



STUDY ON BILATERAL INVESTMENT BETWEEN CHINA AND MALAYSIA UNDER THE FRAMEWORK OF REGIONAL COMPREHENSIVE ECONOMIC PARTNERSHIP FROM SUSTAINABLE DEVELOPMENT PERSPECTIVE

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***Abstract** - after an in-depth analysis of the concept of the principle of sustainable development and its extension, the investment of China and Malaysia under the framework of RCEP starts; by putting the problems in the existing bilateral investment agreements between China and Malaysia to the principle of sustainable development in the framework of RCEP, the specific problems of bilateral investment agreements between China and Malaysia, and according to the investment provisions in RCEP the investment and investor agreement boundaries are unclear and The problems of investor-state conflict caused by the unclear principle and provisions of sustainable development; the principle of divergence between the good vision of sustainable development and its actual effectiveness caused by the unclear principle and provisions of sustainable development; the crisis of legitimacy and rationality of the dispute settlement system caused by the provisions of investment dispute settlement; and the clarification of the principle of sustainable development that China and Malaysia BITs should adhere to in the international investment agreements to propose relevant The BITs of China and Malaysia should adhere to the principle of sustainable development in the IIAs in order to propose relevant supporting and resolution measures.*

***Keywords:** Dispute settlement mechanisms, International investment provisions, Sustainable development principles;*

INTRODUCTION

FDI and foreign trade remain one of the pillars that underpin globalization and globally interconnected value chains. ²The international community has taken note of the unsustainability of IIAs and hopes to correct the developmental bias of IIAs by introducing the principle of sustainable

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²Bungenberg M., Griebel J., Hindelang S. International Investment Law and EU Law[M/OL]. Berlin Heidelberg: Springer-Verlag, 2011[2018-12-03]. <https://doi.org/10.1007/978-3-642-14855-2>.



development at a deeper level to avoid plunging IIAs into the crisis of unsustainable development, including continuous calls for sovereign states to pay attention to the balance between public and private interests, and between investors' rights and interests and host country development when formulating IIAs. Constantly calling for the addition of national control rights clauses, clarification of investment treatment standards, and revision of investment dispute settlement clauses. Over the years, the principle of sustainable development has only been "fragmented" and included as a development and guiding principle in various investment agreements.

Due to the lagging nature of IIAs and the rapid development of international economic activities, the most important of them are the problems of investor-state conflicts caused by the unclear boundaries between investment and investor agreements through existing agreements; the principles of sustainable development that are contrary to the good vision of sustainable development and its actual effectiveness due to the unclear principles and provisions of sustainable development; the dispute settlement system due to the investment dispute settlement provisions; and the crisis of legality and rationality of the dispute settlement system. The crisis of legality and reasonableness. Using the principle of sustainable development to improve the various provisions in IIAs, so that the principle of sustainable development can promote and protect international investment in a healthier way, is the issue to be discussed in this paper.

1. REVIEW OF LITERATURE

1.1 Theoretical aspects

In 1987, the World Commission on Environment and Development gave a clear definition of "sustainable development" In 1987, the World Commission on Environment and Development defined "sustainable development" as "development that meets the needs of the present without jeopardizing the ability of future generations to meet their own needs. Since then, some international investment treaties have included references to "sustainable development" in their preambles, and in the preamble to the Trans-Pacific Partnership (TPP), which states: "The Parties to this Agreement, resolve to conclude a comprehensive regional agreement to promote economic integration to reduce poverty and promote sustainable growth. In his article "Sustainable Development Reform of Fulfillment Requirements under International Investment Law", scholar Qian Jianing elaborates the practical significance of BIT in the context of sustainable development reform: that is, when designing specific investment policies and regulations of IIAs (International Investment Agreements), sustainable development should be the goal, on the one hand, introducing the concept of responsible investment, using fulfillment requirements as a way to strengthen corporate social responsibility and ensure the realization of host country social value goals.

