Panda and Singapore on Commercial Arbitration: Analysing Environmental Protection Clauses in International Investment

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Abstract: As the principle of sustainable development and the concept of community of human destiny have gradually become the consensus of the international community, environmental protection in international investment has been paid more and more attention by the international community. This paper analyses the case of Singapore Asiaphos Corporation v. China using a case study approach. The author points out that the main problems facing environmental protection in international investment are the unclear distinction between foreign control and indirect expropriation, and whether foreign investors can be treated fairly and equitably. The author gives recommendations to improve environmental protection provisions, environmental enforcement and related measures and procedures, and gives insights into China's different capacities as a host country and an investor in order to cope with the increasingly stringent environmental protection in international investment.

***Keywords*:** environmental protection clause, indirect taxation, fair and equitable treatment

1. Introduction

Since the industrial revolution in the West and the expansion of the world, the global economy and productivity have developed rapidly, especially after the Second World War, the establishment and stabilisation of the world economic, trade, political and legal order, and the rapid development of international investment among countries around the globe, with a significant expansion in the number and amount of investments. However, with the outbreak of many major and serious environmental pollution incidents since the 20th century, such as the London smog incident in 1953, the Chernobyl nuclear leakage incident in 1986, Ecuadorian oil leakage, etc., these serious environmental incidents have brought about a huge disaster to mankind, and as we learnt from the painful experience, we began to reflect on the major environmental incidents, and the principle of sustainable development was gradually integrated into the principles of international law. The Declaration on the Human Environment was adopted by the United Nations Conference on the Environment held in Stockholm, Sweden, in 1972. Later, the United Nations Conference on Environment and Development adopted "Life on Sustainable Development." In 2015, the United Nations adopted "Transforming Our World: the 2030 Agenda for Sustainable Development." The principle of sustainable development has evolved from its initial establishment to being uniformly adopted by United Nations member states. The principle of sustainable development has become one of the principles of international law. Environmental issues have gained global attention, so environmental factors will increasingly lead to disputes in the field of international investment. [1]

2. Analysis of the case of Singapore AsiaPhos. v. China

2.1 Introduction to the case of Singapore AsiaPhos v. China

AsiaPhos Company is a Singaporean investment enterprise in China, mainly engaged in the development of phosphorus resources in Mianzhu City, Sichuan Province, the phosphorus mining right was originally scheduled to expire on 28 February 2018, but in 2017, the Sichuan government, for the consideration of environmental protection factors, due to the fact that the mining area belongs to the Giant Panda Nature Reserve, and in order to protect the natural environment in the public interest, requested Singaporean company AsiaPhos to stop the mining of Jiuding Mountain, and rejected ACHE's application for an extension of its mining rights, after which negotiations between the two parties failed. In August 2018, ACHE initiated arbitration with the Chinese government based on the China-Singapore Bilateral Investment Agreement ('BIA'). The dispute between the two parties centered on whether the Chinese government's measures — requiring Singapore ACHEM to evacuate,[2] rehabilitate the mine site, and reject its application for an extension of the mining rights—constituted "indirect expropriation." Consequently, the case also addressed whether ACHEM was entitled to compensation and, if so,

the appropriate amount.

2.2 The main legal grounds involved in this case

The main legal basis involved in this case is the Singapore-China Bilateral Investment Agreement (BIA) signed in 1985 , which entered into force in 1986 and was terminated in October 2019 following the entry into force of the Protocol on Upgrading the China-Singapore FTA[3]. Under the sunset clause, the agreement remains applicable to investments made before the effective date of the notice of termination for a period of fifteen years from the effective date of the notice of termination. In addition, Article VI of the agreement provides for an expropriation clause, and Article XIII limits justiciable disputes to those relating to the amount of compensation for expropriation. Article VI stipulates that neither Contracting Party shall expropriate, nationalise, or take any other measures equivalent to expropriation or nationalisation against investments made by nationals or corporations of the other Contracting Party, unless such measures are: (1) for a lawful purpose, (2) applied on a non-discriminatory basis, (3) in accordance with domestic laws, and (4) accompanied by compensation that is effectively enforced and not subject to unreasonable delay. If a concurrent Article XIII dispute remains unresolved, it may be submitted to an international arbitral tribunal composed of representatives from both parties. In addition to the Sino-Singaporean BIT, the China and ASEAN Comprehensive Investment Agreement (CACIA), signed in 2009, also applies to this case, as Singapore is an ASEAN member stateArticle XIV of the CACIA establishes the ICSID arbitration mechanism for resolving investment disputes between foreign investors and the host country.[4]

