Environmental Protection in International Investment: Balancing with Investor Interests

Maomao Qin *

Law school, University of Exeter, Exeter, England, UK

* Corresponding Author Email: mq241@exeter.ac.uk

Abstract. Based on the natural vulnerability of the investor in the host country, early ISDS favored the protection of the investor in the Investment interests of host countries. However, as countries pay attention to their domestic environmental interests and national environmental awareness has increased, they have become more aware of the need to protect the environment. The conflict between the host country's environmental protection measures and the interests of foreign investors is undoubtedly a serious challenge to the existing international investment arbitration regime. This essay firstly describes the investor protection clauses in IIAs; secondly, it analyses the conflict between environmental protection and investor rights and interests, describes IIAs between environmental protection and investor rights and interests, and researches and analyses specific dispute cases. Then it analyses how to better balance and coordinate the relationship between investment protection and the host country's right to environmental regulation from the three perspectives of the host country, home country and cross-border investors. Finally, it proposes measures to better balance environmental protection and investor rights from the perspective of IIAs and green investor responsibility.

Keywords: International Investment Agreements (IIAs); environmental protection in host countries; environmental responsibility of international investors.

1. Introduction

The contemporary legal regime for international investment is based on two core values: first, to grant maximum protection to foreign investors; and second, to guarantee the right of host countries to regulate in the public interest, including the right to integrate FDI into domestic economic and social development policies [1]. In practice, these two core values often conflict with each other. One of the most typical conflicts is between investment protection provisions and environmental protection provisions. According to statistics, from 1972 to the present, there have been more than one hundred international investment arbitration cases involving environmental issues, such as the obstruction of the Rio Blanco copper mining project invested by Zijin Mining in Peru; the huge economic losses caused by the obstruction of the construction of the Myitsone hydropower plant in Myanmar; and the unilateral suspension of PetroChina's oil mining project in Costa Rica by the Colombian side. Conflicts between host country environmental protection and investors' rights and interests have been a hot issue in current investment [2]. At this stage, however, international investment law is not moving in the direction of promoting mutual benefits for host countries and foreign investors.

Indeed, the current ICSID system, which had evolved from arbitration practice, was asymmetrical and oriented exclusively towards the protection of investors' rights [3]. In cases concerning environmental measures of the host state that arose at the beginning of the 21st century and before, international investment arbitration tribunals in most cases did not support the host state's side, but rather chose to protect the rights of investors. For example, Eiser Infrastructure Ltd. v. Spain [4]. The fact that tribunals have mostly sided with investor interests in previous cases has led some scholars to criticise them for treating private economic interests as superior to the public interest. As a result, in the last decade, there have also been rulings in some international investment arbitrations that no breach of investment agreement obligations had arisen from the host state's environmental measures. But even in today's world of heightened environmental protection, this should not mean that the legitimate interests of investors are necessarily diminished.

Against this background, therefore, it becomes important to examine how to balance the equilibrium between the investor and host country environments in IIAs.

2. Overview of Investment Protection and Environmental Protection Provisions

2.1. Investor Protection Provisions in IIAs

International Investment Agreements (IIAs) are international agreements entered into to protect and promote cross-border investment and to provide legal security and stability for investors [5]. These agreements are designed to provide protection of investors' interests in international investment in order to incentivise and attract more investment, and there are four common ways in which investment interests are protected in IIAs. This article will then go on to describe these four ways in detail.

2.1.1 National treatment

IIAs usually provide for equal treatment of national and foreign investors in the implementation of national investment policies [6]. This means that foreign investors should enjoy the same treatment as domestic investors when investing in, operating and managing enterprises. Many International Investment Agreements (IIAs) include the principle of national treatment. For example: Under NAFTA/USMCA, the principle of national treatment is outlined in Chapter 11--Investment [7].

2.1.2 Most-favoured-nation treatment (MFN)

The principle requires that when a state grants preferential treatment to an investor from one country, it should also grant the same preferential treatment to investors from other countries with which it has entered into most-favoured-nation clauses. In this way, foreign investors may enjoy treatment no less favourable than that enjoyed by investors from other countries.

