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Balancing Investment Protection and Environmental Protection: The Integration of Green Clauses in Modern Bilateral Investment Treaties

Minya Yu

Department of Law, Zhejiang University of Finance and Economics, Hangzhou, China
2061915504@qq.com

Abstract. Traditional Bilateral Investment Treaties (BITs) have been widely criticized for insufficiently safeguarding host states' environmental interests and failing to impose meaningful environmental obligations on investors. In response, a new generation of BITs has begun exploring reform pathways aimed at achieving a more balanced approach. This study adopts a combined methodology of legal analysis and case study to trace the evolution of environmental provisions in BITs across multiple jurisdictions. Using Burlington Resources v. Ecuador as a focal case, it examines how arbitral tribunals reconcile investor protections with the host state's right to regulate for environmental purposes. The research further explores mechanisms for integrating binding environmental obligations for investors and offers concrete, practical recommendations for treaty drafters. The findings suggest that moderate, well-defined, and predictable environmental liabilities do not deter foreign investment; rather, they help prevent disputes by clarifying responsibilities, creating a more stable and transparent legal environment for sustainable investment, and promoting a mutually beneficial balance between investment protection and environmental preservation.

Keywords: Traditional Bilateral Investment Treaties, environmental obligations, environmental provisions

1. Introduction

Today, the global community is laying more and more stress on the need to create a balance between international investment and environmental protection. The traditional Bilateral Investment Treaties (BITs) have placed much emphasis on protecting the rights of foreign investors, including the right to national treatment and the right to most-favored-nation treatment, but have not given much attention to protecting the environmental interests of the host states and imposing any significant environmental obligations on the investors. This imbalance in structure has attracted increasing criticism within the international legal and policy discourse. Recently, in reaction, new generations of BITs started to consider new methods of dealing with this asymmetry and how to bring investment treaties in line with the global sustainability agenda.

This paper posits that the old BITs should be restructured to incorporate the modern requirements by including strong and enforceable environmental clauses in the new agreements. In this regard, the

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paper aims to find viable ways of incorporating binding environmental commitments on investors and offers practical, concrete and practical advice to steer treaty writers and policymakers towards a more balanced, sustainable, and fair international investment regime.

2. Literature review

2.1. Previous research: the absence of environmental protection in IIAS

There is a considerable amount of literature on the deficiency of environmental protection clauses in International Investment Agreements (IIAs). As a reaction, more and more studies examine how IIAs can integrate social responsibilities on enterprises and protect the environmental rights of the host states. This question overlaps wider discussions on BITs, Regional Trade Agreements (RTAs), and the Investor-State Dispute Settlement (ISDS) mechanism. This paper is a review of the literature on the connection between IIAs and environmental protection.

2.2. International investment and environmental protection

The main legal framework of cross-border investments is IIAs. Conventional IIAs usually focus on substantive protections of investors and their investments, frequently to the detriment of the environmental interests of host states. According to Gleason [1], the asymmetric structure of the traditional IIAs enables investors to invoke ISDS mechanisms in cases when their operations cause serious harm, such as environmental damage, to the host state. The same pattern is generally followed by BITs, which is a major subset of IIAs.

As global environmental challenges intensify, both developed and developing countries have increasingly sought to integrate environmental provisions into BITs. For example, the Colombia-United Kingdom BIT [2] explicitly provides in Article 6.2(c) that non-discriminatory measures adopted by a contracting state for public health, safety, or environmental protection shall not constitute indirect expropriation. Similarly, China introduced a comparable clause in Article 6.3 of the China-Uzbekistan BIT [3]. However, such provisions are largely defensive in nature, primarily designed to shield host states from investor claims challenging legitimate, non-discriminatory, and good-faith environmental regulations. By contrast, relatively few BITs incorporate proactive measures that impose binding environmental obligations on investors themselves, leaving a significant gap in the treaty framework.