On the one hand, the concept of responsible investment should be introduced as an effective way to strengthen corporate social responsibility and ensure the achievement of social value objectives in host countries, and on the other hand, investment promotion and incentives should be promoted,



combining compliance with incentive investment policies to promote inclusive and sustainable development.³

Milton Moskowitz was the first to introduce the concept of Socially Responsible Investment (SRI), describing both its origins and development(p.71).⁴ Scholars Stephanie Giamporcaro and Lise Pretorius(p.41),⁵ Artie W. Ng(p.5)⁶, Gordon K., Pohl J. and Bouchard M(p.76).⁷ summarize and refine the formulation of sustainability.

Their consensus is that what distinguishes the principles of sustainable and responsible investment from other investment principles is the requirement that investments be integrated with environmental, social, and governance (ESG) issues. Scholars Benjamin J. Richardson(p.2),⁸ Max M. Schanzenbach, and Robert H. Sitkoff⁹(p7-p10), Stephen Viederman, and Nick Robbins have all argued that the principles of sustainable and responsible investment are distinct from other investment principles in that they require the integration of ESG issues(p9-p25).¹⁰ -They agree on another point that the principle of sustainable and responsible investment is an umbrella term that should not be defined in a specific way to limit its application.

1.2 Practice Level

The Forum for Sustainable and Responsible Investment (USA),¹¹ The European Sustainable Investment Forum,¹² the UK Sustainable Investment and Finance Association,¹³ the Responsible Investment Association Canada, and the Responsible Investment Association Australia. Sustainable Investment

³ Colin Fenwick(2002). "Minimum obligations with respect to Article 8 of the International Covenant on Economic, Social and Cultural Rights", in Audrey Chapman and Sage Russell (eds.), *Core Obligations: Building a Framework for Economic, Social and Cultural Rights*, Intersentia, Antwerp.p. 60.

⁴Milton Moskowitz.(1971)Choosing Socially Responsible Stocks.*Business and Society Review*.p.1(1):71.

⁵Stephanie Giamporcaro,(2012,)Lise Pretorius.Sustainable and Responsible investment (SRI) in South Africa: A limited Adoption of Environmental Criteria[J].*Investment Analysts Journal*.p.41.

⁶Artie W. Ng.(2019).Socially Responsible Investing in Sustainable Development.*Encyclopedia of Sustainability in Higher Education*.March .p.5.

⁷Gordon K., Pohl J., Bouchard M.(2014.)*Investment Treaty Law,Sustainable Development and Responsible Business Conduct: A Fact Finding Survey*. OECD Working Papers on International Investment.Jan.p.76.

⁸Benjamin J. Richardson.Socially Responsible Investment Law(2008): *Regulating the Unseen Polluters*[M].Oxford University Press.p.2.

⁹Max M. Schanzenbach, Robert H. Sitkoff.(2007)*Reconciling Fiduciary Duty and Social Conscience: The Law and Economics of ESG Investing by a Trustee*.*Stanford Law Review*.p72.p7-p10.

¹⁰Cary Krosinsky, Nick Robins, Stephen Viederman.*After the Credit Crisis- The Future of Sustainable Investing, The Next Generation of Responsible Investing*[M].Springer Netherlands Published.2012.p9-p25.

¹¹ The Forum for Sustainable and Responsible Investment.SRI Basics[OL.US SIF Homepage[2019-10-10].<https://www.ussif.org/sribasics>.

¹²The European Sustainable Investment Forum.European SRI Study 2018[R].Eurosif Report.Sep.2018:10-12.

¹³UK Sustainable Investment and Finance Association.Sustainable Investment and Finance[OL.KSIF Homepage[2019-10-10].<https://www.uksif.org/resources/faqs>.



and Finance Association (SIFA), the Responsible Investment Association Canada (RIA), the Responsible Investment Association Australasia (RIA),¹⁴ and the Asian Sustainable Investment Association (ASIA).¹⁵ Association Australasia, the Association for Sustainable and Responsible Investment in Asia,¹⁶ and other major global investment organizations have all focused on and explained the principles of sustainability and written them into the guiding principles of their organizations and conferences. They have also written the principles into the guiding principles of their organizations and conferences.