2.1.3 Fair and Equitable treatment (FET)

This principle requires the host country to provide fair and equitable treatment to foreign investors and to refrain from any discriminatory measures against foreign investors, including unreasonable or hostile policies or behaviour. For example: Article 3(2) of the China-ASEAN Investment Agreement (CAIA) signed in 2009 requires that: “Contracting Parties shall provide fair and equitable treatment to investors of the other Party and shall not take unreasonable or discriminatory measures against them [8].”

2.1.4 Indirect expropriation measures

IIAs usually prohibit direct or indirect expropriation of investors, and even non-discriminatory measures require reasonable compensation. This prevents the host Government from unjustifiably infringing on the property rights of foreign investors. For example, Article 9(7) of the CPTPP includes a provision on indirect expropriation, stating: “A Contracting Party shall not expropriate or nationalize an investment by an investor of another Contracting Party except for public purposes, in a non-discriminatory manner and after payment of prompt, adequate and effective compensation [9].”

Through these protective measures, IIAs aim to provide investors with a stable, fair, transparent and predictable investment climate that encourages cross-border investment and promotes economic development. At the same time, these protections help to reduce the risks of cross-border investment, increase the attractiveness of countries and build stronger investment relationships internationally.

2.2. Environmental Protection Provisions in IIAs

The inclusion of environmental issues in BITs has become a major trend, and half of the BITs signed in 2005 began to include environmental provisions [10]. Up to now, under the influence of the new generation of U.S. Model BIT 2012 and the strengthened environmental provisions in the U.S.-Mexico-Canada Agreement, environmental protection-related provisions have become the unavoidable standard provisions in BIT signing in line with the development trend of international

environmental protection [11]. Establishment of environment-related provisions in investment agreements, mainly through preambles. For example, the preamble to the Japan-Colombia BIT clearly states that "co-operation between the Parties must be based on safe and healthy environmental protection measures as a fundamental environmental basis for economic development, thereby better contributing to the attainment of economic objectives and promoting sustainable development [12]." The preamble to the China-Tanzania BIT similarly states that "economic co-operation between the two sides shall be realised in a healthy, safe and stable overall environment, thereby better improving the overall standard of living of their respective nationals [13]."

The obligations of the contracting parties with respect to environmental issues may be regulated by an environmental specific clause in the BIT. The environmental clause first appeared in Article 1114 of NAFTA in the context of measures for the protection of the environment and has since been widely used by most of the countries that have entered into BIT agreements. The environmental clause specifies the obligations of the contracting parties with regard to environmental protection, and that economic investments shall not be made at the expense of environmental standards or the environment. By making it clear that economic development must not be achieved at the expense of the environment, this clause serves as an effective check on the behaviour and actions of investors who may damage the environment in order to achieve economic gains. In Article 13 of the Environment Chapter of the U.S.-Mexico-Canada Agreement (USMCA), there is a provision to strengthen the adoption of best practices related to environmental protection by enterprises,and the governments of the member states are required to formulate policies in such a way as to encourage enterprises to fulfil their responsibility for environmental protection [14]. The China-Japan-Korea Investment Agreement (CJKIA) also contains a specific clause on the environment, which stipulates that investors may not make the relaxation of environmental measures a precondition for the conduct of investment [15]. In response to this clause, parties are required to refrain from taking any environmentally damaging measures in acquisitions and other investments.