Nonetheless, Malya [4] highlights the Nigeria-Morocco Investment Agreement [5] as a pioneering effort to embed environmental duties within an investor accountability framework. Articles 14 and 18 of this treaty require investors to conduct environmental impact assessments (EIAs) and adhere to the precautionary principle. Despite its innovation, Malya [4] criticizes the absence of a unified enforcement mechanism and notes persistent challenges in the practice of investment arbitration.

Complementing this perspective, Choudhury [6] argues that IIAs can and should incorporate corporate human rights obligations. She contends that IIAs and investor-state arbitration constitute some of the most enforceable forms of hard law applicable to corporations. Incorporating corporate human rights and environmental commitments into IIAs would therefore accord them an equivalent position to host state commitments to investors. Moreover, IIAs offer a decent enforcement platform, investment arbitration, that offers comparatively inexpensive financial damages. Choudhury further claims that the derivation of such obligations should be founded on international instruments that have been widely ratified, e.g. the Universal Declaration of Human Rights

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(UDHR), the International Covenant on Civil and Political Rights (ICCPR), the ILO Declaration on Fundamental Principles and Rights at Work and the UN Framework Convention on Climate Change (UNFCCC) since they are more likely to be legitimate and enforceable due to their universal ratification. This plan is similar to the overall support of the UN Global Compact, which articulates the values of human rights, labor standards, and environmental protection. Finally, Choudhury [6] argues that host states ought to require investors to conduct Human Rights Impact Assessments (HRIAs) or EIAs prior to authorizing their investments to induce investors to implement mitigation measures that would reduce the risk of risks in the future.

The international organizations have also tried to strike a balance between international investment protection and environmental sustainability. The OECD Report on the Future of Investment Treaties: Track 1 Investment Treaties and Climate Change concerns primarily the prospect of RTAs and single investment treaties to facilitate the promotion of environmental and climate-related objectives. It is important to note that standalone investment treaties mention Multilateral Environmental Agreements (MEAs) much less often than RTAs, and in many cases, focus on investment protection rather than sustainable development ambitions and exclude environmental concerns [7]. The report recommends increased incorporation of environmental priorities into investment systems in order to overcome this imbalance. This change has started to be reflected in treaty practice in recent years. For example, the European Union has proposed reforms to the investment treaties of its member states to incorporate environmental protection clauses. Nevertheless, these provisions remain largely defensive in nature, aiming to prevent regulatory rollbacks that could create unfair competitive advantages, and they lack dispute resolution mechanisms tied to MEAs or specific enforcement measures to strengthen compliance with environmental obligations.

The IISD Conference Report on Integrating Investor Obligations and Corporate Accountability Provisions in Trade and Investment Agreements strongly advocates strengthening the environmental rights of host states. The report underscores that investments covered by IIAs must comply with the host state's domestic legal framework, with non-compliance rendering the investment unlawful [8]. Participants further observed that nearly all binding obligations under international law currently rest on states rather than investors [8]. To address this asymmetry, the proposed draft text seeks to impose obligations on investors to respect minimum international standards on environmental protection, labor rights, and human rights. The report also recommends requiring pre-establishment impact assessments as a condition for investment approval and endorses granting host states the right to submit counterclaims in investment disputes, thereby reinforcing the principle of reciprocal accountability [8].

The literature reviewed in this section underscores the systematic absence of binding investor obligations in IIAs, despite a growing international consensus supporting the inclusion of environmental provisions. However, much of the existing scholarship primarily advocates for the "incorporation of environmental clauses" without addressing the crucial question of effective implementation. This paper, therefore, aims to examine how environmental obligations can be carefully drafted in BITs, considering whether their legal foundations should be grounded in international environmental law, domestic legislation, or a hybrid approach, and to explore practical pathways for embedding these obligations in treaty practice and dispute resolution mechanisms.

3. Methodology

This study adopts a combined methodology of legal analysis and case study to systematically explore how states can integrate environmental obligations for investors into international

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investment treaties.

