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Analysis of "Green Liability" on Environmental Damage

--State Responsibility in International Investment Law

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Abstract: Long before the birth of international environmental law, disputes over transboundary environmental damage have long existed in global trade and investment. Since the promulgation of the Rio Declaration on Environment and Development, with the arrival of the Period of Liberalization in international investment, the environmental issues involved in cross-border investment have skyrocketed, and international judicial bodies such as the International Court of Justice and the International Tribunal for the Law of the Sea have adjudicated a number of disputes over transboundary environmental damage. These "post-Rio" transboundary environmental damage disputes are characterized by complex afflictions, wide scope and serious damage. At this stage of adjudication, international judicial institutions have not developed relatively stable standards, principles and systems for *ex post facto* remedies for transboundary environmental damage. From the perspective of state responsibility, this paper analyzes the issue of transboundary environmental damage theoretically and practically, and explores the attribution, standards, and requirements of responsibility for cross-border environmental damage arising from international investment and the formation of the *ex post facto* remedy system, in order to provide reference for the establishment of a more sound and refined remedy mechanism of transboundary environmental damage in future international investment practice.

Keywords: international investment law, state responsibility, environmental damage, ARSIWA, dispute settlement

1. Introduction

Environmental Problem is one of the most significant challenges facing the international community in the new century. The conflicts and solutions between international investment behavior and environmental protection are of concern to the field of international law. How to ensure that international investment promotes economic development while avoiding pollution and environmental damage to the greatest extent is the core of the sustainable development problem in the field of international investment. While promoting their own and international economic development, multinational companies continue to reveal the harm to the environment of host countries and gradually become a global problem. In the case of climate change, for example, one-fifth of human carbon dioxide emissions come from the global supply chains of multinational enterprises [1]. As the main body of global environmental governance and regulation, how the home

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country of multinational corporations and their investment host country undertake national responsibilities in environmental issues related to international investment has become a topic that needs to be discussed.

This paper mainly analyzes the issue of transboundary environmental damage theoretically and practically, and explores the attribution, standards, and requirements of responsibility for cross-border environmental damage arising from international investment and the formation of the ex post facto remedy system, in order to provide reference for the establishment of a more sound and refined remedy mechanism of transboundary environmental damage in future international investment practice.

2. State Responsibility for Environmental Damage Caused by International Investment

When facing the risk of environmental damage caused by the international investment of its nationals and enterprises, the investing state needs not only to actively take measures from the perspective of risk prevention, but also to formulate emergency and relief mechanisms in the event of environmental damage. On the other hand, the consequences of environmental damage incurred by their own investors in the investing country during overseas investment do not necessarily lead to the investing country's national compensation liability. This needs to first analyze whether the investment conducts of domestic investors under the jurisdiction of the investing country can be attributed to their home country, and whether there have been major losses that are difficult for the operator to compensate.

2.1. Traditional Theory of State Responsibility

In modern international law, state responsibility is incurred when one State commits an internationally wrongful act [2]. To confirm whether a certain investment behavior can lead to state responsibility, it needs to be analyzed subjectively and objectively: (1) Whether there is the existence of attributable state misconduct; (2) Whether the conduct violates norms of international law.

Determining whether there are subjective elements of traditional state responsibility requires analyzing and judging whether the particular misconduct involved can be attributed to the State concerned and thus regarded as an act of the State. In accordance of Chapter 2 of ARSIWA [3], it is necessary to make analysis based on specific conditions of state's conducts.

From the perspective of objective elements, the traditional theory of state responsibility requires that the conduct of a state objectively violates its international obligations [3].

Many international investment behaviors are carried out by private commercial subjects, and there are also investment behaviors that are authorized by the state to specific subjects according to the will of the state. Most international investment behaviors generally do not directly issue in a state's breach of international obligations, but can be classified as behaviors which are not prohibited by international law. The obligation to prevent pollution of the marine environment under *Article 194* of the *United Nations Convention on the Law of the Sea* [4] may also directly lead to a state's violation of its own obligations under International Law. In such cases, supposing that the act of foreign investment is attributable to the state, it would lead to liability for breaches of international obligations.

2.2. State Responsibility for Acts Not Prohibited by International Law

Many international investment behaviors can be classified as acts not prohibited by international law. As to whether such international investment behaviors will trigger the liability of states, it is essential to learn from relevant theories of transboundary environmental damage and analyze whether international investment behaviors are not prohibited by international law. Circumstances of liability and its specific elements.

State liability for transboundary damage must meet the following requirements [5]:

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the existence of the activities of the State or the activities of operators under its jurisdiction or control, whether or not prohibited by international law, and whether or not the activities take place domestically and internally;

Whether or not the country has a common border with other countries, whether the activity has caused significant damage to the domain of other countries or their jurisdiction or control, or the environment of the public domain.