3. Conflict between Environmental Protection and Investor Rights Protection in Host Countries

3.1. Possible Environmental Impacts of International Investment

The behaviour of international investment has led to the occurrence of many environmental disasters, and these disasters are also evidence of the adverse impact of international investment on the environment. For example, in 1979, in the Gulf of Mexico on Mexico's Yucatan Peninsula, a well blowout by a foreign oil company led to half of the coastline of the US state of Texas being polluted by an oil spill [16]. When exploring the deep-rooted reasons for the frequent occurrence of environmental pollution in transnational investment enterprises, it is not difficult to find that, when transferring pollution-intensive industries, investors from developed countries generally move from their home countries with more stringent environmental protection regimes to developing countries with different or less stringent environmental protection regimes, thus forming a "pollution sanctuary" in order to avoid the higher environmental protection standards of the investor's home country. This creates a "pollution refuge" to avoid the higher environmental protection standards of the investor's home country. Awareness of environmental protection and investment costs are higher in developed countries than in developing countries, which leads to the transfer of more polluting industries to developing countries where the cost of pollution is relatively small [17]. The NGO Greenpeace suggests in one of its surveys that, at this stage, developed countries are sending about 50 million tonnes of hazardous waste to developing countries every year [18].

3.2. Stricter Host Country Environmental Protection Standards

Along with the influence of economic globalisation and the development trend of international environmental law, the concept of environmental protection in the host country is also increasing,

and all countries are strengthening their environmental protection responsibilities. For example, Nigeria has passed the Petroleum Industry Bill for preliminary approval, which imposes strict requirements on the environmental issues of petroleum joint ventures; Peru's Mines and Hydrocarbons Law points out that the investor must fully communicate with the local community and residents at public hearings; and the Law on the Right of Prior Consultation with Native Inhabitants or Locals states that the company should publicly explain the mandatory environmental impact assessment. Peru's Minerals and Hydrocarbons Act states that investors must communicate adequately with local communities and residents at public hearings, and the Law on the Right to Prior Consultation of Indigenous or Local People states that companies should publicly explain mandatory environmental impact assessments at public hearings [19]. The strengthening of environmental protection in the field of international investment is manifested in the continuous improvement of the quality of attracting international investment and the strict requirements of the environmental protection system, with some countries even overdoing it to the detriment of the legitimate rights and interests of investors. According to the requirements of international law, in the process of safeguarding the public interests of their own countries, all countries have the right to exercise their environmental sovereignty, safeguard their own environmental interests, and have the right to impose environmental domestic regulations on foreign investment. However, there is a view that in practice, there are also host countries violating the "principle of non-discrimination", in the exercise of the right to environmental protection, infringing on the rights and interests of investors, and this kind of infringement of investors with a discriminatory flavour is forming the "Environmental Barrier" in international investment in a way similar to the technical barriers existing in international trade. In order to avoid excessive environmental protection measures and discriminatory environmental barriers in host countries, while clarifying that investors should actively undertake all environmental responsibilities, the rules of investment agreements should also be used to strengthen the normative nature of host countries' behaviour, so that host countries can implement sustainable development policies and must also safeguard the legitimate rights and interests of investors.

4. Conflict and Coherence between Environmental Protection and Investor Protection in Host Countries

4.1. Conflict between Host Country Environmental Protection and Investor Interests

This essay will then explore the conflict between the environmental protection responsibilities of multinational investment groups and the environmental protection of host countries in IIAs with respect to the two protection standards of prevention of expropriation and fair treatment.

4.1.1 Early position on protecting investments.

According to the analysis of the practice of international investment arbitration, in most of the cases concerning the environmental measures of the host country in the early 21st century and before, the international investment arbitration tribunals did not support the host country's side, but chose to protect the rights and interests of the investors, and ruled that the environmental measures taken by the host country were in fact contrary to the content of the investment agreement, and found that the host country had engaged in the act of indirect expropriation.

For example, in 2007, in Bear Creek Mining Corporation v. Republic of Peru, Bear Creek conducted exploration work and an environmental and social impact assessment (ESIA) at the Santa Ana my site. The ESIA was approved by the Peruvian authorities in 2011. However local residents are strongly protested against the project as they consider it to be damaging to the local environment, and in June 2011, in an effort to address social unrest in the Puno region, the government issued Decree 032-2011, which shut down Bear Creek Mining Corporation's mining project.In Bear Creek Mining Corporation filed a claim against Peru under the Canada-Peru FTA in August 2014. The company asserted that Decree 032 violated the FTA's requirement that investors are protected from illegal expropriation. Bear Creek could assert that the company met all legal requirements because

the Respondent ratified and supported the investor's conduct, as per the Tribunal's finding. In light of these factors, the Tribunal concluded that Decree No. 032 constituted an indirect expropriation and violated fair and equitable treatment.

