

The Environmental Clauses in Chinese Investment Treaties

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Abstract: This article empirically studies the environmental provisions in Chinese international investment treaties, discussing their characteristics and implications. It aims to explore how China deals with the conflict between the protection of the environment and international investment during its treaty practice. Among all of the 141 investment treaties signed by China, only 21 treaties contain environmental provisions, which can be divided into three types: preamble provisions, environmental cooperation provisions, and exception clauses. None of the adjudicated investment arbitration cases involving China has been decided based on environmental provisions. The challenges before specific environmental clauses play a significant role in an arbitral tribunal may include (1) the absence of abundant environmental clauses in investment treaties; (2) the limited effectiveness of the existing environmental clauses; (3) the restricted arbitral consent clauses signed by China; and (4) the amicable settlement preference in traditional Chinese culture.

Keywords: Environmental Clause; Chinese Investment Treaties; International Investment

1. Introduction

China has signed the world's second-largest bilateral investment treaties (BITs), only less than Germany. According to a work report of the OECD, the first environmental protection clause in international investment agreements was in the BIT signed between China and Singapore in 1985.^[1] At present, China has signed more than 140 international investment agreements (IIAs). Still, only 21 agreements contain environmental clauses.^[2] None of the adjudicated investment arbitration cases involving China has been decided based on environmental provisions. In a recent case, two Singaporean companies accused China of indirect expropriation according to the BIT. China argued that it was due to the consideration of public interest since the investment was in the giant panda reserve. The case seems to be a dispute related to the environmental clause. However, the arbitral tribunal rejected all the Claimant's requests in the jurisdiction award.^[3] The case did not advance to the trial stage of merit issues, which means the environmental clause did not play any role in the arbitration award of this case.

Why did China sign so few investment agreements containing environmental clauses? Why did China, as the first country to include environmental clauses in BITs, not experience any environmental arbitration? Under the background that environment protection is becoming increasingly important, is there a risk of conflict between the protection of international investment and the environment in China's investment treaty system? In China's decades of investment treaty practice, how to deal with these risks through investment agreements? These are all fascinating and valuable questions. This research will focus on China's international investment treaty practice and try to find out the answers to such questions.

2. Research methods

By using both quantitative and qualitative analysis methods, this research explored the characteristics of environmental clauses in existing Chinese investment treaties by order of time. During this process, the text analysis method was used to analyze the terms of typical investment agreements generally recognized as investment treaties with environmental clauses such as the North American Free Trade Agreement (NAFTA), the Energy Charter Treaty (ECT), and the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) to conclude common elements as models of environmental clauses. And then used the models to check through all of the international investment agreements signed by China and picked up those treaties with environmental clauses.

The relevant elements to be concerned included the context and terms of the environmental clauses, the number and proportion of the articles containing environmental elements, the location of environmental clauses in each treaty, and the signed states of those treaties. Meanwhile, the case analysis method was used to analyze the award on environmental clauses of typical investment arbitration. It compared them with Chinese environmental clauses to discover potential problems that may cause conflicts between investment and the environment in China's treaty practice.

3. Results

There are 21 Chinese investment treaties containing environmental clauses, including 11 BITs, 8 FTAs with investment chapters, a TIP signed with Japan and Korea, and 1 regional investment agreement signed with the ASEAN.

The main components of the environmental clauses in Chinese IIAs can be concluded as three significant types: the provision in preambles, the environmental cooperation clause, and the exception clause. Furtherly, the third one can be divided into five sub-types, namely the exception of prohibitions and restrictions, the exception of environmental measures, the exception to expropriation, the exception to Fair and Equitable Treatment (FET), and the general exceptions. Early Chinese IIAs contained only one provision involving environmental elements either in the preamble or in exception clauses. Starting from the China-New Zealand FTA, one specific investment treaty has more environmental clauses.

An overlook of signed Parties and the location of such environmental clauses can be seen in Table 1.