2.3 Environmental protection in international investment in the context of this case

The fundamental conflict of interest in the case of Singapore AsiaPhos v. China lay in the conflict between the protection of the investor's existing interests and the host State's interests in environmental protection, and the resulting conflict gave rise to the following issues in the field of international investment: first, the issue of the ‘expropriation’ of investment assets, which was stipulated in both the 1985 Singapore-China BIT and the 2009 China-ASEAN Comprehensive Investment Agreement (CACIA). First, the issue of ‘expropriation’ of investment assets, which is provided for in the 1985 Singapore-China BIT and the 2009 China-ASEAN Comprehensive Investment Agreement (CACIA), which in principle prohibits the host government from taking expropriation or nationalisation measures against foreign investment or other measures the effect of which is tantamount to expropriation or nationalisation, unless the government measures are based on purposes permitted under the law and provide effective compensation for the foreign investment after the implementation of the measures on a non-discriminatory basis.And the host government providies effective compensation for foreign investment after the imposition of the measure. Whereas expropriation in international investment is mainly divided into two categories: direct expropriation and indirect expropriation, Singapore AsiaPhos argued that the Chinese government's measures such as evacuation, rehabilitation of the mine site and rejection of the application for extension of the mining right constituted indirect expropriation in contravention of the Singapore-China Bilateral Investment Agreement (BIT) and China-ASEAN Comprehensive Investment Agreement (CCAA), [5]and China argued that measures taken on the basis of a legitimate aim of preserving the natural environment of the giant pandas, as well as on the non-discriminatory basis, were consistent with the relevant agreements. measures taken on a non-discriminatory basis were consistent with the legal purposes of the relevant agreements and did not constitute an indirect expropriation. In general, the China-ASEAN CIA provides for the right of the host country to take necessary measures to control foreign investment for the purpose of protecting the life or health of animals, and in this case, the Sichuan Provincial Government's taking of necessary measures against YAC for the purpose of protecting the survival of giant pandas is an exercise of the right to control foreign investment, which is in line with the legitimate legal purpose and should not constitute an indirect expropriation. Secondly, the question of whether the host country's conduct is fair and equitable treatment, Singapore AsiaPhos Company was rejected the application for extension of the mining area in Sichuan, as an international investor will also be fair and equitable treatment clause as a touting clause, hoping to safeguard the established interests of the investor. China believes that the relevant operation to give fair and equitable treatment to Singapore AsiaPhos Company is in line with the procedural justice substantiation, which is mainly manifested in the one hand, in line with the principle of good faith. On the one hand, the Chinese government's measures are based on the public welfare purpose of protecting giant pandas, and have a legally permissible bona fide purpose; on the other hand, they have a scientific basis, as evidenced by the fact that the Chinese government's request for ACHA to cease operations has been subject to the approval of the soil and water conservation plan, and has been subject to the appropriate hearings and other processes, which provides for fairness in the process and a scientific basis. As well, the measures comply with the principles of non-discrimination and proportionality. Specifically, the Chinese government's actions apply to all enterprises and companies within the nature reserve, rather than targeting YACC exclusively. This ensures non-discriminatory treatment and aligns with the standards of fair and equitable treatment.

3. Deficiencies in environmental protection clauses in international investment

3.1 Difficulty in distinguishing between environmental regulatory rights and indirect expropriation in international investment

