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# The Conflict between Environmental Protection and Investment Protection in Host Country and the Optimal Path of the Regulation

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**ABSTRACT**
This article will focus on the protection of environmental issues in international investment agreements. In today's society, environmental disputes between foreign investors and host countries continue to be submitted to arbitration on the basis of international investment agreements. The exploration of the public interests of host countries and the specification of investors' rights and obligations have always been important topics of international discussion. The author will discuss existing international adjudication disputes arising from environmental enforcement and performance of responsibilities. It is found that there is always an imbalance between the investment protection required by investors and the environmental protection of the host country, and the arbitral tribunal is often difficult to come up with convincing results due to transparency and vague division of responsibilities in international agreements. This result will have a negative impact on foreign investors and the host country and affect the environmental policies of the host country in the long run. Then this paper makes a detailed analysis of the reasons for the formation of the problem, which is discussed from three aspects including the difficulty to define environmental responsibility, inconsistent status between countries, and the need to update the concept and judicial mechanism. After that, some suggestions for improvement can be put forward by exploring the causes of the problems and drawing lessons from the international law. In terms of procedure, the arbitral tribunal should increase the appeal means of counterclaim, which can effectively rebalance the procedure. In terms of the agreement, a clear division of rights and standard wording is needed, their discretion will be limited and unnecessary disputes should be resolved in a way that avoids vague definitions. From a substantive point of view, IIA's theory should be updated to include environmental issues neglected in international investment treaties.

***Keywords-*** *Responsibility, obligation, status, the optimal path*

## 1. INTRODUCTION

With the deepening of the concept of environmental protection and sustainable development in the world, the interaction between international investment and environmental protection is increasingly obvious. As an important force driving the world economic growth, international investment agreements have certain positive effects on the host country's environmental protection policies, but there are also great obstacles. Especially in international investment activities, the conflict between international investment and environmental protection is more and more frequent. On the one hand, the international community and arbitration are increasingly concerned about the environmental impact of foreign investors. On the other hand, the international arbitration tribunal often requires the host country to pay a huge amount of compensation for infringing the interests of investors because of protecting its public environmental interests. Although the existing international investment agreements and relevant international legal documents are seen in the investment of environmental protection rules, most of the concepts are vague, can play a limited role. Therefore, in the new situation of significant global climate change, international investment treaties need to be reformed to balance the rights of states and investors.

Today, countries in the world have paid more and more attention to environmental protection based on

 

economic concerns. Some scholars combine environment and trade and find that developed countries are strict with their trading partners and developing countries demand a trade. Gaps in environmental trade measures are beginning to emerge. In developed countries, most investors are responsible for their pollution. In developing countries, however, most of this pollution is borne by host countries in the form of subsidies（1994）. [1] Cameron, J., & Ramsay, R. also mentioned that international disputes are caused by environmental problems, and investors are required to be responsible for the foreign environment, which is the main cause of environmental disputes. The author focuses on two principles for resolving environmental disputes, namely the inconvenient forum principle and the Mozambique principle. These principles have a certain effect on resolving environmental disputes (1996). [2] Some scholars analyze the concerns about environmental issues in the North American Free Trade Agreement (NAFTA) from the legality of THE TARIFF and Trade agreement. Glatt's indifference to legitimate environmental concerns has led to a decline in environmental standards in countries with stringent standards due to domestic industry pressure. As a result, the market-based approach to reducing environmental pollution has not worked well. [3] Perisin, T. explained the problems of environmental protection standards in more depth, taking the European Union, the United States, and Canada as examples. Because they shared similar values. But clearly, the EU has higher standards for the environment, health, and animal welfare. Regulatory differences resulting from the independence of regulators need to be eliminated in the interests of all parties. [4]

Although in terms of the number of articles, the research on environmental disputes of international investment agreements is far less than that of other international agreements, with the increasing number of treaties, scholars' research on new treaties is also increasing gradually. Most scholars analyze the progress or deficiency of the new treaty based on the arbitration cases heard by ICSID in combination with the actual development of the new treaty. These materials also provide good ideas and materials for academic research.

Due to space constraints, this article will take a broad-based but not exhaustive approach to examine issues arising from environmental implementation in practice. The first part will analyze the problems arising from existing international disputes through some examples. The second part will discuss in general the absence of policies in international investment agreements. The third part will analyze the causes of the problems from the aspects of environmental responsibility definition, trade barriers caused by the status difference of the host country, and the concept and policy of international investment agreement. The fourth part will give some solutions to this problem.