First, employing a legal-analytical approach, the paper examines the evolution and legal effects of environmental clauses in BITs. Comparing provisions in traditional BITs with those found in more recent agreements highlights emerging trends and increasing international demands for imposing environmental responsibilities on investors.

Second, the study employs a case study approach to explore the manner in which investment tribunals have interpreted and applied environmental commitments in practice, and to draw conclusions about the implications of this interpretation and application to treaty design and interpretation. Specifically, the Burlington Resources v. Ecuador case [9] of Ecuador is examined to determine the extent to which the tribunal struck a balance between the protection of the investors and the regulatory powers of the host state concerning environmental issues. The case study can be used to determine the effective regulatory models and the possible points of conflict between the investment protection and environmental policy.

Combining these complementary approaches, this research provides a solid theoretical framework and empirical evidence of how states should design and adopt effective environmental protection in IIAs.

4. Hypothesis

4.1. H1: current BITs still lack effective environmental obligation clauses

This hypothesis aims to prove the lack of clear environmental protection commitments in the framework of the existing IIA, which shows the inadequacy of the current BITs in addressing environmental issues. It highlights the urgency and need to reformulate BITs to include binding environmental provisions that go beyond empty, aspirational provisions and give enforceable guidelines on how investors should act.

Although the world is increasingly focusing on environmental protection, the majority of BITs still focus on the rights of investors, providing little acknowledgement of the regulatory capacity of host states. In cases where environmental provisions are found, they tend to be broad, principled, and defensive in character- they do not contain specific, actionable obligations of investors or effective enforcement provisions. Indicatively, a search of BITs in the UNCTAD [10] database shows that even agreements that have been concluded recently usually have only defensive clauses or no environmental clauses at all. An example of this is the China-Venezuela BIT [11] which simply establishes the validity of non-discriminatory public-interest action in Articles 7.4, 14.1, and 14.2 [11], and thus it only serves to protect host states against investor claims but not to enforce substantive environmental obligations on investors. Equally, the Indonesia-Switzerland BIT [12] is a modern agreement, but it lacks any environmental clauses. More liberal treaties, like the Morocco-Nigeria BIT [5], that require EIA and adherence to environmental laws of the host state, are, however, exceptional. In general, the current trend is to minimize environmental provisions as protection against expropriation claims without specifying the environmental obligations of investors and setting the penalties of non-observance.

The case of Burlington Resources Inc. v. Republic of Ecuador further substantiates this hypothesis [9]. The relevant US-Ecuador BIT did not contain any express terms that would impose environmental liability on investors, which forced the tribunal to apply Ecuadorian domestic environmental law, Production Sharing Contract (PSC) provisions, and general principles of international environmental law, including the so-called polluter pays principle, to prove the liability of Burlington. Even though this approach ultimately helped to substantiate the environmental

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arguments of the host state, it also highlighted the immense loopholes and deficiencies of the BIT framework in its investor responsibilities. Introduction of explicit and enforceable environmental provisions into BITs would eliminate the need of such indirect jurisprudence and offer a more effective and sounder basis on which environmental liability is to be founded.

This hypothesis is particularly relevant to the central concept of this thesis as it provides the necessary premise to investigate the weaknesses of the current BITs and promote the change. This paper sets the stage by demonstrating the ineffectiveness of existing agreements against the background of the environmental duties of investors, and moves on to look at particular solutions to the problem, such as internationalization of environmental duties, their integration as claims arbitrable, reference incorporation of domestic law and counterclaim mechanisms. A combination of all these could bring BITs to a more just and sustainable system that would harmonize the protection of investments and environmental responsibility.

4.2. H2: states can directly incorporate their domestic environmental law provisions into BITs or explicitly stipulate in BITs that investors are subject to host state domestic laws

This hypothesis explores the potential of holding investors accountable as regards to environmental responsibility through incorporation of local environment regulations into global investment agreements.

The principle of the party autonomy is the foundation of the BITs that give the contracting states a tremendous freedom to decide on the scope, content, and terms of their agreements. Provided that the agreed terms do not conflict with peremptory rules of international law (jus cogens), or with the binding rules of domestic legal systems, such clauses are generally regarded as valid and binding.

