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Research on Environmental Protection Clauses in the Investment Field from the Perspective of CPTPP

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Abstract

CPTPP is a typical model in regional integration agreements, and its environmental protection clauses in the investment field reflect the current new concepts of international investment law regarding environmental protection. As China has become the world's largest outward investment economy and the second largest recipient of foreign direct investment, on the one hand, some foreign investment projects have caused damage to China's environment, and on the other hand, China's overseas investments in some countries and regions have also had adverse impacts on the local environment. China has always attached great importance to environmental protection, and in recent years, environmental protection clauses in the investment field have frequently appeared in bilateral investment agreements signed by China. However, there are still many deficiencies in these clauses, which need to be improved by benchmarking against high-standard environmental protection clauses in the investment field. In the context of CPTPP, there are conflicts between environmental protection clauses and investment protection clauses, including the National Treatment Clause, Fair and Equitable Treatment Clause, and Expropriation Clause. From the perspective of CPTPP, the environmental protection clauses in China's investment treaties ignore the setting of balance clauses, the investor protection clauses lack rationality, and exception clauses are absent, requiring China to attach importance to improving environmental protection clauses in investment treaties.

Keywords

CPTPP; Investment Protection; Environmental Protection.

1. Introduction

At the birth of international investment agreements, the core issue they focused on was only the protection of investments and the security of investment returns. Issues related to sustainable development, such as environmental protection, were not covered in the text of the initially signed international investment agreements. The emergence of environmental protection clauses is closely related to the global environmental crisis. Against the backdrop of global environmental degradation and frequent ecological disasters, environmental protection awareness has gradually awakened. Especially after the signing of the North American Free Trade Agreement (NAFTA) in 1992, international investment arbitration cases related to environmental protection in the investment field have increasingly emerged. Whether environmental protection measures taken by the host country violate investment protection obligations has become a new issue that has to be considered in many arbitration cases. In this context, as a major investment-exporting country, the United States re-examined the importance of environmental protection clauses in international investment agreements and incorporated an environmental protection chapter into the TPP it led, attempting to clarify the boundaries of the host country's legitimate exercise of environmental protection management rights. After the United States withdrew from the TPP, Japan took the lead in promoting the formulation of the CPTPP, which inherited a large number of relevant provisions on environmental protection and investment protection from the Trans-Pacific Partnership Agreement (TPP) in its text.

2. Analysis of the Main Contents of Environmental Protection Clauses in the Investment Field from the Perspective of CPTPP

2.1. Environmental Protection in the Investment Field under the Preamble of CPTPP

The preamble of CPTPP uses more forceful language than previous international conventions and free trade agreements such as the Energy Charter Treaty (ECT) and NAFTA. The preamble of CPTPP emphasizes "recognizing their inherent regulatory powers and being determined to retain the right of each Party to determine legislative and regulatory priorities... such as public health, safety, the environment, exhaustible living resources... to promote the achievement of high-level environmental protection through effective environmental law enforcement and other measures, and to promote the achievement of sustainable development goals through mutually supportive trade and environmental policies and practices." This expression reflects the willingness of the Parties to safeguard their national sovereignty in environmental protection and declares the determination of the Parties to strengthen environmental protection in the process of development, indicating the common commitment of the Parties to environmental protection and sustainable development.

Although the declaratory provisions on environmental protection in the preamble of CPTPP do not have mandatory effect, as the chapter that introduces the entire agreement, the expressions in the preamble are the goals to be achieved by the entire agreement, and the statement on environmental protection will play a guiding role in the interpretation of the contents of other relevant chapters and clauses of CPTPP. The Vienna Convention on the Law of Treaties requires interpreters to consider the context when interpreting treaties. For arbitration tribunals, this often means that the preamble of an international investment agreement is of great reference significance. Once an environmental dispute arises in the investment process between the Contracting Parties, the attitude towards environmental protection shown in the preamble of CPTPP can also provide a reference for the arbitration tribunal to interpret the general exception clauses.