## 2.PROBLEMS

### *2.1International adjudication of environmental disputes*

The conflict between international investment agreements and environmental protection has become a paradigm in the study of international investment law. The purpose of international investment treaties is to protect foreign investors from the sovereign risks of some host countries, such as discrimination, predation, protectionism in the host country, and other arbitrary acts（2009）. [5] But in recent years, many foreign investors with bilateral investment treaty (BIT) and the free trade agreement (FAT) to protect their investments in chapter activities from the effects of risk and the host country law, especially about fair and just principles (FET) and citizen treatment standards for many investors destruction of public interests provides protection. Recent cases also reflect the bias of arbitral tribunals such as the International Center for Settlement of Investment Disputes (ICSID) in favor of investors.

For example, in one of the early environmental disputes, the Ethy case, an American investor challenged Canada's ban on an additive called MMT because the company was Canada's only importer and shipper of MMT (1996）. [6] It argues that this violates national treatment standards and conflicts with the takings provisions of Chapter 11 of the North American Free Trade Agreement (NAFTA). As a result, Ethy filed a claim with the Arbitral Tribunal, which sided with Ethy and overruled Canada's objections. The case was finally settled under the Canadian Internal Trade Agreement. Many commentators see this as a typical conflict between an international investment treaty and the environmental protection of the host country, as Canada enacted the prohibition act to protect its public interest (MMT has potentially toxic effects). However, according to the interpretation of arbitration results, many investors use international Investment agreements (IIA) and investment arbitration to force host countries to abandon environmental measures that may affect their interests. This raises concerns about threats to national sovereignty on environmental issues. Especially in many subsequent environment-related cases, the environmental measures of the host country are frequently claimed by investors. This leads to the host country potentially compromising on environmental issues because of huge compensation costs.

In addition, the imbalance between investment protection and environmental protection often appears in arbitration practice. Unfortunately, based on the treaty on environmental protection is incomplete, the tribunal is mostly in favor of investment protection. In the case of Metal clad, the investor's industrial plant was blocked by ecological measures in Mexico (2001). [7] In this case,

Metal clads purchased a waste treatment plant to develop a hazardous waste landfill, but there was a lot of improper disposals of hazardous materials, causing illness among local residents. Without sufficient evidence, Metalclad was stripped of its building permit by the local government to protect the local environment. Finally, the investors sued the Mexican government under Chapter 11 of the NAFTA. The tribunal held that there was no need to consider the motive or intent of the environmental law and that the effect of the environmental law banning waste treatment plants was equivalent to expropriation. The result was $15.6 million in damages from the Mexican government. Many commentators believe that these investors challenge the host country's environmental regulatory rights to some extent affect the sovereignty of the host country. Therefore, there are still many challenges in the signing of multilateral agreements to resolve international adjudication environmental disputes.

### *2.2The imperfect environmental system*

Clarifying specific environmental rules not only helps to determine the scope and extent of environmental measures adopted by the host country but also can form a relatively clear guide for treaty interpretation. It is of great significance to safeguard the environmental interests of the host country and properly deal with investment disputes. Firstly, In existing international investment agreements, some only mention environmental protection in the preamble. This is because the language of environmental clauses in international investment agreements appears to be largely flexible and vague, failing to clarify the rights and obligations of parties (2016) [8]. There is no clear definition of "environment" in many bilateral or multilateral investment treaties, and words such as "public interest" and "public welfare" are often used, which cannot directly reflect the importance and particularity of environmental protection.

Although such abstract and broad terms can reserve space for states parties to implement environmental policies, there may be a great deal of ambiguity and uncertainty when the arbitral tribunal interprets the key terms of the treaty, which may adversely affect the settlement of disputes. For example, the free trade agreement signed by China and Iceland in 2013 only mentioned environmental protection issues in the preamble (2013) [9]. This shows to a large extent that the importance of the environment has not been taken seriously. Other environmental provisions are scattered in general provisions, cooperation provisions, and expropriation provisions. For example, article 6 of the Bilateral trade agreement between China and Uzbekistan, "Exception of Expropriation for public Interests"(2011) [10]. Similarly, the North American Trade Agreement (NAFTA), the first international agreement to include an environmental treaty, is equally vague about environmental language. Because it has no clear standards of environmental protection. This leads to its weak operability and difficulty to play a real role in judicial practice.

In fact, in recent years, few host countries have directly invoked Article 1114 to defend international environmental disputes. Therefore, the existing protocols and rules are not sufficient to solve environmental problems. In addition, violation of fair and just treatment rules has become an important basis for investors to claim compensation from the host country's government. As far as the environment is concerned, the situation is unpredictable. With advances in environmental science and the prominence of sustainable and ecological governance, new knowledge about protecting the environment has prompted countries to change their policies. This leads to conflicts between host countries and MNEs. Investors tend. to focus on the economic sector, while host countries need to consider broader non-economic interests, such as the environment. Also, the behavior of the host country may. In such cases, the interests of the investor may conflict with the legal provisions of these non-economic obligations. In general, under the background of the new era, the absence of the statutory norms in the international investment law has led to the emergence of many problems.