The case of Burlington Resources Inc. v. Republic of Ecuador provides a good example [9]. The arbitral tribunal in this dispute made a comprehensive examination of the domestic environmental frameworks in Ecuador, the 1999 Environmental Management Act (EML) and the Environmental Regulations of Hydrocarbon Operations in Ecuador (ERHOE) and found Burlington to have violated these requirements. The case shows that domestic environmental norms may in practice bear binding obligations on foreign investors and may act as a valid source of law to resolve environmental disputes under BITs.

Moreover, since the relevant BIT did not impose any specific environmental commitments, the tribunal in Burlington had recourse to the provisions in the Production Sharing Contracts (PSCs) most prominently, Article 5.1.18, which obliged the investor to abide by all relevant laws and regulations of Ecuador. This contractual clause was successful in enforcing the domestic environmental standards of Ecuador as a part of the legal liability of Burlington. Logically, in case such compliance requirements or the substantive text of domestic environmental laws were directly incorporated into the BIT itself, the environmental responsibilities of investors would be clear. This would give tribunals a direct legal foundation on which to adjudicate environmental disputes without having to refer to indirect contractual or domestic law.

Accordingly, the inclusion of host-state environmental law (or, at least, some form of a general compliance with host state environmental laws clause) into BITs would be a both legally viable and strategically appropriate tool to enhance the enforceability of environmental norms in international investment law.

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4.3. H3: arbitration tribunals can uphold state claims for compensation when investors cause environmental damage to the host state

This assumption is based on the view of arbitral jurisprudence and holds that it is both legally and practically possible to include domestic environmental standards in BITs. This possibility is informed by the fact that international tribunals, which serve as objective third party adjudicators, have always acknowledged that domestic environmental norms can justifiably regulate the conduct of investors and offer effective solutions to the environmental interests of host states.

The case of Burlington Resources Inc. v. Republic of Ecuador offers compelling validation [9]. Despite the absence of explicit incorporation clauses in the applicable BIT, the tribunal conducted a detailed review of Ecuador's domestic environmental legislation, including its evolution and substantive provisions, before ultimately finding Burlington in violation of these norms. This approach affirmed not only the legal validity but also the centrality of domestic environmental standards in resolving investment disputes.

Such reasoning reflects a growing international consensus that investors bear environmental responsibilities. Explicitly integrating host-state environmental laws into BITs would therefore align with emerging arbitral practice and is likely to gain broader acceptance in future treaty-making. This integration would provide a clearer legal basis for tribunals, reduce interpretive uncertainty, and strengthen the capacity of host states to protect their environmental interests.

4.4. H4: states can include jurisdictional provisions to allow them to bring counterclaims against investors under an investment agreement

This hypothesis is concerned with the procedural aspect of the implementation of environmental responsibilities of investors. Even well-articulated substantive rights are useless in the absence of the procedural mechanisms by which the host state can pursue redress. Therefore, the procedural right to initiate a counterclaim during investment arbitration is an essential complement to the creation of environmental obligations.

The case of Burlington Resources v. Ecuador can be viewed as a landmark case, as it was among the few cases when a host state managed to develop an environmental counterclaim in international investment arbitration. The reasoning of the tribunal pointed at two critical aspects (1) the US-Ecuador BIT did not specifically exclude the right to counterclaims, and (2) Article 46 of the ICSID Arbitration Rules permits the hearing of ancillary claims that directly result out of the subject matter of the dispute. These results, combined with each other, showed that, without an express prohibition in the treaty, arbitral tribunals can claim jurisdiction over environmental counterclaims.

The case reaffirms that counterclaims can be procedurally viable where there are no express treaty provisions. However, to strengthen this procedural safeguard and to diminish the difficulty of jurisdiction, BITs should also contain a jurisdictional clause that recognizes the right of the host state to bring counterclaims on environmental harm. Such prospective treaty-making would provide a greater degree of legal predictability, enhance the enforceability of environmental obligations and enhance the concept of collective responsibility in investment arbitration.