4.1.2 Shift towards protection of the environment

The fact that arbitral tribunals have mostly sided with investor interests in previous cases has led some scholars to criticise them for treating private economic interests as superior to the public interest. As a result, in the last decade, there have also been cases in some international investment arbitrations in which it was ruled that the host country's environmental measures did not appear to be in breach of investment agreement obligations and did not constitute an indirect expropriation.

In the 2009 case of Glamis Gold Ltd. v. United States of America, Glamis Gold, a Canadian company, opened an investment project in southeastern California to exploit local gold mines, and the mining process was carried out in an open-pit method, which resulted in significant damage to the local environment and local residents have raised objections to the project. Federal environmental protection laws and state administrative regulations in California require backfilling and reclassification if mining is to take place in the vicinity of an Indian reservation. Grimes Gold stated that the requirements of the United States federal government constituted an indirect expropriation. The tribunal stated that the environmental measures imposed by the State of California in the United States were generally applicable to the public at large and were not directed solely at the company's investment behaviour. The environmental protection measures did not violate the requirement of investor protection, and the United States Government did not have a "special guarantee" to protect the company's expected returns. The tribunal did not uphold Glamis Gold's allegations and rejected the company's claim for compensation.

In 2015, in Adel A Hamadi Al Tamimi v. Sultanate of Oman, the plaintiff, Adel's company, was arrested and tried for allegedly operating in violation of environmental regulations in Oman where it was located, and Adel himself was arrested and tried, and the quarry and company ceased operations accordingly.On the basis of the United States-Oman FTA, the claimant filed a request for arbitration, arguing that Oman's actions constituted an indirect expropriation. The tribunal noted that an analysis of the circumstances of the actual case, taking into account the economic consequences of the government's actions and its own nature, was required to determine whether its actions could be judged as an indirect expropriation. In addition, in order to protect the legitimate public interest, the government adopts non-discriminatory behavior to regulate does not constitute indirect expropriation. The regulatory behaviour of the Government of Oman does not constitute an indirect expropriation in the light of the provisions of article 2, paragraph 4, of annex 10 to the United States-Oman FTA and the content of the relevant provisions of Oman's domestic private property law. This is because the Government of Oman is acting in the interest of protecting the public environment, which is not an act of discrimination against foreign-owned enterprises.

From the above cases, it can be seen that arbitral tribunals, in deciding investment arbitration cases involving environmental protection, have become more inclined to favour the host country that has implemented environmental protection measures in line with the strengthening of environmental protection awareness. However, even in today's environmental protection, this should not mean that the legitimate rights and interests of the investor are inevitably diminished, and the arbitral tribunal also needs to determine the legality of the host country's environmental measures with a prudent attitude in the process of adjudication, so as to better balance the protection of investment rights and interests and the host country's environmental protection and the relationship between the two.

4.2. Balancing Investment Protection in IIAs with the Host Country's Right to Environmental Regulation

How to balance investment protection with the host country's right to environmental regulation is still much debated, and with the globalisation of transnational corporations (TNCs), the environmental externalities that they bring with them is an issue that requires global governance, and the environmental problems arising from international investment need to be governed by the

participation of all relevant subjects. This section will analyse how to balance the host country's right to environmental regulation with investment protection from two perspectives.

4.2.1 Giving environmental policy space to host countries

Environmental policy space should be reserved for host countries in the area of international investment. Due to the limitations of international law itself, host countries may be involved in a large number of treaties, which may give rise to treaty conflicts. For example, if a country is a signatory to both a multilateral environmental agreement and a bilateral investment agreement, it may be in breach of its obligations to protect and promote investment under a BIT when it should have complied with its obligations under the environmental agreement. Or when the international community becomes more aware of environmental pollution issues and modifies previously agreed environmental agreements. At this time, if the contracting parties in the country through the formal legislative process to adopt the revised environmental agreement, in order to maintain the harmonisation of their own legal system, often need to amend the newly adopted environmental agreement with the conflict of laws and regulations. If these amended regulatory documents affect the interests of investors, it will make new investments weigh the appropriateness of investing at this time, which in turn will affect the economic development of a country. For investments that have already entered the host country, the probability is that they will limit their investment activities at a later stage. In this case, if the transnational investor needs to assume new obligations, it will initiate arbitration based on the BIT signed between the host country and the host country. These possible arbitrations would have a chilling effect on the host country, and it is therefore necessary to reserve space for environmental policies in IIAs for the host country.