## 3.REASONS

### *3.1Environmental problems are difficult to define*

Substantive protection standards remain vague, and it is difficult to define the interaction between innovative instruments for protecting the environment and countries' economic obligations. This is because these obligations are generally broadly interpreted and can hinder future environmental regulatory projects. And with the normal development of the law, many environmental regulations may change. The criteria for various forms of expropriation may also change, particularly in the environmental area, where there may be partial compensation given the negative externalities of investments. However, the provision of IIA is that "except in rare cases, the impact of a measure is very serious and causes obvious excess" [11], which is ambiguous and difficult to define in judgment and even harms the environmental regulatory space of the host country. In addition, the investment protection standards in international investment agreements have high requirements for host countries. This is because of fair and equitable treatment and standards of collection. For example, fair and just treatment is often used by international investors to defend the host country. The principle of fairness and justice is intended to prevent

different types of state actions from infringing on investors' fairness, justice, protection, and promotion of investors' investment. However, in the context of international investment law, the host country has conflicts of interest with investors to improve the regulatory power of public welfare. In such cases, it is difficult for the arbitrator to determine the extent to which policies and laws of the host country may be reviewed for public welfare purposes. However, the FET clauses just lack the provisions on investors' obligations in environmental regulations and non-economic obligations.

### *3.2Inconsistent barriers to liability protection*

Barriers to status are inconsistent between states, as are barriers to liability protection. This is because developed countries are the champions and biggest beneficiaries of investment liberalization in international agreements. After all, many rules in the field of foreign investment (no matter unilateral rules or bilateral rules) in developed countries are to unilaterally restrict the government behavior of capital importing country (host country) to provide favorable treatment and effective protection for foreign investment and investors as the main purpose and content. For this reason, when developing multilateral investment rules, developed countries always try to reduce the investment access restrictions in the capital importing countries and raise the investment protection standards to a high level to expand their overseas markets and protect their overseas investment interests, to facilitate the capital of developed countries to obtain more protection in the host country. Secondly, every developing country hopes to effectively promote product upgrading and industrial structure optimization to enhance international competitiveness by introducing foreign investment.

However ， due to the great difference in economic development level between developing countries and openness degree, investment policies of developing countries also have obvious imbalance characteristics: The first point is the cause of the regional imbalance. The low degree of liberalization in most African countries directly affects the quantity and quality of foreign investment absorption, which leads to the different positions of developing countries and developed countries in terms of investors. As mentioned above, developed countries have driven the development of international investment law. Therefore, the issues that lead to international investment law focus on policies in developed countries and ignore the situation in many developing countries. Secondly, the countries participating in a regional economic integration organization have a higher degree of liberalization than the countries outside the integration organization due to the improvement of regional market openness the strengthening of mutual trade and investment cooperation, which leads to a large gap between the international status of many developing countries and developed countries. The gap in international status leads to the fact that the negotiating capital of developing countries is far less than that of developed countries in the process of signing agreements with investors as host countries. Thirdly, the imbalance is the imbalance between industrial sectors. Most developing countries are focusing on manufacturing. Investment liberalization in basic industries, services, and agriculture was relatively low. This leads to core differences in the concerns of developing and developed countries. In general, since the makers of globalization rules come from developed countries, and most of the major industries in the global economy come from developed countries, the decision-making initiative is biased in favor of developed countries. This has led to uneven consequences, most of which are concentrated in developing countries.

### *3.3Limited arbitration mechanism*

Investment arbitration has come under attack for several reasons. It is often claimed that there is a public interest in arbitration courts not being able to resolve disputes because arbitration is in the public interest and the court's acceptance of briefs is limited. Moreover, the protection provided by investment arbitration is necessarily higher than that provided by domestic law. Investment arbitration deprives domestic courts of their natural jurisdiction, and many people believe that the arbitration tribunal is biased against the state for reasons of fairness and justice. This is because the protection regime foreign investors receive from a particularly favorable policy puts them above the law and they can challenge environmental measures through external mechanisms. In addition, mere participation in arbitration is a major blow to the government's international standing, and the arbitration process is long and discouraging. Moreover, in practice, when genuine environmental measures are challenged, investment criteria are very high and vague, which can jeopardize the formulation of host country environmental policies. Therefore, the mechanism of justice and the concept of justice have to be redefined.

## 4.SOLUTION

How to balance the needs of investment protection and the protection of public interests of the host country through the text design of international investment treaties has been a difficult problem faced by international investment agreements since the implementation of NAFTA. In recent years, though, the 2012 MODEL BILATERAL Trade Agreement (BIT) of the United States has provided preliminary specifications for environmental protection and the Free Trade Area of the Asia-Pacific (FTAAP) has introduced an

environmental dispute settlement mechanism (2018). [12] However, as a developing system, many issues still need extensive discussion.