2.2. Environmental Protection in the Investment Field under the Investment Chapter of CPTPP

The investment chapter of CPTPP delimits the scope of application of environmental protection measures and stipulates that in order to achieve the goal of environmental protection, regulatory measures including "performance requirements" and "minimum treatment" with the goal of environmental protection can be implemented as long as they comply with the provisions of the investment chapter. By defining the scope of application of environmental measures and clarifying regulatory measures through relevant clauses, the main framework of the environmental protection rules in the investment chapter of CPTPP is constructed. This affirmative list-style authorization also provides strong support for the Contracting Parties to use environmental measures to actively protect their domestic environment from the perspective of under what circumstances environmental measures do not violate the requirements of the investment chapter. [1]The investment chapter of CPTPP does not limit the scope of implementation of environmental measures, which means that each Contracting Party can take environmental measures against any type of investment project within its territory that violates environmental protection laws, so as to maintain the environmental level within its territory. This provision once again confirms the right of each Contracting Party to take environmental measures, makes a limited balance between developed and developing countries among the Contracting Parties, and can to a certain extent restrict developed countries from using investment and trade facilitation to transfer polluting industries to developing countries as consumer countries, and then import high-pollution and high-energy-consuming products from developing countries to their own countries.

From the perspective of the expression of the clauses, CPTPP stipulates in the "Performance Requirements" clause that when necessary, the Contracting Party can implement certain environmental measures to protect the life and health of humans, animals and plants, even if these environmental measures are suspected of constituting "performance requirements". This provision is similar to the provisions of NAFTA. In NAFTA arbitration cases, NAFTA supports the Contracting Party to take environmental measures to protect the country's environmental development. The provisions in the CPTPP text are highly similar to those in NATFA, also reflecting the same attitude of balancing environmental development and protecting investors' interests.

As a supplement to the "National Treatment" and "Most-Favored-Nation Treatment", the "Minimum Treatment Clause" plays a supporting role in each free trade agreement. However, in CPTPP, the principle of environmental protection give a higher upper limit to the "Minimum Treatment Clause". CPTPP clearly lists several situations that do not constitute a violation of the "Minimum Treatment Clause" in the "Minimum Treatment Clause", such as decisions made by the Contracting Party that do not meet the expectations of investors, changes, reductions or stops in granting corresponding subsidies and grants.

3. Conflicts and Coordination between Environmental Protection Clauses and Investment Protection Clauses of CPTPP

3.1. Conflicts between Environmental Protection Clauses and Investment Protection Clauses of CPTPP

3.1.1. Conflict between CPTPP Environmental Protection Clauses and Non-Discrimination Treatment Clauses

As a basic principle of international economic law, non-discrimination treatment aims to provide protection for international investment. This principle is mainly reflected in the National Treatment Clause and Most-Favored-Nation Treatment Clause in CPTPP. The non-discrimination treatment clause of CPTPP requires that the treatment given by the host country to investors shall not be lower than that given to domestic investors or investors of other contracting parties. The potential forms of conflict are as follows: first, when the host country exercises its environmental regulatory power, it violates the requirements of non-discrimination treatment in terms of the measures taken by environmental regulation, the effects achieved or the enforcement procedures of law enforcement agencies;[2]second, the host country uses environmental protection as a defense in international investment arbitration and discriminates against investors from different countries; third, when interpreting the clauses, the arbitration tribunal pays more attention to the environmental protection clauses, so that the standard of non-discrimination treatment is invisibly improved.

For the problem that the host country violates the requirements of non-discrimination treatment when exercising environmental regulatory power, the root cause is generally that the host country tries to set up environmental protection barriers with environmental regulatory power in order to protect its domestic related industries; for the problem that the host country uses environmental protection as a defense to discriminate against investors, it mainly depends on the consensus reached among the contracting parties. If all parties tend to prioritize environmental protection, the exemption clause will be more comprehensive. If the fundamental goal is to protect investment, the exemption clause will be weaken; for the problem that the environmental protection clause makes the non-discrimination treatment standard rise, it is the consideration of the arbitration tribunal for the balance of interests between environmental protection and investment protection.

3.1.2. Conflict between CPTPP Environmental Protection Clauses and Fair and Equitable Treatment Clauses

As the last "umbrella" for investors, it is very common for the complaining party to file an arbitration on the grounds that the host country has violated the fair and equitable treatment clause, and it is also difficult to avoid this type of conflict in the implementation process of CPTPP. In form, the conflict between the CPTPP environmental protection clause and the fair and equitable treatment clause also shows three forms: first, when the host country takes environmental measures, it does not follow the due process, or the measures contain discriminatory factors, or does not provide sufficient judicial relief channels for investors; [3]second, the environmental measures taken by the host country may damage the legitimate expectations of investors. The host country has made relevant commitments on environmental protection standards in the process of attracting investment. Once the host country changes the agreed environmental protection standards during the contract period, it will have a considerable adverse impact on investors; third, the concept of the fair and equitable clause in international investment arbitration is still changing, so it is still very easy for the host country to exercise environmental regulatory power to constitute a violation of the fair and equitable clause.

