Coordination of International Investment and Environmental Protection: Based on the Comparative Analysis

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Abstract. With the accelerated development of economic globalization, more and more countries participate the global economic activities. As the main pattern of capacity circulation, the benefits of economic development of international investment are without doubt. In that case, more and more countries improve their economic development by attracting foreign investment. With the rapid development of the economy, environmental problems evolved. In international business, under the need for economic development, international investment agreements have always been aimed at protecting the interests of investors. However, with the environmental issues becoming serious, the economic growth rate which is achieved by trading off environmental damage is slowed down. And because of the bad environmental conditions, in some countries, the poverty rate even increased. Therefore, more and more countries realized the importance of environmental protection. So it is better to treat international investment and environmental protection correctly and keep a balance between investors' rights and the environmental interests of host countries. For this, we can add sustainable development, host national regulatory provisions, and encourage corporations to take their social responsibilities.

Keywords: Investment protection; environmental protection; sustainable development; USMCA.

1. Introduction

The United States-Mexico-Canada (USMCA) came into effort on July 1, 2020, and replaced the North American Free Trade Agreement (NAFTA) as the leading trade agreement between the three largest trade entities in North America. In the UNCITRAL case, S.D. Myers, in order to protect the environment, the Canadian government imposed a ban on the export of PCBs from Canada, which harmed the interest of Myers [1]. Despite the Canadian government's statement that PCBs are not only bad for human health but also pollute the environment, the PCB ban is consistent with its obligations under national law and relevant international environmental treaties. Also, the actions taken are in fulfillment of its environmental obligations under the Basel Convention, and the environmental exceptions clauses in NAFTA. So they did not intend to discriminate, the tribunal found that their measure had a discriminatory effect and discriminated defectors against overseas investors. The court ruled that Canada's prohibition against exporting PCBs contravened the national treatment provisions of Article 1102 of Chapter 11 of the NAFTA. With the publication of USMCA, there may prove to be a different solution in investor-state dispute settlement (ISDS).

The main body of this article will proceed as follows. Part I will introduce the types of environmental protection provisions in USMCA and examine the successions and major changes made compared to NAFTA. Part II will discuss the conflicts between investment activities and environmental protection through case studies. Finally, part III will analyze the solutions for solving the conflicts.

2. Environmental protection provisions in USMCA

2.1. The Successions from NAFTA to USMCA Provisions

Regarding environmental protection provisions, USMCA took a broad continuation of the clauses in NAFTA. Including Preamble Environmental protection provisions, specialized environmental

protection provisions, Environmental Exceptions clauses, and Environmental Collateral Agreements clauses.

2.1.1 Preamble Environmental protection provisions

The environmental protection clause is typically located in the preamble section of an agreement, providing a concise statement of the purpose, objectives, and commitments of the countries signing the agreement. For example, the purpose of signing the USMCA is to promote high levels of environmental protection, which includes effective enforcement of environmental laws by all parties. By strengthening environmental cooperation, the agreement aims to further advance sustainable development goals, which include supporting mutually supportive policies and practices for trade and environmental issues [2].

2.1.2 Specialized Environmental Protection Provisions

The specialized environmental protection provisions refer to specific clauses or regulations within international trade and investment agreements that specifically address environmental protection. These provisions aim to safeguard and promote environmental protection, ensuring that all parties comply with environmental laws and standards in their trade and investment activities, and collectively address global environmental issues [3]. In the USMCA, the special environmental protection provisions are outlined in Chapter 24, which is dedicated to the environment.

In Chapter 24, these provisions define the scope of environmental laws and clarify that the chapter's objective is to advocate for trade and environmental policies that are mutually supportive. and practices, facilitate high levels of environmental protection, and enforce environmental laws effectively to achieve sustainable development goals. Furthermore, the chapter addresses topics such as ozone layer protection, air quality, marine pollution, corporate social responsibility, and dispute resolution concerning environmental matters. It is the most robust and most Enforceable Environmental Obligation of Any Trade Agreement [4].

2.1.3 Environmental Exceptions Provisions

The environmental exception provisions generally aim to clarify that host countries' expropriation actions taken for environmental protection purposes do not violate expropriation provisions in investment protection clauses [5]. USMCA follows Article XX(b) of the GATT 1994[1] and GATS Article XIV(b)[2] when dealing with the relationship between the environment and investment [6].

2.1.4 Environmental Side Agreements provisions

The environmental side agreement provisions are an enhancement of environmental protection clauses in investment treaties [5]. In the USMCA, the environmental side agreements includes the following provisions:

Levels of Environmental protection: The three countries shall adhere to environmental standards and requirements to ensure that trade and economic activities do not have adverse effects on the environment [7].

Environmental Impact Assessment: It requires an evaluation of the environmental impact of significant trade projects or policies to assess their potential effects on the environment and adopt appropriate environmental protection measures [8].

