted the findings of the risk assessment, ensuring regulatory action to suspend or terminate the certification of Lindane. Although the PMRA initiated the evaluation process based on the review committee's report, it did not change the final outcome. The applicant, Chemtura Corp., argues that the Government of Canada's ban on the agricultural chemical lindane violates its obligations under the Canada Investment Agreement and constitutes indirect expropriation, and therefore goes to arbitration under sections 1116, 1117 and 1120 of the North American Free Trade Agreement ("NAFTA").

2.2. In Favor of the Investor

2.2.1. Gold Reserve v. Venezuela (2009)⁷

The dispute arose from a number of mining concessions as well as mineral rights indirectly held by the claimants in Venezuela. The investor (plaintiff) alleges that the host country (defendant) violated articles II, III and VII of the Investment Promotion and Protection Treaty between the Government of Canada and the Government of Venezuela (the "BIT"), which entered into force on 28 January 1998. The defendant disputed the fact.

2.2.2. Methanex v. United States (2005)⁸

In this case, the applicant is Methanex Corporation, registered in Canada, which is a large methanol distributor with two subsidiaries in the United States, Methanex US and Methanex Fortier. The respondent is the United States. In March 1993, the Governor of California issued a decree to protect the environment and water resources, restricting the use of methyl tert-butyl ether (MTBE) on the grounds of "significant danger to the environment." According to the executive order, California gasoline producers have until December 31, 2002, to eliminate methyl tert-butyl ether as a gasoline additive. Methanex then filed an arbitration with ICSID, arguing that MTBE is safe, the EU has not banned its use, the California government's legislation is arbitrary and has exceeded the scope of protecting public interests, and the California government's environmental regulatory measures will lead to the long-term closure of the plant, in fact, Methanex's investment is deprived. Constitutes a violation of NAFTA Article 1110 "Study 13 on the Assessment of the Environmental Regulation Compliance of the Host Country under International Investment Arbitration Practices similar to Expropriation". The Tribunal found that there was no excuse for bad faith in the California executive Order and the California regulations, and that scientific reports and administrative records clearly established that the California government's actions were intended to protect the California environment and not to harm the interests of foreign methanol producers. Therefore, the arbitral tribunal finally rejected the claimant's claim for arbitration.

2.3. Serious harm caused by environmental problems

According to the principle of sustainable development, it is the duty of every country to abandon the old view and attach importance to environmental protection during the process of economic development [1]. However, some multinational enterprises put primacy on the economic interest, even at the cost of destroying the ecological environment. It not only brings great destruction to the ecological environment, but also leads to the vicious effect of enterprises. In the long run, it is not only detrimental to the long-term development of enterprises, but also has an adverse impact on the social benefits of enterprises. An investor in a good business will not only value economic benefits, but also focus on ecological and environmental benefits. If investors want to avoid being annihilated

⁷ *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014

⁸ *Methanex v. United States*, UNCITRAL, Aug 3, 2005.

in the wave of international investment, they must have the concept of sustainable development. This concept should be incorporated into the formulation of relevant regulations when making specific decisions. The offer is vested in the investment. Some developed countries will transfer high-polluting enterprises to developing countries, these backward countries can get out of poverty enough to lower the environmental threshold to attract foreign investment. Cross-border investors also use loopholes in the legislation of backward countries to massively destroy the ecological environment, which is contrary to the principle of sustainable development.

To sum up, what should be deeply understood is the significance of sustainable development, which should be better reflected in international investment. Only in this way can international investment be more long-term development and promote the global economy to a new vitality point. Since the scientific and technological revolution, the productive force has increased explosively, and the quality of economic medical treatment and health has been improved. Basic living water level has been solved. People began to reflect on the inadequacies of social development. Land desertification, climate warming, ozone hole and other phenomena appear one after another, these environmental problems seriously interfere with human life. Environmental issues concern the whole society. In this situation, the vision of environmental protection in international investment is also becoming higher and higher. Recognizing the importance of environmental protection for international investment, more and more emphasis is placed on environmental protection.