2.3. State Responsibility on Environmental Damage of Private Extra-territorial Investment

Traditionally, the assumption of international responsibility by a state is premised on its implementation of internationally wrongful act. However, in modern international investment, the situation has undergone new changes. Activities that are not prohibited by law, such as industrial production, atomic energy utilization, outer space exploration and seabed development [6], often bring damage and threats to other countries, especially the host countries. Such transboundary damage caused by acts not prohibited by international law involves not only countries but also private individuals, which is beyond the jurisdiction of traditional international law. Different from the state responsibility for private actions under the traditional liability system of international law, the situation in which the state assumes responsibility for private extraterritorial actions in the field of transboundary damage has remarkable characteristics: even if the actor causing the pollution is a private person, there is no situation that can be regarded as a state action, states also always have an obligation to protect other states from the harmful actions of individuals under their jurisdiction.

2.3.1. The Home Country's Supervisory Responsibilities for Its Multinational Subsidiaries

The control of the home country over its overseas subsidiaries can be achieved indirectly by supervising the parent company by legal means. Therefore, the responsibility of the home country to supervise the overseas operations of multinational companies is reflected in the fact that the home country has both the power and the obligation to urge multinational companies to prevent violations of the environment and human rights in the entire supply chain.

Although the international investment decisions of multinational companies largely depend on the policies and rules of the host country, more and more international investment practices show that Home Country Measures (HCMs) also have a great impact on investors' investment decisions, and they are increasingly becoming investors. Multinational corporations need the help of the home country when it comes to market access conditions and conflicts with the host country; the corporate strategy of multinational corporations will also reflect the country's policy orientation. Especially in the field of global trade and foreign investment, multinational corporations often convert corporate interests into national will, and the state then converts this will into international legal norms through participation in international legislation.

2.3.2. Host Country's Environmental Management Rights Related Responsibilities

From the environmental perspective of the international law, the appropriate management power of a state comes from its resource sovereignty. Corresponding to the host country's environmental management power, the host country has the obligation to supervise multinational companies to protect the environment. This obligation requires that when the actions of multinational corporations cause environmental damage to the host country, it shall deal with the relationship between the investment of multinational corporations and environmental protection based on the principle of not lowering environmental standards. The host country should always pay attention to the protection of the human rights and environmental health rights of the host country by multinational corporations, and should be obliged to remedy and guarantee such environmental damage in its own country; when

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the private entity lacks the ability to bear the responsibility, the state has the responsibility to compensate and make up for it.

In the absence of an explicit international legal basis for establishing direct state liability for transboundary damage of compensation, it is advisable to follow the principles of fairness and justice, the principle of loss sharing, and the principle of concentrating the liability on the state, which can be shared by States in conformity to international law and practice.

In another perspective, it will of course be more difficult for the state to assume responsibility for transboundary damage caused by private actions. Compensation for transboundary damage is mainly faced with two difficulties: first, the domestic laws of most countries deny that the state is directly responsible for private acts; second, when an injured party is a private person, the compensation from the state is likely to be due to local protection The obstructing of the doctrine will ultimately fail to guarantee the realization of the interests.

3. How to Take "Green Liability" in the Sector of International Investment

3.1. Forms of State Responsibility on Environmental Damage in International Investment

Environmental damage caused by international investment can refer to the form of responsibility of the state under the ARSIWA, including: termination of infringement, restoration to the state of origin, economic compensation and apology [3]. For the environmental damage caused by the international illegal investment behavior, the responsible country should bear the direct responsibility. For investment behaviors not prohibited by international law, the investor or its relevant operator may bear the direct responsibility, and the investor country bears the supplementary responsibility.

3.1.1. Take Emergency Relief Measures to End the Violation

In the likelihood of an accident in which a perilous activity causes or is likely to cause transboundary harm, the state of origin is obliged to take emergency measures to reduce or eliminate the transboundary harm. Principle 5 of the *Draft Principles on the Allocation of Loss* provides for emergency measures [7]. The origin state is obliged to promptly notify the affected State of the emergency and to take contingency measures to reduce the consequences of the damage. The state of origin needs to consult and take joint measures with the affected country, and if necessary, seek help from the international community.

Draft Articles on Prevention of Transboundary Harm from Hazardous Activities also stipulates the obligations of the state of origin in the event of an emergency, including the obligation of emergency preparedness [8] and the obligation of emergency notification [8], to take necessary emergency preparedness measures and promptly notify the affected persons of the relevant emergency.

It can be seen from the above Articles that in the event of an international investment project causing environmental damage or an emergency situation that may occur, the investing country should perform: (1) the obligation to notify and consult; (2) the obligation to take preventive measures and emergency measures; (3) the obligation to provide emergency assistance. The country of origin should strictly perform these obligations. If the above-mentioned obligations are not strictly performed and the loss of transboundary damage is caused or expanded, the country of origin will bear the responsibility for fault, which constitutes the state responsibility caused by the wrongful act under the traditional state responsibility law.