International investment agreements set up in the environmental protection provisions, that the host country has the right to take certain measures due to ecological environmental protection problems occurring, the investor also needs to assume certain obligations of environmental protection[6], it is generally believed that the host country has the right to control the environmental problems, that is, the right of environmental control, but how to distinguish between the right of environmental control and indirect expropriation, in the international investment law is an important proposition. It is generally believed that the exercise of environmental control rights and the consequences of the need for compensation, while in the conditions of indirect expropriation need compensation, and whether to give compensation is often decided by the court or arbitration institutions, adjudicators often have greater discretion, so the international community of the prevailing sources of law, concepts, views often play an important role. The host government exercises environmental control, its legitimacy comes from the legitimacy of the government's objectives, so the host country wants to prove that measures belong to the environmental control, need to prove the legitimacy of the purpose, that is, the motivation to take measures for the sake of the public interest, which also need to be judged by the size of the public interest, the greater the public interest, the more the environmental measures taken by the government will be recognised as an exercise of the right to control the environment. In addition to lawfulness and reasonableness, the nature of the measures plays a crucial role in determining their classification. Key factors to consider include: whether the measures constitute a bona fide regulatory act, whether their purpose aligns with genuine public interest goals, and whether they exhibit characteristics such as non-discrimination, due process, and proportionality. Therefore, a comprehensive assessment of the measures' nature, characteristics, and purpose is necessary to resolve whether the government's actions constitute an exercise of environmental regulation or indirect expropriation. This determination ultimately guides whether compensation should be awarded.

3.2 Whether environmental provisions for international investment give fair and equitable treatment

Fair and equitable treatment is the underpinning clause in international investment treaties, which generally pays more attention to the procedural issues in the application of the clause, so fair and equitable treatment is centred on procedural justice as a way to judge the reasonableness of environmental clauses. In disputes between investors and host countries, determining whether the host country's measures are fair and just primarily depends on several factors: whether the environmental impact assessment process is impartial, whether there are delays in government approval procedures, whether the allocation of administrative approval authority is clear and transparent, and whether the government's stance on environmental projects remains consistent.[7] These factors are crucial in assessing whether the measures qualify as fair and equitable treatment. Since procedural justice lies at the core of fair and equitable treatment, practical evaluations of environmental investment projects must consider elements such as environmental impact assessments, environmental risk assessments,and environmental hearings. Therefore, in the case of a dispute between an investor and a host country over whether a measure is fair and equitable treatment, it is crucial to consider it in terms of procedural justice.

4. Implications of Environmental Provisions in International Investment for China

4.1 Insights from China as host country

China in recent years for the environmental protection issue is paying more and more attention, the party's twentieth report stressed: must firmly establish and practice the concept of green water and green mountains is the golden mountains, standing in the height of the harmonious coexistence of man and nature to plan for development. At the same time, Chinese-style modernisation is required to be a modernisation in which human beings live in harmony with nature. Now because of environmental protection and not many international investment disputes, but the future of environmental protection requirements more and more stringent situation, strengthen the foundation of internal measures essential. On the one hand, improve environmental legislation. China currently maintains a positive stance toward attracting foreign investment. However, there is no clear consensus on whether to universally incorporate environmental protection provisions into international investment agreements. From a practical perspective, it is essential for host countries to emphasize their right to environmental regulation. This underscores the need to universally integrate environmental protection provisions into bilateral investment agreements. Additionally, improving environmental law enforcement is equally critical. The administrative authorities should implement legal and reasonable environmental measures, disclose the corresponding

information in a timely manner, and enforce the law with goodwill and equal treatment without discrimination.

4.2 Insights from China as an investor

The inclusion of environmental provisions in international investment agreements is a double-edged sword, which not only gives the host country certain environmental control rights, but also puts forward higher requirements for the exercise and procedural propriety of the host country's environmental measures. To prevent overseas countries from using environmental protection as an investment barrier against China as an investor, it is essential for China to proactively prepare by conducting thorough investment assessments. This includes establishing an early warning mechanism for environmental risks and closely monitoring the environmental laws, regulations, enforcement practices, and judicial systems of the host country. At the same time, Chinese overseas investors need to focus on changing product production methods, increasing the perspective of sustainable development in business operations, and combining the concept of sustainable development with corporate strategies, so as to meet the opportunities and challenges brought about by the overall environmental trends and achieve a win-win situation for both business development and environmental protection.

5. Conclusion

When the principle of sustainable development has gradually become a recognised principle of international law and the concept of the community of human destiny has become an important consideration in international investment, crude and environmentally polluting investment projects are bound to give rise to numerous international investment disputes, and environmental protection clauses are increasingly valued by host countries and investors. The host country should clearly differentiate between foreign investment regulation and indirect expropriation, ensuring fair and equitable treatment for foreign investors. It is also essential to universally incorporate environmental protection clauses into bilateral investment agreements. Meanwhile, investors should establish an early warning mechanism for environmental risks, closely monitor the environmental laws and regulations of the host country, and align their business development strategies with the principles of sustainable development.

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