2. RESEARCH METHODOLOGY

The researcher used qualitative research methods; and analyzed and sorted out the information by using research methods of literature research and library materials. The specific application of sustainable development principles in various treaties and agreements is also collected through various databases and online information sources. This analytical approach will be used to capture the main current applications of sustainable development principles and the specific ways in which sustainable development has been applied in international bilateral investment agreements.

At the same time, a literature research approach is adopted, focusing on theoretical normative analysis and interpretation, integrating and re-refining primary sources and existing research results from literature repositories and libraries, exploring the issues arising from the practice of sustainable development in the introduction of international treaties, and dissecting the useful mechanisms and successful experiences of successful mechanisms of sustainable development application.

2.1 The Concept of Sustainable Development in the Field of International Investment Law

The concept of sustainable development was originally proposed as a concept in the field of environmental protection, and the concept of sustainable development originated from a series of international documents.¹⁷ In the field of international investment law, the concept of sustainable development has covered environmental, economic, social and corporate responsibility, and sustainable development strategies have been integrated into international investment law policies, and international investment flows are indispensable for the realization of sustainable development goals.¹⁸ The 2002 Plan of Implementation of the World Summit on Sustainable Development (hereinafter referred to as "the Plan of Implementation") set out specific arrangements for sustainable development, making new commitments to poverty eradication, natural resources,

¹⁴Responsible Investment Association Canada.Rebuild Better: Lessons from Responsible Investing in This Period of Crisis and Uncertainty[J/OL.RIA Canada Magazine, July 2020[2020-10

¹⁵Responsible Investment Association Australasia.What is RI[OL.RIAA Homepage[2019-10-10].<https://responsibleinvestment.org/what-is-ri/ri-explained/>.

¹⁶ASrIA.SRI[OL.ASrIA Homepage[2019-10-10].<https://www.asria.org/chinese/sri/intro>.

¹⁷The Stockholm Declaration on the Human Environment

¹⁸United Nations Conference on Environment and Developmen.Agenda 2. UNCED Report.June 1992:1-351.



sustainable production and consumption, and other areas.

The Plan of Implementation (hereinafter referred to as "the Plan of Implementation") set out specific arrangements for sustainable development, with new commitments in the areas of poverty eradication, natural resources, sustainable production and consumption, and noted that worldwide investment flows and capital mobilization present new challenges for sustainable development. The Plan of Implementation calls for the integration of sustainable development into government decision-making. Based on the principles and spirit of the UN Charter, the UN Millennium Declaration identifies principles on sustainable development, including economic development, social development and environmental protection.

The Investment Policy Framework for Sustainable Development and the Investment Action Plan for Sustainable Development Goals released by the United Nations Conference on Trade and Development (UNCTAD) in 2012 indicate the new development of the international community's investment policies, aiming to build a new international investment order for sustainable development, from favoring the protection of foreign investment rights and interests to promoting the sustainable development of host countries, from favoring the protection of foreign investment to seeking a balance between the rights and obligations of both sides.

The 2016 G20 Global Investment Guiding Principles set out specific requirements for transparency in investment policy rules, and the investment chapter of Chapter 10 of the RCEP between China and Malaysia includes a section on sustainable investment development. In Chapter X, Article 16, it is explicitly agreed to encourage investment between Parties, mainly to promote sustainable development of investment; each Party shall endeavor to facilitate investment between Parties, including by: (i) creating the necessary environment for all forms of investment; (ii) simplifying its investment application and approval procedures; (iii) promoting the dissemination of investment information, including investment rules, laws, regulations, policies and procedures; and (iv) promoting the dissemination of investment information, regulations, policies, and procedures; and (iv) establishing or maintaining focal points, one-stop investment centers, contact centers, or other entities to provide assistance and advisory services to investors, including the facilitation of business licenses and permits.¹⁹ This is a direct perspective to agree on facilitation measures for the sustainable development of investment. At the same time, in Article 3 National Treatment, Article 4 Most Favored Nation Treatment, and RCEP Article 5 Investment Treatment, we can find that the RCEP investment chapter basically follows the main principles of international investment law in sustainable development. However, there are some shortcomings in RCEP's Heads of Terms and Conditions that do not include the sustainable development of economic investment in principle at the beginning of the chapter, and there is no existing agreement on dispute settlement in the investment chapter, which stipulates that the parties will discuss and negotiate the settlement of

¹⁹RCEP Chapter 19, Article 17, paragraph 1



investment disputes within two years, which also reflects the lack of agreement on sustainable development of investment in RCEP.