3.1.2. Restoration to the Original State

In the case of environmental damage caused by international investment, restitution is also an important form of responsibility to restore the environmental state before the environmental damage

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occurred. Even if the cost of environmental restoration is high and the time is long, it should not simply be without any remedies for environmental restoration. The responsible country should provide financial, resource and technical support for the environmental restoration of the affected country.

3.1.3. Compensation

The scope of compensation for environmental damage caused by international investment should include the following: (1) Personal injury and property damage, that is, environmental damage caused by international investment and thus damage to the health of residents in the relevant area, and related properties such as agricultural products, aquaculture, etc. (2) The cost of eliminating pollution and taking emergency measures and other related measures, that is, the cost of taking emergency measures and other related measures to eliminate related pollution due to environmental damage caused by international investment; (3) The cost of restoring resources and environment , that is, the cost of restoring the environmental damage caused by international investment behavior to the original healthy environment, but the environmental restoration is based on practical feasibility and the restoration measures are within a reasonable range; (4) Consequential economic losses, such as the income loss due to personal injury, reasonable profit loss due to business shutdown, and income reduction due to reasonable environmental damage [9]. Here, attention should be paid to the causal relationship between the harmful behavior and the consequential economic loss and the reasonable scope of the relevant economic loss.

In addition, if the injured state or the victim caused the damage to the international investment environment due to its actions or omissions intentionally or negligently, the compensation amount of the investor and the investing country should be reduced accordingly when considering the relevant compensation.

3.1.4. Apology

In the case of environmental damage caused by international investment, when the foreign investment behavior of the nationals of the country can be attributed to the country of origin, the country of origin can ask the affected country to make an apology. The country of origin should face up to rather than ignore the consequences of cross-border environmental damage caused by its nationals' extraterritorial investment, and may consider making an apology by expressing regret, formal apology or other appropriate means to undertake responsibility.

3.2. Responsibility Sharing Mechanism of a State for Environmental Damage in International Investment

The sharing mechanism for environmental damage caused by international investment behavior means that once international investment, which is an act not prohibited by international law, causes damage to the host country's environment, in order to enable victims to obtain appropriate compensation in a timely manner, multiple entities (including those that cause transboundary investment) will be responsible for a legal mechanism established to share the compensatory liability for the losses suffered by victims according to certain principles and order of compensation. From the perspective of the responsible party, damage compensation is not entirely borne by the state. In principle, the operator should bear the responsibility for compensation. In the event that the insurance amount of the operator is insufficient to compensate for the loss, the state shall share the compensation liability within a certain limit.

The loss-sharing mechanism discussed here is only applicable to international investment behaviors that are not prohibited by international law, and not applicable to international investment

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behaviors that are misconduct in international law. The latter should be directly held by the state in accordance with the provisions of the corresponding international law.

In the construction of a multi-layered subject loss-sharing mechanism for damage to the international investment environment, at least the following three layers should be included.

3.2.1. Investors or Their Related Entities Shall Bear the First and Major Liability on Compensation

Investors or their relevant operating entities, as direct participants and implementers of international investment, should bear direct responsibility for environmental damage caused by international investment. In order to ensure that victims are compensated in a timely manner and the environment is repaired in a timely manner, whether the investor or its relevant operating entities is at fault is not a constituent element of their liability for compensation, and a no-fault compensation liability system can be implemented. This also complies with the requirements of Principle 4 of the *Draft Principles on the Allocation of Loss* [7]. The above measures should include the operator or other entity or individual (if appropriate) assuming responsibility, and such responsibility should not require proof of fault. The above-mentioned arrangement of first-level compensation liability can be resolved at the legal level of the host country, and the host country shall, through its own legislation, stipulate that investors or their relevant operating entities shall be liable for no-fault compensation for environmental damage caused by international investment.

3.2.2. Banking Insurance and Other Relevant Financial Institutions Shall Bear the Second Layer of Compensation Liability

There is a possibility that investors or their relevant operating entities are unable to bear all the compensatory responsibilities, or will fall into operational difficulties due to assuming all compensatory responsibilities and other financial instruments, and providing a second-tier supplementary liability in addition to the amount of liability assumed by the investor or its relevant operating entities. This kind of supplementary liability can be realized through the legislation of the host country or through the legislation of the investor country. The investor country or the host country can also set up a national-level industrial compensation fund to undertake the second-level compensation liability in a targeted manner.