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5. Case study and analysis

5.1. Case analysis of environmental clauses in BITs across countries

By analyzing selected BITs from the United Nations Conference on Trade and Development (UNCTAD) database, this study identifies a clear temporal evolution and substantive diversity in the inclusion of environmental provisions across different countries. Developed nations were pioneers in integrating such clauses. For example, the United States incorporated defensive environmental provisions as early as the Mozambique-United States BIT [10], which explicitly safeguarded the host state's regulatory authority in environmental matters and ensured that legitimate environmental measures could not be challenged as indirect expropriation. Similarly, the United Kingdom introduced procedural clauses for environmental dispute resolution for the first time in the Mexico-United Kingdom BIT [11], signaling a move toward embedding environmental considerations into dispute settlement mechanisms. By contrast, developing countries, such as China, were slower to adopt such measures, only introducing comparable defensive provisions in the China-Uzbekistan BIT [3], which aimed to shield good-faith environmental regulations from being interpreted as indirect expropriation.

In subsequent years, some BITs, including the China-Venezuela, Bolivarian Republic of BIT (Article 14) [12] and the Georgia-Switzerland BIT (Article 3.3) [13], went a step further by prohibiting parti es from attracting foreign investment through the lowering of environmental standards, thereby seeking to prevent a "race to the bottom." Nevertheless, these provisions frequently suffer from a lack of specificity and remain largely aspirational, with no clear criteria for determining what constitutes a violation.

Other BITs, such as the Angola-China BIT (Article 31) [14] and the Mexico-United Kingdom BIT (Article 20,) [11], have gone further by introducing procedural mechanisms that empower arbitral tribunals to appoint environmental experts to provide independent assessments on scientific matters related to environmental or public health issues. Such provisions enhance the professionalism, objectivity, and evidentiary rigor of environmental fact-finding in investment arbitration, thereby improving the quality and legitimacy of arbitral decisions.

Environmental provisions remain uneven across BITs. For instance, the Indonesia-Switzerland BIT omits them entirely, while the Georgia-Switzerland BIT [15] includes defensive clauses (Article 3.3 and Article 9.1) to preserve host state regulatory capacity. This disparity highlights the lack of a unified standard and the need for more consistent treaty drafting.

The Morocco-Nigeria BIT [15] is a leading example of progressive practice. Articles 14 and 18 go beyond defensive strategies to impose green obligations on investors, requiring EIAs, compliance with host state laws, environmental management systems, and adherence to international standards such as ISO 14001. This marks a paradigm shift from purely investor-protective BITs toward treaties that integrate precautionary measures and align investment with domestic and international environmental standards, offering a balanced template for future agreements.

The above analysis leads to the following conclusions:

First, the developed nations included environmental provisions earlier than the developing nations, which is indicative of their initiative to incorporate environmental factors into investment contracts. However, over the last few years, the emerging economies like China have also been catching up at a very high pace and their environmental provisions have become more detailed and comprehensive. This development highlights the increased awareness of the world on the need to protect the environment. However, the fact that some treaties, including those concluded by

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Switzerland, still do not include environmental provisions underscores the lack of uniformity and the lack of a general agreement in the IIA framework on environmental regulation.

Second, environmental provisions of BITs continue to be largely defensive in nature and aimed at the protection of the regulatory space of the host state as opposed to directly enforcing their obligations on investors. The majority of the provisions lack tangible investor obligations and do not specify the results in the event of non-compliance, which constrains their practical effectiveness. Few treaties, the most famous of which is the Morocco-Nigeria BIT [15], are the first steps toward the replacement of passive exception clauses by active distribution of environmental obligations. However, more doctrinal analysis, empirical research, and treaty practice are required to provide a more precise guidance to the general reformulation of BITs in this area.