3. The Legal Problems Existing in the Environmental Protection Provisions

3.1. The Provisions Related to the Environmental Protection for International Investment

Through analysing the changes of the environmental protection clauses in international investment agreements in recent years, it can be found that they can be divided into the following three types: multilateral investment agreement, regional investment agreement and bilateral investment agreement (BIT).

The relevant multilateral investment agreements in international investment mainly include the General Agreement on Tariffs and Trade (GATT), the Agreement on Trade-Related Investment Measures (TRIMs), the General Agreement on Trade in Services (GATS), and the Agreement on Intellectual Property Rights related to Trade (TRIPs) and so on. GATT and GATS have become the norm for dealing with the relationship between investment and environmental protection. The relationship between investment and environmental protection is mainly determined by means of inter-junction.

The most advanced regional investment agreement is the North American Free Trade Agreement (NAFTA), which was negotiated by the United States, Canada and Mexico after a long time, and is known as the greenest and greenest free trade agreement on investment and the environment. It is called higher and stricter in terms of environmental protection in the International investment agreement. It provides an important standard guide for other agreements in the future, and creates a new situation of investment and environmental protection. Later, the establishment of the multi-sided investment agreement is based on this, the main is to protect the ecological environment of the eastern countries, and strictly abide by the laws and regulations of the eastern countries on environmental regulation [3].

The present types of bilateral investment agreements mainly include treaties on friendly trade and navigation, investment guarantee agreements, and investment promotion and protection agreements. These bilateral investment arrangements can be the most effective means of coordinating investment between the two countries. It has a great role in promoting the coordination of international investment and the environment, which can alleviate bilateral contradictions and better realize the interests of the two countries. Compared with the multilateral investment agreement which seeks multi-country balance, bilateral investment agreements can be put to good use because there is less conflict of interests between countries to reach an agreement.

3.2. Typical Legal Problems in the Present Environmental Protection Provisions

The relevant environmental protection provisions in the previous investment agreement were not very complete. There are also several legal issues in the current environmental protection provisions, such as conflicts between environmental protection provisions and investment protection, the vacancy rate for the specific environment of environmental protection provisions, the application of vague, lack of legal binding and so on. [4].

Environmental protection clauses and investment clauses are both important component of international investment agreement. They are closely connected and unbreakable. But the two also have a conflicting side. With the development of international investment, the relationship between environmental protection clauses and investment clauses becomes tenser. Multilateral investment agreements have gradually failed to meet the needs of current investment and development. Both the investor and the host country want to maximize their own interest. In order to reach the goal, the host country attach more importance on the protection of its own environment, strengthening its environmental regulation right, which requires more specific and systematic rules and agreement to restrict the behavior of both parties in the contract [5].

In the international investment agreement, the provisions of various articles on environmental protection are also different, and the most important form of special articles and environmental provisions are not clear enough to express the contents of environmental protection. One representative example of this is article 1114 of NAFTA.⁹ Although it stipulates that contracting parties must not lower their environmental standards, the weak and imploring tone of the clause makes it voluntary and lacks strong safeguards.

Current environmental protection provisions are modelled on the NAFTA, largely because it claims to be the greenest agreement in the world. The NAFTA only provides some provisions on environmental protection in the preamble, and it is not very detailed, leaving it to be interpreted later. How to apply them in reality needs to be further studied. These preamble clauses only express some meanings and wishes, and do not involve the entity legal relationship, which makes the subsequent environmental protection clauses lack the legal binding force. Although the North American Free Trade Agreement is a milestone in the development of environmental protection in international investment agreements and the incorporation of environmental protection into international investment agreements provides a new form for the development of international investment agreements, the lack of compulsion can only express a wish for environmental protection [6].