2.2 Development of the connotation of sustainable development principles

Sustainable development is no longer simply a concept in the field of environment, but has been condensed into a multifaceted concept consisting of economic development, social development and environmental protection, which are interdependent and mutually reinforcing, and aims to achieve the harmonious coexistence of human and nature, the integration of ecology and economy, and the organic coordination of interests between the present and future generations.²⁰ The development in the field of international investment law specifically extends to balancing the interests of investors and host countries, the development of international investment law provisions, and dispute settlement mechanisms in the field of international investment law.

2.3 Development of the legal concept of the principle of sustainable development

In the early stage of the introduction of sustainable development into international investment law, the general provisions of IIAs at this stage were relatively small in number and simple in content, and the focus was also on the field of environmental protection, which basically did not involve the environment, labor, human rights protection and other value objectives other than the protection of investment property, and sustainable development in the treaty showed a completely external character. However, as the scope of application of sustainable development and the concept of sustainable development continue to deepen and expand, the concept of sustainable development as a principle has penetrated into all aspects of international investment law. We can find that the concept of sustainable development has gradually entered the field of international investment law from the field of environmental protection.²¹

It can be seen that in the development of international investment law, at the beginning, the International Court of Justice considered sustainable development as a concept and was relatively cautious about invoking the relevant provisions in its decisions. However, in the last 20 years, new norms and standards have emerged in the legal documents on international investment provisions. It has become an important criterion for international trade and economic entities to refer to when signing, and the principle of sustainable development has been included in the relevant agreements between international investors. The International Court of Justice in the *Gabkovo-Nagymaros* case invoked sustainable development as a concept to reconcile the conflicting interests of the "right to development" and the "protection of the environment". The principle of sustainable development has been the guiding principle throughout the case, encouraging the parties to the dispute to negotiate their own solutions through sustainable development and through amicable negotiations. The above

²⁰United Nations Conference on the Human Environment. Declaration of the United Nations Conference on the Human Environment 1972. UNHEC Report. June 1972:1-9.

²¹Mads Andenas, Stefan Zleptnig. (2007) Proportionality: WTO Law: in Comparative Perspective. Texas International Law Journal. p.42(3):371-381.



arguments show that the concept of sustainable development is a norm or standard of international law and has some legal significance. Although the ICJ bypassed the question of the characterization of sustainable development, the invocation of sustainable development as a legal concept for the first time is a landmark.

Thus, sustainable development originates from documents that are not binding under international law and was not initially a legal concept or term, but merely a goal universally pursued by humanity; however, the invocation and application of sustainable development by international dispute resolution mechanisms has gradually transformed it from its soft law attribute to a concept with legal normative attributes.

3. Sustainable Development as a Core Controversy of Bilateral Investment under RCEP Framework

The principle of sustainable development, as a systematic concept encompassing environmental, economic and social factors, has been extended to the field of international investment law, specifically covering three aspects of balancing the interests and relations between investment and investors, the interpretation and development of sustainable development provisions, and the sustainability of dispute settlement in the field of international investment. International investment treaties have introduced the principle of sustainable development as the guiding principle of relevant agreements, and have placed more emphasis on the principle of sustainable development in dispute settlement provisions to resolve corresponding disputes. The RCEP agreement oriented by this principle should also be an important reference in the subsequent negotiation of investment provisions.