Environmental Cooperation: Encourages collaboration among the United States, Mexico, and Canada in the field of environmental protection, jointly addressing cross-border environmental issues such as air and water pollution, species conservation, etc. [9].

[1] The General Agreement on Tariffs and Trade (GATT) Article XX(b) provides for general exceptions, stating that the provisions of the agreement shall not be interpreted to prevent contracting parties from adopting or implementing the following measures, provided that the measures do not constitute arbitrary or unjustifiable discrimination between countries in the same circumstances or disguised restrictions on international trade.

[2] GATS Article XIV(b) states that the provisions of the General Agreement on Trade in Services (GATS) shall not be interpreted to prevent a member from adopting or enforcing measures necessary to protect public morals or to maintain public order, or to protect human, animal, or plant life or health. However, these measures should not be applied in a manner that would constitute arbitrary or unjustifiable discrimination between countries where like conditions prevail or a disguised restriction on trade in services.

Environmental Dispute Settlement Mechanism: Establishes a specialized mechanism for resolving disputes and issues related to environmental protection [10].

These provisions aim to improve the balance between environmental protection and trade and investment activities in the USMCA, emphasizing the importance of environmental standards, cooperation, transparency, and dispute resolution for the benefit of all three countries.

2.2. The Improvement USMCA Made in Environmental Protection Provisions

In the ninth preambular article, USMCA has regulated the purpose of parties to protect human and animal health, which has not been regulated in NAFTA. In the thirteenth preambular article, USMCA introduces a new environmental cooperation mechanism and proposes to strengthen environmental enforcement and environmental cooperation. This cooperation mechanism emphasizes information sharing, technical cooperation and jointly addressing transboundary environmental issues which can improve the cooperation in the field of environmental protection through the parties.

Also, USMCA set up specialized environmental dispute resolution mechanisms to deal with the dispute about environmental protection. This mechanism improves the ability to solve environmental problems and is beneficial for protecting the rights of the environment. USMCA introduces the environmental impact assessment and recommends parties evaluate the environmental impact on major trade projects or policies. From this, governments can avoid the negative influence on the environment. Meanwhile, to improve the standard and transparency of environmental impact assessment, and minimize the damage of business activities, USMCA recommends the parties open publication of environmental information and data, and strengthen the environmental enforcement cooperation.

Overall, the USMCA is more specific and clearer than NAFTA in environmental protection provisions. To foster sustainable development and environmental protection, the USMCA emphasizes the commitment and cooperation of the parties in environmental protection and enhancing the requirements for environmental impact assessments in major trade projects. The agreement reflects a global understanding of the evolving interconnections between trade, investment, and the environment, offering a positive direction for international agreements in addressing the complexities of today's challenges.

3. The Conflict between Investment and Environmental Protection

3.1. Investment Protection May Restrict Environmental Regulation

In order to protect the interest of foreign investors, some investment protection agreements may include National Treatment and Most-Favored-Nation Treatment. However, these agreements may cause the environmental protection regulations the governments make regarded as discriminating against foreign investors and limiting the freedom of legislation and enforcement in environmental matters.

3.2. Environmental Law May Affect Investment Rights

Some environmental protection clauses may have a negative influence on the business activities of investors. Such as setting up limitations on some production methods or resource extraction. These limitations may damage investors' rights and lead to investment disputes.

3.3. The Conflict between Investment and Environmental Protection through Windstream Energy LLC v. Government of Canada

In Windstream Energy LLC v. Government of Canada, Windstream is a renewable energy company set up in America and planned to open an offshore wind energy project in the Wolfe Island Shoals area of Ontario [11]. The Canadian government gave permits to Windstream and allowed the company to construct the project. However, when the Canadian government made the environmental

impact assessment, the government found the project may be harmful to the local environment. So, to protect the environment the government canceled the permits. Windstream Energy company thought the decision that the Canadian government made violated the obligations under NAFTA, especially Article 1110 (Expropriation and Compensation), 1105 (Minimum Standard of Treatment), and 1102 (National Treatment). The company announced that the decision was an unreasonable intervention for their investment rights and damaged their interest.

According to the analysis the tribunal made, this case did not have expropriation. Firstly, the Feed-in-Tariff Contract was not canceled. Secondly, the amount of investment did not significantly exceed the amount of the deposit which remained. So the investment rights of the company had not been deprived. In that case, the decision did not violate the Article 1110. Also, the moratorium was just for the offshore wind energy project and canceled all the offshore wind energy projects. Therefore, the decision did not violate National Treatment.

In this case, the tribunal referred to decisions of other NAFTA arbitral tribunals on the interpretation and application of Article 1105. The tribunal argued that the decision the Canadian government made was inappropriate. Before canceling the permit, the government did not notice Windstream. After the project stopped, the government did not take any action to compensate Windstream. The procedures the government took were unreasonable, also unfair for Windstream. Therefore, the tribunal regarded the government as violating the Minimum Standard of Treatment and ought to compensate for the loss of Windstream.