4. The Practical Problems Existing in the Environmental Regulatory Compliance in the Host Country

4.1. Lack of Valid Evidence for the Public Interest

As can be seen from the cases mentioned in 2.1, all of them were based on the interest of public. However, some host countries have not demonstrated their "public interest purpose", resulting in the lack of effective evidence to support the evaluation results. For example, in *Gold Reserve v. Venezuela* (2009), after analysing relevant evidence, the tribunal found that there was no sign that there was a risk of harm to population health and the environment.

4.2. Lack of Supervision in the Perspective of International Law

When it comes to international investment, both domestic and international law are binding on host country environmental regulation. Therefore, the assessment should be carried out within the environmental regulatory system. As international law evolves, so does the number of international treaties that host countries are parties to and must abide by [7]. From an international investment

⁹ Article 1114(2): The provisions of this Chapter shall not be construed to prevent a Contracting Party from adopting, retaining or applying any measure inconsistent with the provisions of this Chapter, provided that the measure is considered appropriate to ensure that investment activities in the territory of the Contracting Party are conducted in a manner sensitive to environmental concerns.

perspective, environmental management measures in the host country should, at a minimum, be consistent with the relevant provisions of international investment law. In addition, where environmental protection is involved, compliance reviews from the perspective of international environmental law are also required. As the extension of public interest is relatively large, it will also involve other relevant international legal norms. Together with domestic law, these international laws form the boundary of environmental regulatory compliance.

In *Chemtura Corp. v. Canada*, the regulatory measures taken by Canada against Lindan are in accordance with the relevant contents of the Aarhus Protocol to the LRTAP Convention in international environmental law.

4.3. Defect in the Evidence on Compliance with Environmental Regulations

The evaluation of environmental regulation behavior by the host country must be carried out through relevant evidence. The quality of evidence is directly related to the compliance of environmental regulation behavior.

In *Methanex v. United States*, the California government fully demonstrated the evidence before adopting environmental regulatory measures, starting with an authoritative study report provided by a professional body, which covered the full scope of the 11 research topics stipulated in the California Act and the RFP. Second, the report went through a public hearing. At these hearings, with broad participation from government officials and the public, including MTBE and methanol producers, the findings were widely supported. In this case, the arbitral tribunal has analyzed the UC report and other evidence under “scientific evidence”, and its expression can be used as a reference to evaluate the validity of evidence.

5. The Suggestions on a More Stringent Environmental Regulatory Regime in the Context of International Investment.

5.1. The Suggestions for Improving Investment Law Clauses on Environment

As for the conflict between environmental protection clauses and investment clauses, what be concluded from the previous cases is that instead of thinking and arguing from the perspective of environmental protection, the core of the question is often judged from the perspective of the treatment and benefits of investors. Therefore, the most basic thing is to correct the status of environmental protection articles and listen to the opinions of environmental experts and representatives of some enterprises for comprehensive consideration. In the process of formulating and improving environmental protection provisions in investment agreements, international investors, especially those from developed countries, should be urged to actively assume social responsibilities. In the earlier multi-lateral investment agreements, the relationship between investment and the environment showed a smooth relationship. At that time, environmental protection was not particularly important, and the interests of investors were the main center. After regional free trade agreements and bilateral investment agreements, the impacts are not obvious, especially increasingly acute manifestations, which should raise awareness of environmental protection in the east countries [8].

States Parties should be as specific as possible in their international investment agreements so that the environmental protection provisions have a clear meaning. Whether it is in the special environmental protection clause or the general environmental exception clause, the meaning should be made concrete and clear in the process of formulation and modification. In addition, clarifying the applicable conditions and parameters and setting out the rights and obligations of the parties to the treaty are equally important. One of the most criticized is the special environmental protection clause, which deals with the relationship between investment and the environment. Some words are not clear enough [9]. For example, Article 114 of the Chapter on Environmental Regulation of the North American Free Trade Agreement (NAFTA) lists the right to regulate the environment and the

obligation not to reduce environmental standards in terms of rights and obligations. "Nothing in this chapter shall be construed as preventing any Contracting Party from adopting, maintaining and implementing any measures it deems appropriate for investment activities secured within its territory to be developed in a manner that takes into account environmental considerations" [10]. This provision allows foreign investors to use their spiritual hand to protect the environment of their own country, but it is unclear where the spiritual limit is and how large the space. In order to make our country's environment safer, it is necessary to perfect our country's environmental regulation right.