3.1 Definition of investment and investor

The issue of defining the scope of investment and investor is related to the balance between international interests and private interests, as well as the conflict of international jurisdictions. An international commercial transaction can only be considered as "investment", and the issue of defining investment and investor will be related to the procedure to be adopted, whether it is the dispute resolution procedure for international investment or the procedure that can be adopted for domestic civil matters, which is related to the smooth conduct of the procedure and the smooth resolution of the dispute under the principle of sustainability.

3.1.1 Investment

It is generally accepted that the elements of investment include substantial input, existence for a period of time, and risk borne by the investor. For the definition of investment and the scope of property, the agreement in the preamble of the international investment clause is generally invoked. The BIT between China and Malaysia provides a detailed description in the definition of Article 1. And in fact bilateral treaties between RCEP member countries are agreed to be inconsistent. For example, the China-Korea BIT stipulates that the term "investment" refers to all kinds of property invested by investors of one Contracting Party in the territory of the other Contracting Party in accordance with



the laws and regulations of the other Contracting Party at the time of the investment, while the China-Australia BIT stipulates that "investment" refers to all kinds of assets owned, controlled by nationals of one Contracting Party. China and Australia provide that "investment" means assets owned, controlled or invested by nationals of one Contracting Party and accepted by the other Contracting Party in accordance with its laws and investment policies applicable from time to time. There are a few investment agreements that merely list the scope of investment and do not outline the definition of investment, which is inconsistently defined in the bilateral investment agreements of different countries among RCEP members. Although in the Regional Comprehensive Economic Partnership Agreement (RCEP), Chapter X, Article 1 defines investment in general terms and by way of enumeration, as economic activities become more complex and deeper, the principle of sustainable development should be consistently used as a guide in specific texts.

3.1.2 Investors

Regarding the identification of investors countries have adopted different standards in practice. Natural persons as investors are regulated by national laws. And when legal persons as investors, there are different standards and controversies on how to determine their nationality. In practice, there are different approaches: firstly, the nationality of the legal person is determined by the nationality of the person who controls the capital of the legal person; secondly, the registration of the company is made through the place of registration; thirdly, the domicile doctrine is adopted based on the location of the main activities; fourthly, the quasi-legal doctrine is adopted, etc. Each of the above propositions on the determination of the nationality of legal persons has its own advantages and disadvantages, and each country may leave room for the application of other connecting points in addition to the consideration of the principle approach. Analyzing the relevant provisions of the BIT between China and Malaysia, the principle of combining the place of establishment with the place of nationality will be adopted between China and Malaysia, requiring the investor to have a substantial connection with the country of nationality, while the nationality of legal persons will apply to the law of the place of establishment or the principal place of business.²²

3.2 Unclear interpretation and lack of gaps in the sustainable development provisions

3.2.1 Unclear interpretation

The preamble of the BIT between China and Malaysia is the opening chapter of the BIT text, stating the treaty's contracting parties, cooperation principles and contracting purposes. Generally speaking, a complete BIT has a preamble. Although the preamble clause is not binding on the parties, it plays a significant role in the actual application of the whole treaty. According to Article 31 of the Vienna Convention on the Law of Treaties: A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to it in its context and in the light of its object and purpose, and for the

²²Article I of the Agreement between the Government of the People's Republic of China and the Government of Malaysia on the Reciprocal Encouragement and Protection of Investments



purpose of interpreting a treaty, the context is the preamble together with the annexes.²³ Therefore, the preamble clause is an important reference in the event that an investment act occurs or an investment dispute arises that requires dispute resolution through arbitration.

From the perspective of the sustainable development clause, the inclusion of the sustainable development clause as a separate clause in the BIT serves two purposes: firstly, it can serve as a reminder to the contracting parties and the relevant subjects of the treaty, and secondly, it is a clear basis for the arbitral tribunal to interpret the breach in the event of an investment dispute to determine the conduct of the defaulting party. In the BIT between China and Malaysia, there is not enough agreement on sustainable development between the two parties, and the preamble serves to focus on the less binding aspects of sustainable development as a principle clause for both parties. The diversity of sustainable development concepts and the lack of standards also lead to the lack of targeted and operable laws and regulations for concrete practice.