This case reflects the conflict between investment protection and the environmental regulation made by host countries in international investment activities. Tribunals need to evaluate the aim of national environmental protection and the legal rights the investors have and keep a balance between environmental protection and investment protection.

4. Coordination of Investment Activities with Environmental Protection Measures

Environmental protection is not only an affair of some specific nation but also an affair that will influence all human beings. To protect the interests of all humans, it is necessary to protect the environment and pursue a sustainable development strategy. However, the legal rights of investors should also be protected. For this part, it is better to keep a balance between the protection of the rights, and interests of foreign investors and the environmental protection in host countries. This article is divided into three areas of discussion.

4.1. Add Sustainable Development When Signing International Investment Agreements (IIAS)

Sustainable development means that when developing the economy, the stability of society and the integrity of nature should also be taken into consideration [12]. The concept of sustainable development was first proposed in the Brundtland Report as “development that meets the needs of the present without comprising the ability of future generations to meet their own needs” in 1987. After a long time of development, the connection between sustainable development and investment has been built. To achieve sustainable development and create a more equal and fair world, the UN 2030 Agenda proposed 17 sustainable development goals (SDGs), including clean water, sanitation, renewable energy, economic growth, and so on [13]. To achieve the SDGs, more and more countries consider sustainable development while signing up for IIAS.

4.2. Add Host National Regulatory Provisions

National regulatory authority is part of national sovereignty, the nation could publish environmental protection clauses and standards to regulate the influence of investment activities. With the development of economic globalization, using foreign investment to accelerate economic growth is the main goal for signing IIAS. However, with the increasing number of international

arbitration cases, the environmental regulations of host countries are facing challenges and increasing conflicts between national regulatory and investment protection. So, adding host national regulatory provisions and making the host country consider both environmental and economic requests and the interests of investors while making and enforcing environmental clauses and policies. Adding host national regulatory provisions in IIAS has also been a tendency around the world, USMCA has already regulated the levels of environmental protection, environmental impact assessment, environment cooperation, and so on [14].

4.3. Encourage companies to take social responsibilities

Encouraging investors to follow the aim and system of values of host countries while investing and producing, taking social responsibilities, using sustainable business patterns, and decreasing the negative influence on the environment when chasing economic interests [15]. These will not only build a good corporate image in the host country but can also balance the between investment protection and environmental protection, and improve both sustainable and healthy development of foreign investment.

The host government could encourage the corporation to take environmental, social, and governance (ESG) investing. The ESG means when corporations make an investment decision, they need to consider the aspects of environment, society, and governance [16,17]. On the environmental front, considering the environmental protection strategy and resource efficiency of the corporation, and minimizing the negative impact on the environment in the business activities. On the social front, considering the treatment of employees and the policy of human rights, and ensuring the corporation has a good impact on society. On the governance front, ensuring the corporation has a practical mechanism through evaluating the corporate governance structure and transparency. ESG investing, can not only achieve economic rewards but also improve sustainable development, social liability, and corporation governance, driving companies towards more sustainable and responsible practices.

5. Conclusion

With the development of economic globalization, more and more countries have realized that developing the economy by sacrificing the environment is unsuitable. To protect the environment, the host countries set up environmental clauses and policies to regulate international business activities. In that case, the actions that countries took deeply intensified the conflict between international investment protection and environmental protection. As having the strongest and the most enforceable environmental obligations of any trade agreement are the environmental provisions in the USMCA chapter, which bring all environmental provisions into the core of the agreement and make them enforceable. From the action USMCA took, we can find the importance of environmental protection in IIAS.

To keep the balance between environmental protection and investment protection, on the one hand, it is not advisable to intensify the protection of foreign investors and neglect the local environment just to absorb foreign investment and develop the economy. On the other hand, one side enhancing the protection of the environment in host countries and neglecting to protect the rights of investors is also incorrect. Neglecting environmental protection is a shortsighted behavior, that will deeply damage the local environment. Such as in the Niger Delta, Africa's largest oil-producing region, because of the frequent oil spills, the river has been polluted. Meanwhile, the degraded environment deeply damaged the health of residents and led to high poverty rates. Also, if the government ignores the investment protection, it will be unfavorable to attracting foreign investment and lead to a low economic development rate. So, when signing up for IIAS, governments should not only take the economic interests and social interests of host countries into consideration but also consider the interests of operations. Weighing economic and environmental objectives to reconcile investment activities with environmental protection measures, take comprehensive strategies, and make sure sustainable development and environmental protection. With this in mind, governments can add

sustainable development clauses to emphasize the importance of the environment, add host national regulatory provisions to ensure the action host countries take is appropriate and without exceeding necessary limits, and encourage companies to take social responsibility. Only in this way can IIAS reflect the interests of all parties and ensure the participation of all parties and enforcement of environmental protection provisions.

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