4.2.2 Strengthening investors' responsibility for environmental protection.

In previous IIAs, investors were given more protection. Investors have been subject to few liability obligations. Environmental problems caused by investment are becoming more and more serious. Under such circumstances, the environmental protection obligations of investors should be mentioned. It becomes very important to strengthen investors' responsibility for environmental protection. Nowadays, there have been considerable attempts to increase CSR provisions. For example, the Norwegian 2007 BIT model has special provisions on the social responsibility of multinational corporations, including environmental protection, sustainable development goals, and so on. Nowadays, more and more international investment laws advocate the SRI concept, which reflects the increasingly frequent calls for multinational corporations to fulfil their environmental protection responsibilities. Against this background, we need to strengthen the environmental protection obligations of investors in IIAs.

5. Conclusion

Guided by sustainable development, transnational investment should contribute to the economic development of host countries while at the same time mitigating its negative impact on them. In the past, early investment agreements were less restrictive of investor obligations, and host country regulation of foreign investment based on public policy objectives could easily be recognised as expropriation. As a result, investors would resort to international arbitration based on the BIT signed between the home and host countries. It can be seen from the arbitration practice of ICSID arbitration tribunal, with the importance of the environment and environmental protection awareness, the host country based on public policy considerations on foreign investment to regulate the act of the arbitral tribunal to support the judgement. How to balance the conflict between the host country's environmental concerns and investors' interests, which often occurs in IIAs, is becoming increasingly important.

References

[1] Arcuri, Alessandra, and Federica Violi. Public Interest and International Investment Law: A Critical Perspective on Three Mainstream Narratives. Handbook of International Investment Law and Policy. Singapore: Springer Singapore, 2021:1-27.

[2] Neumayer E. Greening trade and investment: environmental protection without protectionism. Routledge, 2017.

[3] Zeng, Huaqun. Co-development: innovations in investment treaty practice between China and 'Belt and Road' countries. Journal of International Economic Law, 2019,1: 1-33.

[4] Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain, [2013] ICSID Case No. ARB/13/36.

[5] Fecak T. International investment agreements and EU law. Kluwer Law International BV, 2016.

[6] Du, Tao. The Competing Issues of Local Litigation and International Arbitration in Investor-State Dispute Settlement from the Case of Hailer Siazer v. China. Collection, 2019,3:78-91.

[7] China-ASEAN Investment Agreement (CAIA), s 3(2).

[8] Comprehensive and Progressive Agreement for Trans-Pacific Partnership, s 9(7).

[9] Kathryn Gordon, and Joachim Pohl, Environmental Concerns in International Investment Agreements: a survey (OECD 2011)

[10] Bian Yongmin. Trade and environmental protection rules constructed by the United States-Mexico-Canada Agreement. ETLR, 2019,4:27-64.

[11] Colombia - Japan BIT (2011).

[12] China - United Republic of Tanzania BIT, 2013.

[13] The United States-Mexico-Canada Agreement (USMCA), 2020.

[14] China - Japan - Korea, Republic of Trilateral Investment Agreement, 2012.

[15] Myer P G. IXTOC I: Case study of a major oil spill.1984.

[16] Copeland, B.R. and Taylor M.S. North-South Trade and the Environment. The Quarterly Journal of Economics, 2009,109: 755-769.

[17] Data from Greenpeace official website, http://www.greenpeace.org.cn/publications/report-of-survey/

[18] Han Xiu Li. Environmental protection in China's Overseas Investment. Research on international issues, 2013,5: 103.