3.2.2 Lack of Gaps

Although the BIT incorporates part of the content of sustainable development, it does not clarify the international legal instruments or domestic laws and regulations corresponding to the treaty obligations. The incoherence of the system may lead to the fact that the investment entities do not know what rules they should follow to realize the sustainable development of investment when they conduct investment activities according to the BIT. It is interesting to note that the sustainable development provisions written into the BIT that are binding on both parties are more vague and general in language and conditional in application than the various non-binding agreements, and are more flexible in application, with language that is closer to incentive rather than strict binding. For example, the standards on labor rights to be observed when investing are based on the domestic legislation of the host country of the investment or on documents adopted by the World Labor Organization, as stated in only three BITs of the United States. The lack of clarity in the legal text as to what rules should be observed for a particular obligation can significantly reduce the binding nature of the provision. Although from the perspective of the international law attribute of sustainable development, its main role is to guide the sustainable development orientation of specific legislation and to interpret statutory and customary law with a sustainable development orientation, this does not mean that sustainable development has not been identified as a possibility of mandatory legally binding.

3.2.3 Rationality and legality of investment dispute settlement system

In addition to IIAs, the international investment arbitration system is equally controversial. "Investors have almost unrestricted access to any host country regulatory actions that negatively affect their profit realization or their growth as the subject of claims in international arbitration, regardless of

²³Vienna Convention on the Law of Treaties



whether these regulatory actions are discriminatory or based on legitimate purposes"²⁴, arbitral tribunals do not give sufficient attention to the public interest,²⁵ increase jurisprudential and legal application. For reasons such as inconsistency and confusion, the international investment dispute settlement mechanism has been subject to disagreement among states and scholars in its application,²⁶ M. Sornarajah(2008) which has led to a crisis of legitimacy and rationality.²⁷ The main responsibility for sustainable development lies with the sovereign government of other countries, and if the ISDS system infringes too much on the sovereignty of a country, it will affect the sovereign government's consideration of the public interest of a country.

4. Types of Sustainable Development in RCEP

The principle of sustainable development is no longer based on environmental considerations alone, but the meaning of the concept has penetrated into all aspects of international bilateral investment. The development of "sustainable development" provisions in international investment agreements has given rise to a variety of expressions. The following eight forms can be considered for the subsequent development of the RCEP provisions in the bilateral investment agreements under the RCEP framework:

First, the general sustainable development clause, as the guiding principle of the international bilateral investment agreement, appears as a separate "sustainable development" clause in order to show the guiding and principled role. Second, the anti-corruption clause has become an important reference factor affecting investment satisfaction, as it has been an important component of public policy and a central element of good governance at the international and national levels, playing an important role in preventing and combating corruption, promoting equity and justice, and building effective, accountable and inclusive institutions. Third, environmental provisions, which are the most common form of sustainable development principles in modern IIAs. In the context of international bilateral head, the interpretation should be expanded to also consider the institutional environment of capital as capital entry and exit, and the term "environment" in the international investment legal system should include not only the natural environment and natural resources, but also the public

²⁴Liu, Sun.(2008,) A Review of Some Crises Caused by International Investment Arbitration and Countermeasures . Journal of Legal Studies. p6:142.

²⁵Fiezzoni S. K.(2011)The Challenge of UNASUR Member Countries to Replace ICSID Arbitration.Beijing Law Review.p:134-144.

²⁶Kron J.,Clark M.South Africa's Changing Approach to Investment Protection: What Does It Mean for Investors?[J]/OL. Nortonroseful

²⁷M. Sornarajah.(2009)A Coming Crisis: Expansionary Trends in Investment Treaty Arbitration[J].Appeals Mechanism in International Investment Disputes.2008:39-45; A. Afilalo.Meaning, Ambiguity and Legitimacy: Judicial (Re-)construction of NAFTA Chapter 11[J].Northwestern:Journal of International Law and Business. 2005,25: 279-282; CN.Brower,S.Schill.Is Arbitration a Treat or a Boon to the Legitimacy of International Investment Law? .Chicago Journal of International Law.9:471.



security and existing institutional environment related to investment; fourth, labor rights and human rights provisions. Fourth, labor rights and human rights provisions, the scope of such provisions will vary depending on the purpose of the investment agreement, generally speaking, it includes not only core labor rights such as those recognized by the International Labor Organization, but also a series of other social rights related to human rights, such as gender equality, poverty eradication, etc.