The reasons for the above three conflicts between the CPTPP environmental protection clause and the fair and equitable treatment clause are as follows: first, at the clause level, compared with the clauses in the previous free trade agreements, the CPTPP fair and equitable treatment clause has a certain improvement in the clarity of language, but it still has a certain degree of ambiguity; second, based on the characteristics of environmental protection supervision itself, the relevant standards will continue to develop with the development of technology. The regulatory standards promised by the host country are likely to be unable to keep up with the requirements of environmental protection after a period of time. Once the newly formulated standards are applied to investors attracted by the previous commitments, conflicts will arise; finally, environmental protection and investment protection, the former focuses on long-term interests, and the latter focuses on real interests, so conflicts are inevitable in application.

3.1.3. Conflict between CPTPP Environmental Protection Clauses and Expropriation Clauses

In international investment arbitration, the expropriation clause is a high-frequency clause invoked by investors. For the host country, the boundary between expropriation measures and management measures is very difficult to grasp. If the host country wants to distinguish between management measures, illegal expropriation and legal expropriation, it must, in accordance with the rules of international law, take environmental regulatory measures for a legitimate purpose, without discrimination, through due process and with prompt and reasonable compensation. Therefore, the conflict between the CPTPP environmental protection clause and the expropriation clause may be manifested in two ways. One is that the environmental protection measures taken by the host country are regulated by the expropriation clause in terms of procedure and purpose, and the other is that the implementation of the environmental protection measures by the host country is restricted by the requirement of the expropriation clause to make prompt and reasonable compensation.

The most fundamental reason for this conflict is the interest conflict between environmental protection and expropriation. The core of the environmental protection clause is to protect the ecological environment of the host country, while the expropriation clause is formulated to protect the national economic interests. The core interests protected by the two are fundamentally difficult to reconcile, so the conflict between the CPTPP environmental protection clause and the expropriation clause is difficult to avoid.

3.2. Coordination of Conflicts between CPTPP Environmental Protection Clauses and Investment Protection Clauses

3.2.1. Coordination of Conflicts between CPTPP Environmental Protection Clauses and National Treatment Clauses

From the perspective of the implementation of CPTPP clauses, if environmental clauses are to play their role, the contracting parties must take the initiative to exercise their environmental regulatory power and formulate specific environmental measures to implement the provisions of environmental clauses. In order to avoid conflicts between environmental protection clauses and non-discrimination treatment clauses, when formulating specific measures, the contracting parties should strictly implement the statutory procedures and try to prevent the establishment of environmental protection barriers for overseas investment.

From the perspective of the interpretation of CPTPP clauses, in order to avoid the arbitration result forming a chilling effect on one party of the dispute, the arbitration tribunal must consider the balance between environmental protection and investment protection. When interpreting the non-discrimination treatment clause, the arbitration tribunal should fully consider that the host country has a deeper understanding of its own national conditions, and avoid blindly emphasizing the protection of investment, which makes the host country's environmental protection policies and measures fail. Appropriately improving the application standard of the non-discrimination treatment clause and fully respecting the environmental protection measures formulated by the host country based on its national conditions are also the requirements of CPTPP to recognize the environmental regulatory power of the host country.[4]

3.2.2. Coordination of Conflicts between CPTPP Environmental Protection Clauses and Fair Treatment Clauses

From the perspective of the implementation of CPTPP clauses, when the host country exercises its environmental regulatory power to formulate relevant environmental protection policies and measures, first, it should carry out comprehensive and scientific investigation and research work; second, it should attach great importance to the principle of procedure, and absorb the opinions and suggestions of all relevant stakeholders as much as possible through hearings; third, it should not bring irrational and unfair practices into the implementation process, but should provide effective relief channels for investors to avoid situations such as the host country's courts refusing justice or deliberately delaying.