Environmental protection clauses nowadays lack substantive legal relationship, which makes it difficult to implement in practical application. This requires us to improve in order to achieve the goal of strengthening the legal covenant. First, both parties can make environmental protection clauses in international agreements enforceable through national legislation and build awareness of environmental protection. Then the two sides signed an international investment agreement on an equal footing, and the same is true for multiple parties. Under the original rules of reclaiming the fee in the article, the penalty is increased, and both sides are equal. It is necessary to abide by the equal and voluntary investment agreements between the two parties, so as to better protect the national interests of the host country [11].

5.2. The Suggestions for Improving the Practice of Environmental Regulation in Host Country Under International Investment Law

First of all, in the arbitration process, the tribunal should follow the principle of fairness, transparency, reasonable expectation and proceed with due process. As a fundamental principle of international law and as an important element of international investment treaties, the principle of fair and equitable treatment plays an important role in balancing the interests of the host country and the investor [12].

Secondly, when it comes to defending during the arbitration, the host country needs to provide more scientific evidence. In the practice of international arbitration, scientific evidence has become one of the key bases to judge whether the host country's environmental regulatory measures are compliant and constitute indirect expropriation. The results of arbitration vary greatly in terms of whether scientific evidence can be provided. Generally speaking, the environmental regulatory measures and provisions of the host country would be easier to be supported by the arbitral tribunal if the country is able to provide scientific evidence. One classic case is *S. D. Myers v. Canada*¹⁰. In November 1995, Canada passed a bill banning the export of PCBS and their waste, citing "significant threats to the environment and human life and health." The Court found that the primary purpose of the prohibition was to protect Canada's PCBS industry from U.S. competition and that there was no valid environmental reason for the prohibition.

Last but not least, the content of an international investment agreement should be coordinated with the current environmental policies of the host country. In the agreement, there should be clear provisions on environmental regulatory rights in line with its national conditions. On the one hand, we can learn from the relevant environmental regulation clauses in the investment agreements of developed countries according to our national conditions. On the other hand, we should pay attention to the study of international arbitration cases, analyze the possible drawbacks of some environmental regulation rights clauses, and try to avoid them when formulating them.

6. Conclusion

As the society attach importance to environmental protection, more and more countries regulate domestic high-polluting enterprises or activities that pollute the environment. Different regulatory measures provide different choices for host countries. Environmental regulation measures of the host country are within the scope of sovereignty, but with the development of international law, the host country's environmental regulation is restricted. Therefore, the environmental management measures

¹⁰ S. D. Myers v. Canada, UNCITRAL, S. D. Myers Partial Award, November 13,2000 ,

of the host country must comply not only with the provisions of national law, but also with the requirements of international law. Through analysing the previous cases, this paper found that problems arise from two aspects, legislation of environmental protection provisions and practical application. To solve the legal problem of the provisions, this paper firstly describes the basic information about environmental protection clauses, then briefly introduced the legislative status of them from the following three aspects: multilateral investment agreement, regional investment agreement and bilateral investment agreement. As for the practical problem during the arbitral process, this paper the cases of international investment arbitration and relevant theories, puts forward some guidelines for evaluating the environmental regulation compliance of host countries. Only by paying attention to the meaning of environmental protection can we better develop in international investment and benefit generations. Each country can be either a host country or an investor country. Learn to deal with the relationship between investment and the environment, so that you can reap lasting benefits. In investment, there should also be a great responsibility to protect the environment, so as to better long-term sustainable development.

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