The issue of labor rights has been incorporated into the important reference to sustainable development issues; fifth, physical transparency provisions. This type of clause is to require host countries to disclose investment-related laws, regulations, policies and practices, and sometimes regulate how these legislation and policies are formulated, and it reflects the social dimension of the concept of sustainable development; sixth, procedural transparency clauses. Such clauses are mainly intended to ensure that the investment dispute resolution process is open and transparent, and to reduce the cost of dispute resolution.

At the same time, a series of procedural matters need to be refined and stipulated in the development of BITs, such as the disclosure of arbitration documents, the selection of the arbitrator system, etc. In recent years, as the public international law nature of the ISDS mechanism is increasingly accepted by countries, the principle of procedural transparency will be used as a guide in the process of setting dispute resolution mechanisms for BITs; seventh, national security clauses. These clauses mainly address the basic security interests of the host country, and the development of these clauses lies in the clarification of state responsibility; eighth, corporate social responsibility; these clauses are mainly for investors, as investors are usually the most active market participants in international bilateral investment, and are also the practitioners of the principle of sustainable development in the international specific investment system. Certainly the clarity of state responsibility and corporate responsibility will help the division of responsibilities and the subsequent concrete practice of sustainable development.

5. The Development Path of Investment Provisions of RCEP Based on The Principle of Sustainable Development

5.1 Combination of Prior Explicit and Subsequent Reference Supplement

The definition of "investment" and "investor" in bilateral international investment agreements should be set out in advance, and this practice has been clearly expressed in the latest international bilateral investment agreements. The definition of investment, the definition of the scope of investment, and the definition of legal person are fully set out in Article 1 of Chapter 10 of the RCEP. ²⁸This is to avoid the ambiguity caused by the inconsistent expression and understanding of concepts between the two parties in a dispute, which will lead to the "paralysis" of the dispute resolution mechanism, or even the failure of the procedure. Therefore, the current mainstream practice is that the concept should

²⁸RCEP Chapter 10, Article 1.



be set out in a way that it can be clearly explained.

However, the pre-specified approach cannot solve all the problems, because the current international BITs are negotiated for a long time and identified for long periods of time, ranging from a few years to several decades. Wang Yanzhi(2021) while in reality, the way of investment will change with the transformation of social industries, while financial conditions and financial policies are often subject to frequent changes. (p44)²⁹Therefore, in addition to the adaptability of BITs, it should be concluded that the agreement should be supplemented by the principle of sustainable development, based on which the principle of "sustainable development" should be used as a guiding concept when the agreement is not clear.

5.2 Set the sustainability clause as a principle substantive law clause

For example, the BIT between China and Malaysia has been enacted since 1988, and the trend of reform and updating is imminent. In the case of the subsequent bilateral update of the investment provisions, a specific "sustainable development clause" will serve both as a preamble to provide guidance and as a substantive law clause to confer rights and interpret rules, and also to prevent investors from abusive litigation through the MFN and FET clauses. In this kind of clause, when the state responsibility and enterprise responsibility are not clear, the host country in the implementation of investment policy or in the implementation of "most-favored-nation" and "national treatment" in the direction of more conducive to sustainable development, rather than one-sided support Considerations of one of the parties. Host countries will be more passive in investment disputes as they have to contend with the uncertainty and unpredictability of the "Principles" clause.