### *4.1Appeals process*

A permanent appellate court is needed because counterclaims are one way to rebalance the process and give the maximum reward. There are several reasons. Firstly, such a mechanism can safeguard the impartiality of arbitration institutions from the perspective of adjudication. In addition, the counterclaim is often combined with the current lawsuit, which improves the trial efficiency and saves the litigation costs of investors and the host country. And this way is more conducive to finding out the facts and distinguishing right from wrong. Thirdly, in most international investment law arbitration cases because counterclaims can include this lawsuit. If successful, the counterclaims can help the host country take the initiative in the case and maintain its international reputation.

### *4.2Improvement measures*

Add environmental domain knowledge to the panel of arbitrators and create specific rules of procedure for environmental disputes. As mentioned above, arbitration procedures take too long and, in many cases, investors demand very high compensation. So, procedures must be limited, such as the use of ISDS in environmental disputes. One solution is to introduce an "environmental veto" along the lines of the permanent members of the UN Security Council. Most of the time, the arbitration tribunal unwarranted dissuasion procedures against states can enjoy some flexibility by adopting sensitive measures, such as incentives for renewable energy, and opposing prior approval of bans on exploration projects or products based on the precautionary principle. the screening mechanism will not deprive investors of a fair trial: in the case of an unreasonable environmental policy, claims can still be reviewed by the tribunal. The second procedure is the introduction of allotment clauses that allow such investments to be exempted from the scope of international investment agreements, which means that arbitrators apply a prima facie good faith test to environmental measures. Its advantage is that it does not block claims from well-meaning regulators but only stops the process at an early stage when environmental measures are involved. In this way, the trial results can be more convincing, and the trial efficiency can be improved.

### *4.3Clear division of right and avoidance of vague definitions*

In IIA, sometimes its semantics change. While many of the agreements say they impose no additional restrictions on measures like FETs, "following international law." Therefore, the arbitral tribunal should regulate the wording and limit its discretion. There are some ways.

As mentioned above, to increase the discretion of host countries, many terms of international investment agreements are vague, especially the content of environmental protection is not decisive. This has also led to disputes over the division of responsibility in arbitration. When the host country requires investors to fulfill their obligations due to environmental problems, the host country often violates the principle of fairness and justice. In such cases, it is often the environment that suffers. Hence the need to reduce the use of vague words such as "probably" in international investment treaties. This will standardize the responsibilities and obligations of both parties.

The rights of both parties should be limited in international investment agreements, with less discretion and more attention to environmental protection. The key here is to balance the interests of both sides. First, during franchise negotiations with foreign investors, the state must guarantee the right of citizens to participate in the contract negotiation and concluding process and try to include provisions to stabilize business policies and ensure the quality of investment by investors. Second, investors are required to protect the environment, fulfill certain non-economic obligations, and even local residents have common regulatory rights.

The host country should increase the attention and professionalism of environmental issues in line with existing international agreements. For example, the Appendices to the London Protocol and the Paris Convention. These include a more detailed classification of hazardous substances, which could be incorporated into bilateral agreements and added guidelines for legal interpretation.

Using these methods will further make up for the lack of international investment law in environmental protection, clear division of responsibility.

### *4.4Increase transparency*

For many confidentiality agreements, certain environmental details need to be disclosed to increase transparency. In negotiations, the internationalization of investment and environmental dispute settlement approaches is an essential factor for the success of negotiations. Unlike normal investment dispute settlement procedures, investment disputes involving environmental issues tend to have higher requirements on procedural rules. The key is to avoid abuse of litigation and improve rules on transparency. Because environmental issues are related to national environmental sovereignty and social public interests, if

the degree of public participation cannot be expanded, citizens' right to know and right to participate in public affairs will be jeopardized to a large extent. Therefore, increased scrutiny of case transparency will help judges to hear cases more fairly and fairly in terms of considering the facts.

## 5.CONCLUSION

The relationship between environment and investment agreements is staggered and there is a gap between the status of investors and host countries. How to balance the rights and obligations of both parties in these problems has always been a topic of academic debate.

In particular, the regulation of environmental protection is inadequate. How to better align international investment law with sustainable development, so that foreign investment can become a powerful tool to promote the development of host countries, rather than damage the environment is the main content of this paper. This paper mainly discusses the problems encountered in the international investment agreement. Firstly, the arbitration organization should improve the arbitration procedure and increase the means of the counterclaim. Secondly, the international community needs to take measures to improve the international investment agreement. Thirdly, the host country and investors should make clear the division of rights when signing the agreement to avoid vague definitions. Finally, the host country and investors should increase transparency in the process of the re-agreement and safeguard the rights of both sides. Nowadays, the international community has more and more high requirements for environmental protection, especially for the international investment Law, which leads the international economic situation, it needs to contribute to environmental protection.

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