From the perspective of the interpretation of CPTPP clauses, the interpretation of the clauses must not be divorced from reality. In the context of the global advocacy of green development, the coordination between economic development and environmental protection has been increasingly valued by various countries. The newly signed bilateral and multilateral investment treaties have increasingly shown a "greening" trend, and international investment law has paid more and more attention to the issue of substantive fairness. Therefore, when interpreting the fair and equitable treatment clause, the treaty interpretation method should be innovated, and reference should be innovatively sought from domestic public law and international public law.

3.2.3. Coordination of Conflicts between CPTPP Environmental Protection Clauses and Expropriation Clauses

From the perspective of the implementation of CPTPP clauses, if the host country wants to avoid being recognized as illegal expropriation when exercising its environmental regulatory power, it cannot ignore several key elements such as due process, scientific and reasonable basis, and non-discrimination in the process of formulating and implementing environmental management measures.

From the perspective of the interpretation of CPTPP clauses, although the clauses have clearly stated that indirect expropriation does not include the legitimate management measures taken by the host country for environmental protection purposes, the arbitration tribunal's judgment standard on whether the management measures are legitimate is still very important. It can be said that the key to the conflict between the environmental protection clause and the expropriation clause is the judgment of the legitimacy standard of the management measures. The environmental management measures of the host country often do not directly make the subject matter of the investment lose its physical function, but will directly reduce the property of the investor. Therefore, the judgment of whether the management measures are legal should be mainly based on whether the environmental management measures have caused serious consequences and whether they have continuously caused damage to the economic interests of the investors.[5] Specifically, it can be measured by three standards: whether the consequences of the management measures are serious, whether the damage to the economic interests of the investors is persistent, and whether the proportionality principle and necessity in public law are included in the standard for judging whether the environmental management measures are excessive, and whether the environmental management measures taken by the host country are appropriate.

4. Enlightenment of Environmental Protection Clauses in the Investment Field under the Perspective of CPTPP to China

4.1. Problems Existing in Environmental Protection Clauses in China's Investment Treaties

4.1.1. Ignoring the Setting of Balance Clauses in Investment Treaties

The main purpose of the balance clause is to protect the policy space of the host country and limit national liability. For example, in the preamble of CPTPP, it is determined to retain the flexibility of the parties in environmental legislation and regulatory power. In recent years, international investment agreements have solved the problem of the imbalance between investment protection and public interest protection by adding target clauses for protecting public interests in the preamble. [6]However, in China's investment treaties, the degree of attention to sustainable development and environmental protection is still low. Even through sorting out, it can be found that the word "environment" rarely appears in the text of investment treaties signed by China. In addition, other bilateral investment agreements of China do not stipulate balance clauses. It can be seen that in China's investment agreements, balance clauses are not mandatory contents.

4.1.2. The Rationality of Investor Protection Clauses Needs to be Improved

In the newly signed bilateral investment agreements of China, this clause has been newly developed. For example, Article 5 of the China-Japan-Korea BIT stipulates the "Overall Investment Treatment", [7]which for the first time proposes the "Minimum Treatment Standard". The investment agreement emphasizes the protection of investors' rights, but does not leave a reasonable space for the host country to carry out policy measures. With the improvement of China's rule of law construction and environmental protection awareness, a series of domestic laws have been issued in the field of environmental protection in recent years, and increasingly strict environmental policies have already emerged in China's development. However, in the negotiation of investment treaties, China's attention to environmental protection clauses is still insufficient. In this way, when the signed investment treaties of China do not achieve the balance between investment protection and the host country's environmental regulatory power, China will inevitably face certain investment arbitration risks and in a disadvantageous situation in international investment arbitration.

4.1.3. Lack of Exception Clauses in Investment Treaties

Through combing China's current bilateral investment agreements, it is found that among more than 100 investment treaties, there are very few involving environmental exception clauses. Although including environmental exception clauses in bilateral investment agreements is a breakthrough for China, it should still be seen that the contents covered by these environmental exception clauses only adopt a closed list form and avoid the issue of what circumstances do not constitute indirect expropriation. In this case, the environmental exception clause is equivalent to being placed on the shelf in the investment treaty and is difficult to be truly applied. Especially when the circumstances that do not constitute indirect expropriation are not clear, even if the host country's environmental regulatory measures are taken for public interest considerations and meet the statutory procedures, they may still constitute expropriation.