Moreover, setting the principle of "sustainable development" fixes the scope of application of both parties to the agreement within the scope of the principle's interpretation, just as the national treatment clause and the most-favored-nation clause are "rules" but also "principles". "There are differences between developed and developing countries among RCEP members, and the level of socio-economic development of developing and developed countries is asymmetrical, and the design of BITs must take into account the capacity of developing countries to implement IIAs and their development needs in the implementation of IIAs. Therefore, the setting of "sustainable and responsible investment provisions" makes it possible for both developed and developing countries to apply, and it facilitates the formulation of more detailed policies by the government, so as to be effective for the investment market of developing countries.

5.3 Introduce the principle of sustainable development into the investment dispute settlement mechanism

At present, when conflicts occur under international bilateral investment agreements, bilateral investments are willing to third-party international investment arbitration mechanisms to resolve

²⁹Wang Yanzhi.(2015) RCEP Investment Chapter: Asian Characteristics and Global Implications . Contemporary Jurisprudence.35(2) : 44-58.



disputes.³⁰ The arbitration mechanism can invoke the principle of sustainable development as the reason for the decision in the specific adjudication process. When sustainability is applied to dispute settlement provisions, in response to an investor's claim that the host country's measures to protect the public interest violate the terms of the agreement, the host country may raise the counter-claim that the investor has failed to fulfill the sustainable investment obligations it voluntarily chose to undertake, thereby causing negative environmental, labor, and social problems, and that such investor obligations are based on the exercise of the host country's rights under the agreement and voluntarily undertaken by the investor, and therefore have the relevance of the factual and legal basis of the dispute under the same investment agreement. Putting aside the legal aspect as a tool, the analysis from the level of the pursuit of substantive fairness, the introduction of the sustainability principle clause within the model text of the invocation of the dispute settlement mechanism, the failure to resolve disputes in investment will affect people's investment satisfaction, and thus affect the sustainability of investment.

At the same time, specific conditions cannot be set too high for the introduction of sustainability provisions. If the dispute resolution mechanism is applied only when the conditions are met, it is likely that secondary disputes will arise when the parties confirm whether such specific conditions are met, leaving the original dispute unresolved. The arbitral tribunal should not only focus on the change of interests brought about by the current focus of the dispute in the process of ruling, but should also consider the long-term significance. At the same time, for the long-term development of the investment dispute settlement mechanism, the boundaries of the host country's judicial sovereignty and the rights of the investment arbitration mechanism should be clarified, in order to avoid that the investment arbitration mechanism is resisted by the host country due to the overly broad scope of the rights of the dispute settlement mechanism, and is caught in the theoretical dilemma of legitimacy and rationality.

CONCLUSIONS

The principle of sustainable development advocates the inclusion of environmental, social and governance considerations in investment-related decision-making processes, and the promotion of sustainable development has become a major trend in international bilateral investment principles.

³⁰ Article 38 of the Statute of the Permanent Court of International Justice (PCIJ) stipulates that the law applicable to adjudication includes international conventions, international custom, the general principles of law recognized by civilized nations, judicial decisions under Article 59, and the teachings of the most highly qualified publicists of the various countries. Article 38 provides that the law applicable to adjudication includes international conventions, international custom, the general principles of law recognized by civilized nations, judicial decisions under Article 59, and teachings of the most highly qualified publicists of the various Article 38, Statute of the Permanent Court of International Justice, International Court of Justice Rules of Court, Accessed Oct. 5, 2020. <https://www.icj-cij.org/files/publications/the-permanent-court-of-international-justice-en.pdf>.



This is especially true during the critical period when the RCEP agreement between China and Malaysia is in force and when the China-Malaysia BIT is being updated and supplemented. The introduction of the principle of sustainable development into investment provisions and related dispute resolution mechanisms is not only a legal and technical issue, but also requires the application of the principle to the whole process of investment in conjunction with the development of finance, and the pursuit of sustainable development goals, not only to emphasize the pursuit of investment returns, but also to pay attention to environmental, social and governance factors in an organic manner.

By solving the problems of unclear boundaries between investment and investor agreements, unclear or blank sustainable development provisions, and the combination of sustainable development principles and dispute resolution systems, the application of sustainable development principles in the development of international investment agreements will show new vitality.

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