Table 1. Environmental Clauses in Chinese IIAs

IIAs	Preamble	Exception Clause					Environmental Cooperation
		Prohibitions and Restrictions	Environmental Measures	Expropriation	FET	General Exceptions	
1. 1985 China- Singapore BIT		✓					
2. 1986 China-Sri Lanka BIT		✓					
3. 1988 China-New Zealand BIT		✓					
4. 1996 China-Mauritius BIT		✓					
5. 2002 China-Trinidad and Tobago BIT	✓						
6. 2003 China-Guyana BIT	✓						
7. 2005 China-Madagascar BIT					✓		
8. 2006 China-Pakistan FTA	✓						
9. 2008 China-Colombia BIT				✓			
10. 2008 China-New Zealand FTA	✓					✓	✓
11. 2009 China-Peru FTA	✓						✓
12. 2010 China-ASEAN Investment Agreement						✓	
13. 2010 China-Costa Rica FTA						✓	
14. 2011 China-Uzbekistan BIT				✓			
15. 2012 China-Japan & Korea TIP	✓		✓				
16. 2012 China-Canada BIT			✓	✓		✓	
17. 2013 China-Tanzania BIT			✓	✓			
18. 2013 China-Iceland FTA	✓						
19. 2013 China-Switzerland FTA	✓					✓	
20. 2015 China-Australia FTA						✓	
21. 2015 China-Korea FTA	✓						
Total	9	4	3	4	1	6	2

The growth of environmental clauses in Chinese IIAs does not follow the trend of IIAs practice. The evolving approach of China's IIAs policy can be divided into three or four stages by scholars according to different standards.^[4] While it is undisputed that the most active growth of the signed IIAs falls in the period from 1991 to 2010 as Figure 1 shows. However, nearly half IIAs containing environmental clauses were signed after 2010, and the rapid growth started in 2001(Figure 2), the year of China's accession to WTO. It may not be serious enough to conclude that China's accession to WTO promoted such growth, but the general exception clauses contained in the IIAs do reflect some similarities to the Article XX of GATT 1994.

The progress of China's environmental treaty practice should be viewed from a developmental perspective. It is true that the number of Chinese IIAs with environmental clauses is quite small, especially compared with the number of signed IIAs during China's four decades of investment treaty practice. However, the tendency that more and more environmental clauses have been contained in Chinese IIAs cannot be ignored. When concentrating on the recent two decades, China signed 36 IIAs, and 17 of them have

environmental clauses, showing a proportion of 47%. China has paid more and more attention to environmental elements in its investment treaty practice.