This case study shows that most environmental provisions in BITs are unenforceable, often limited to exception clauses that protect host state regulatory space without investor liability. Hence, BITs need restructuring. The Morocco-Nigeria BIT offers a model, with binding obligations on EIA, references to local and international standards, and recognition of the precautionary principle, making its clauses more practical and enforceable.

Finally, environmental provisions in BITs remain underdeveloped, but their effectiveness can be enhanced through innovative clause design and progressive treaty practice, fostering a balanced approach that protects both investment and the environment.

5.2. Burlington resources v. ecuador

The case was occasioned by the implementation of a petroleum windfall tax by Law No. 42 (2006) and its amendment by Law No. 662 (2007) in Ecuador. Burlington Resources was an oil company in the U.S. which declined to pay the tax and at one-point halted operations. The Ecuadorian government responded by seizing the production facilities of Burlington and by decree of the ministerial government, terminated its PSCs. Burlington then filed arbitration pursuant to the U.S. Ecuador Bilateral Investment Treaty (BIT) claiming that it was subjected to unfair and unfair treatment (FET) and that it was illegally expropriated its investment.

During the arbitratio4 Ecuador had presented a counter claim that Burlington had caused enormous environmental damages in the form of water pollution, soil erosion and destruction of ecosystems and sought compensation on the damages incurred.

On 7 February 2017, the tribunal of arbitral ruled that Blocks 7 and 21 had been operated by Burlington in a manner which resulted in widespread environmental and infrastructural damage. The tribunal therefore ordered Burlington to compensate Ecuador the losses that were incurred.

With regard to the admissibility of the counterclaims of Ecuador, the tribunal noted that Ecuador had submitted two counterclaims in its Counter-Memorial on Liability dated 17 January 2011 in accordance with Article 40(2) of the ICSID Arbitration Rules. Burlington had previously reserved the right to appeal the jurisdiction of the tribunal, but on 26 May 2011 the parties signed an agreement under which Burlington implicitly acknowledged the jurisdiction of the tribunal over the counterclaims. Consistent with this, the tribunal in its Decision on Counterclaims (7 February 2017) affirmed that it had the jurisdiction to hear Ecuador environmental claims [9].

In defining the legal foundation of the liability of Burlington, the tribunal has conducted in-depth research of local environmental legislation in Ecuador and its historical development, incorporating constitutional provisions of 1978, 1998, and 2008, the EML of 1999 and the RAOHE. According to such a general legal framework, the tribunal ruled that Burlington was guilty of breaching the Ecuadorian environmental law (Decision on Counterclaims) [1]. The tribunal also referred to the PSCs between the parties, in which Article 5.1.18 specifically stated that the contractor should abide

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by all the laws and regulations of Ecuador, and Article 5.1.17 was a general obligation to the contractor to abide by the laws and regulations of Ecuador. These provisions in the agreement defined that Burlington was bound to operate within the environmental provisions of the host state (Decision on Counterclaims) [9].

Significantly, the tribunal invoked the principle of strict liability enshrined in Ecuador's 2008 Constitution, which holds operators accountable for environmental harm arising from extractive activities irrespective of fault. Applying this principle, the tribunal found Burlington liable for environmental damage resulting from its oil operations (Decision on Counterclaims). In its reasoning, the tribunal also referred to relevant arbitral jurisprudence, particularly Perenco v. Ecuador, where the ICSID tribunal affirmed that investors must comply with host state environmental regulations and bear the costs of remediation (Decision on Counterclaims). On this basis, the tribunal ultimately held Burlington responsible for compensating Ecuador for the environmental harm caused by its activities (Decision on Counterclaims) [9].

Historically, international investment arbitration has been defined by a high degree of focus on the rights of the investors, which is usually at the cost of other considerations of the public interest. Nevertheless, the current case is a major deviation of this traditional paradigm since it equally considers the environmental interests of the host state. This change is manifested in three major aspects.