4.2. Improvement of Environmental Protection Clauses in China's Investment Treaties from the Perspective of CPTPP

4.2.1. Pay Attention to the Role of Balance Clauses in Investment Treaties

From the perspective of the host country, actively strengthening the balance clause is an effective way to enhance its foreign capital management means. Actively making up for the defect that the legal binding force of the balance clause is weak is also conducive to the host country reducing the risk of failure in international investment arbitration. Therefore, when setting the balance clause in the investment treaty signed by China, the following aspects should be considered. First, pay attention to the role of the preamble, make full use of the leading position of the preamble chapter in the agreement text, highlight the environmental objectives in it, fully reflect the relationship between the environmental objectives and the economic objectives in the preamble, and emphasize the host country's exercise of environmental regulatory power. Second, set up special environmental protection contents in a refined way, or follow the example of CPTPP to fully integrate environmental protection into the investment chapter, clarify issues such as "not reducing environmental measures to encourage investment"[8], in the investment agreement, set up special environmental clauses in the investment agreement, and even add special environmental chapters in regional free trade agreements, so that environmental protection becomes an important follow for the contracting parties in investment activities. Third, focus on considering setting up clauses to clarify the environmental regulatory power of the host country, fully clarify the right of the host country to take reasonable environmental measures, better provide more operation space for the country to take reasonable environmental measures, and at the same time prevent the country from being in a disadvantageous position in international investment arbitration because of taking environmental protection measures.

4.2.2. Improve the Investor Protection Clauses in Investment Treaties

First, when setting the principles of most-favored-nation treatment and national treatment, we should fully consider the interests and demands of all parties, and achieve the goal of reconciling the relations between all parties and promoting sustainable development through clear provisions. These principles can provide a competitive environment for foreign investors equivalent to that of local enterprises in the host country. Second, when setting the compensation system, the compensation standard, compensation procedure and compensation method should be clarified. This can provide a clear and operable relief channel for foreign investors. Third, when setting the dispute settlement mechanism, the dispute settlement procedure, dispute settlement method and dispute settlement institution should be clarified.

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This can provide a fast and efficient dispute settlement channel for foreign investors. In short, when improving the investor protection clause, we should fully consider the interests and demands of all parties, and achieve the goal of reconciling the relations between all parties and promoting sustainable development through clear provisions.

4.2.3. Expand the Application of Environmental Exception Clauses

The environmental exception clause refers to the special clause in indirect expropriation. Some investment treaties of China stipulate this type of clause, which allows the host country to take non-discriminatory regulatory measures to protect the environment and determine that this does not constitute indirect expropriation. Appropriately expanding the scope of application of environmental exception clauses is a necessary means to safeguard the environmental regulatory power of the host country. In addition, when formulating the environmental exception clause of the investment treaty, there is no need to only focus on the scope of the international investment agreement. Although environmental exceptions are rare in international investment agreements, in international trade agreements, environmental exceptions have already been general exception clauses. For example, CPTPP incorporates some clauses from trade agreements that have already included environmental exceptions.，this approach is worthy of reference for China when formulating investment treaties. [9] When signing or supplementing investment treaties with countries that have established trade agreements with China, the clauses of trade agreements that have included environmental exceptions can be incorporate as the negotiation basis. In this way, the negotiation cost of the investment treaty will be greatly reduced, and the environmental clauses in the investment treaty will be better improved.

5. Conclusion

Since the entry into force of CPTPP in 2018, its environmental protection clauses in the investment field have been reflecting the most advanced current environmental protection concepts, aiming at coordinating the relationship between investment protection and environmental protection, and combining the environmental standards of the contracting parties and the widely concerned environmental issues to build a relatively perfect set of environmental rules systems, which can be called a model among the current major free trade agreements. However, it is also in conflict with the "Fair and Equitable Treatment","Expropriation Clause", "National Treatment" and "Most-Favored-Nation Treatment" clauses. By analyzing the conflicts between the CPTPP environmental protection clauses and the investment protection clauses, as well as the problems and causes of coordination with other environmental conventions, this paper preliminarily proposes solutions to mitigate and resolve the conflicts between the environmental protection clauses and the investment protection clauses and the coordination issues with other environmental conventions from three dimensions: clause implementation and interpretation. By learning from the environmental protection clauses in the investment field of CPTPP, in the process of signing investment treaties in China, paying attention to the role of balance clauses in investment treaties, actively improving the investor protection clauses in investment treaties, and orderly expanding the application of environmental exception clauses can contribute to accelerating the construction of a new development pattern with the domestic big cycle as the main body and the domestic and international double cycles promoting each other.

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