3.2.3. The Investing State and Other Relevant Countries Shall Bear the Last Layer of Compensation Liability

In case the first two layers of liability are still unable to fully compensate victims and restore the environment in a timely manner, it is necessary for the investor country, which has personal jurisdiction over the investor, to be the subject of the last layer of liability to ensure that additional financial resources are provided for the liability. Resource support. The implementation of responsibility at this level depends on the provisions of international law documents or the practice of customary international law. Investing countries can also take the initiative to undertake the last layer of compensation liability from the perspective of responsible investment countries, so as to prevent the victims of the host country and their environment from being unable to receive timely relief. The investor country can also work with the host country and other relevant countries to establish a national compensation liability-sharing mechanism with the participation of multiple national entities through negotiation, so as to effectively resolve major environmental risks and reduce major environmental damage.

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3.3. The Exemption of Compensation for Environmental Damage in International Investment of State

In the theoretical system of liability for transboundary damage, the issue of immunity of state responsibility is recognized. Its parties should include state responsibility, intergovernmental international organizations, operator responsibility and multiple subjects, and the sharing of transboundary damages by multiple subjects is more conducive to protecting the interests of victims than the compensation of the single subject liability system. The establishment of the mode of multiple subjects sharing transboundary damage has transformed the compensation for transboundary damage from a single subject to multiple subjects, but this does not mean the weakening of state responsibility in international environmental protection. However, there is also a provision that the absolute responsibility of the State for damage is exempted to a certain extent, that is, the State of origin can prove that the victim is fully or partial damage, or damage caused by force majeure.

The disclaimer of state responsibility of the investing country for environmental damage in international investment is analyzed separately as follows.

3.3.1. Consent or Gross Negligence

The ARSIWA would include consent as one of the exemptions for internationally wrongful acts [3]. The liability of another State shall also be reduced or exempted if the damage is caused by gross negligence or willfulness of that State. For example, Article VI of the Convention on International Liability for Damage Caused by Space Objects exempts the launching State from absolute liability in the event of gross negligence of the requesting State [10].

For a tranboundary investment that constitutes an internationally wrongful act, with the consent of the affected country, the *ARSIWA* should be one of the defenses to reduce or exempt the wrongfulness of the overseas investment. For overseas investments that are not prohibited by international law, the consent of the host country should also exempt or reduce the host country's accountability to the investor country as an affected country. After all, the investment project is within the territorial jurisdiction of the host country and can only be constructed with the permission of the host country government. operation. If the affected country also includes other countries than the host country, the other affected countries can therefore pursue the state responsibility of the investing country.

3.3.2. Force Majeure

It is mentioned in the ARSIWA that force majeure is also an exemption for internationally wrongful acts [3]. The occurrence of force majeure is unpredictable, uncontrollable and unavoidable, such as earthquakes, floods, wars and other events. In the event of force majeure, it will be difficult for a country to continue to strictly perform its international obligations, and its violation of international law obligations will be exempted due to force majeure. However, Article 23 of the Draft Articles on State Responsibility also stipulates two situations in which a State cannot invoke force majeure as an exemption from liability [3]. The UNECE published the Convention on Transboundary Effects of Industrial Accidents in 1992, and the exemption from force majeure also echoes the relevant provisions on transboundary effects caused by industrial accidents [11].

For international investment, force majeure should also be one of the circumstances that exempts the investment behavior from causing state responsibility. In the event of force majeure, the investing country has neither fault nor legal basis to bear state responsibility for the serious consequences of overseas investment. However, if the occurrence of force majeure is caused by the behavior of the investing country alone or in combination with other factors, the investor country can hardly take force majeure as a reason for exemption in this case.

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3.3.3. Distress and Critical Situations

The circumstances precluding wrongfulness in the ARSIWA also include distress and necessity [3], and there are exceptions to each of them. When the state of origin is to protect the basic interests of its own country in a critical situation without seriously prejudicing the basic interests of the international community, it may seek immunity for misconduct under international law.

For international investment, if serious consequences occur, it may also be considered whether to invoke distress or necessity to exempt state responsibility, and attention should be paid to the exceptions in each case.

3.3.4. All Necessary and Appropriate Measures Have Been Taken

When a state has exhausted all necessary and appropriate measures, the liability shall be reduced or exempted if damage to the nationals or the environment of another State is caused by the acts of private persons belonging to that state. The International Tribunal for the Law of the Sea Advisory Opinion No. 17 also clarifies that if the investing state has taken all appropriate and necessary measures to ensure that the contractor effectively performs its obligations, the investing state can be exempted from its liability, but this exemption does not apply to the guarantee state [12].

4. Conclusion

In the field of international investment law, the state responsibilities come from two perspectives, internationally wrongful acts and investment acts that are not prohibited by international law; also, not only investing states but also hosting states could have the possibility to be responsible for the investment acts or consequences of environmental damage. As the international community attaches great importance to the environment, the impact of environmental issues in international investment is increasingly obvious, which requires international investors, investing states, and host countries to jointly take responsibility for environmental issues during investment and create a healthier and more environmentally friendly investment environment.

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