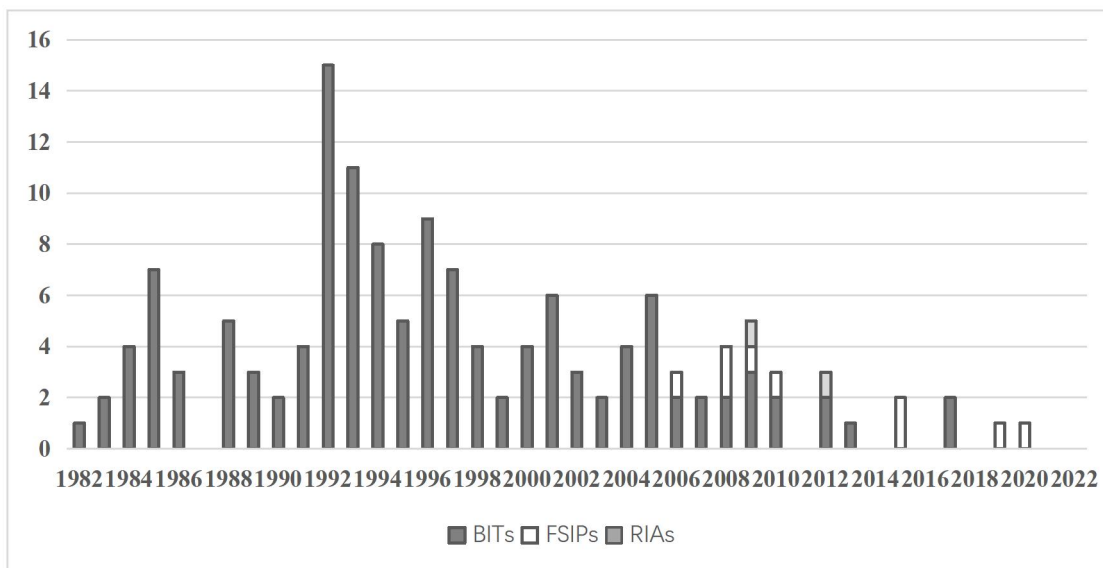


Figure 1. Annual Growth of Chinese IIAs 1982-2011

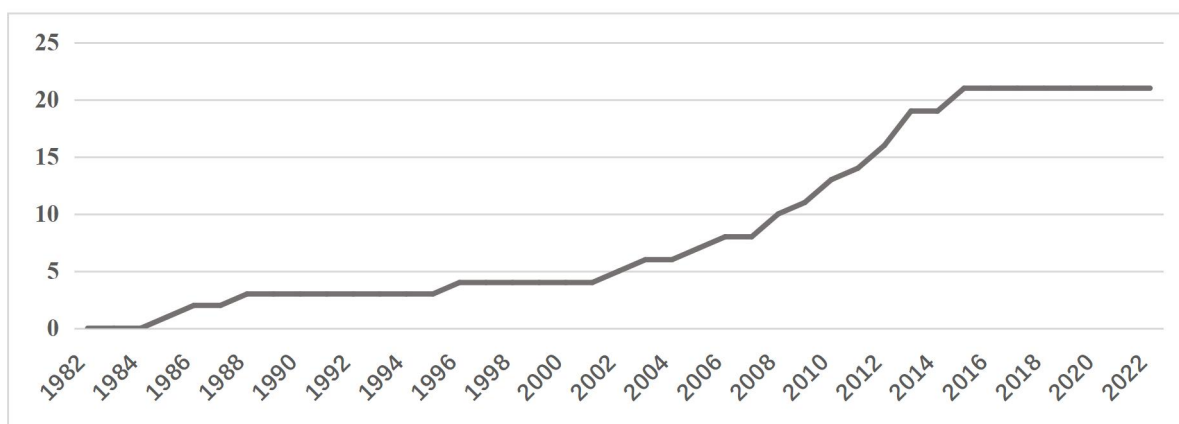


Figure 2. Growth of Chinese IIAs Containing Environmental Clauses 1982-2022

4. Discussion

According to the above result, there is a tough journey before an environmental clause in Chinese IIAs plays a significant role in an investment arbitration tribunal. Challenges fill the way from treaty-making to tribunal awards.

The absence of abundant environmental clauses makes the first challenge. Only 15% of Chinese IIAs contain environmental clauses. Compared with developed countries that give weight to environmental regulation in investment treaties, the proportion is quite low. For example, Canada signed 35 investment treaties in force, 31 include environmental clauses, and the proportion can be 89%.^[5]

The second challenge is the limited effectiveness of existing environmental clauses in Chinese IIAs. As Figure 3 shows, over 30% of the environmental clauses in Chinese IIAs are located in preambles, which means they are not binding. Typical environmental expressions existing in preambles usually follow some soft items such as “mindful”, “recognizing”, or “agreeing”. The preamble does not create specific rights or obligations for the contracting parties, just playing a limited role when interpreting Articles as evidence of the purpose and object of a treaty. In other words, if there are no other substantial environmental clauses, the environmental elements in preambles may never have their role as negotiated.

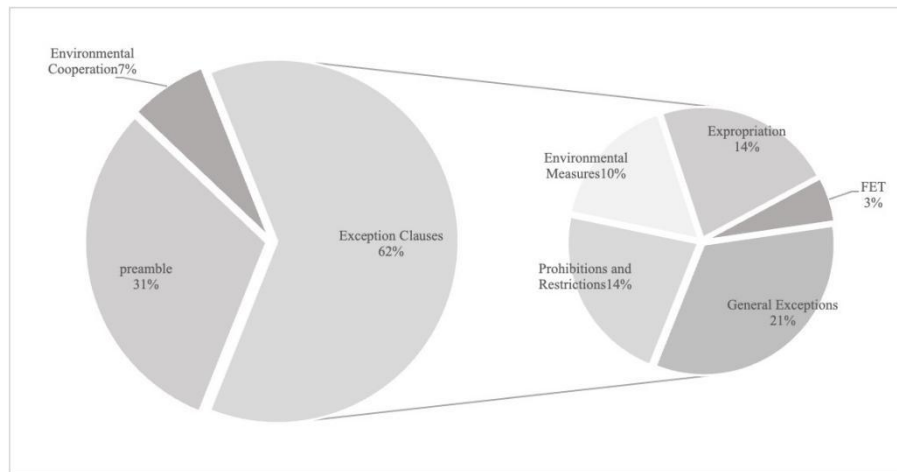


Figure 3. Main Components of Environmental Clauses in Chinese IIAs

The narrow scope of arbitral consent and the preference for amicable settlement mechanisms in China's treaty practice are also significant challenges. On the one hand, under arbitration clauses signed in early stages, only disputes involving the amount of compensation of expropriation can be submitted to international arbitration tribunals. On the other hand, like most Asian states, China prefers to solve disputes in an amicable way first, such as negotiation and mediation. Most disputes have been solved by the parties before they are submitted to the tribunals. As a result, during China's decades of investment treaty practice and under the background of 141 BITs, there are only 30 international investment arbitration cases involving China. Compared with other issues in investment disputes, environmental problems have not attracted enough attention, it is more difficult to let environmental clauses play a role in investment arbitration.

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