First, the tribunal made it clear that the host state was entitled to bring counterclaims in environmental matters, on the basis of mutual consent of the parties to bring their claims before its jurisdiction. This recognition highlights the need to incorporate express counterclaim clauses in BITs to prevent future cases of jurisdictional problems. These are to ensure that the ability of the host state to launch environmental counterclaims is not hampered by investor objections and thereby provides a more balanced and fair dispute resolution process.

Second, the tribunal indicated clearly that environmental obligations could be included in the obligations of the investors and that multinational enterprises had certain environmental obligations to assume when they cross borders.

Third, the decision focuses on the idea that the legal foundation of environmental commitments may be of different origins, including host country domestic environmental law, BITs, and contractual relations between the two parties, principles of international environmental law, ICSID arbitration principles, and international investment case law. Thus, investors are liable to the breach of these requirements in the court of law.

In this way, the specified landmark ruling can be viewed as a paradigm shift in the sphere of international investment arbitration because it elevates environmental protection to the same level of importance as that of investors. The detailed and clear way the tribunal ruled on the issue of environmental liability acts as a good precedent in future cases of balancing of economic interests and the conservation of the environment.

Though this case was not decided by the U.S.-Ecuador BIT, it offers a great deal of guidance concerning the definition and clarification of investor obligations in future BITs:

The first is that BITs must expressly protect the right of the host state to launch environmental counterclaims, or at least not expressly deny such rights. The fact that the tribunal accepted the claim of Ecuador to compensation due to environmental damages was founded on the fact that the BIT did not have any express exclusion of this right.

Second, BITs may include explicit environmental commitments and requirements, which would compel investors to carry out regular environmental audits and adhere to the environmental laws of the host state as well as any international environmental agreements that are ratified by both sides.

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The tribunal's decision shows that domestic and international environmental law, ICSID rules, and investment jurisprudence all provide valid grounds for environmental obligations, making their inclusion in BITs feasible. Where host state frameworks are weak, international law and arbitration precedents can supply additional obligations for investors.

This would create a more balanced structure, which would guarantee the safeguarding of the interests of both the investor and the environment in the IIAs.

6. Recommendations

6.1. Explicitly incorporating substantive environmental obligations for investors in BITs

The host state may have substantive environmental obligations based on its domestic environmental laws or on international environmental agreements, including the Paris Agreement and the Convention on Biological Diversity. The inclusion of these standards in BITs will enable the conversion of both national and international environmental standards into binding commitments on investors, thus filling in regulatory loopholes that otherwise might exist as a consequence of poorly developed domestic law. As an illustration, Articles 14 and 18 of the Nigeria-Morocco BIT incorporate the concepts of international environmental law [5], such as the precautionary principle and the polluter-pays principle, and thus, contribute to their legal importance to the investment framework.

6.2. Stipulating legal consequences for violations of environmental obligations

BITs are similar to contracts and violations of their conditions must have corresponding consequences. In this respect, the introduction of environmental commitments into BITs should be backed by well-defined accountability measures to guarantee adherence. The host state can deny the investor benefits that would otherwise be granted to him or her, including national treatment or most-favored-nation treatment. Second, the host state can seek economic reparation against investors who breach environmental standards, which is enforceable by arbitration, and includes the cost of remediation and the devaluation of ecosystem services. The use of the polluter-pays principle in the Burlington v. Ecuador case [9] demonstrates the ability of investors to be responsible in the event that they cause environmental damage to the host state.

6.3. Establishing procedural mechanisms to support environmental counterclaims

Arbitration systems are, by their nature, reliant on the agreement of the parties. To avoid the situation where investors may turn down submitting environmental disputes to international tribunals, e.g., ICSID, BITs must clearly recognize the right of the host state to launch counterclaims and clarify pertinent jurisdictional matters. The inclusion of these procedural clauses would provide a clear legal basis of environmental counterclaims and reduce conflict over the jurisdiction of the tribunal.

6.4. Implementing EX ante preventive mechanisms

BITs ought to make EIAs a precondition of investment approval. This would require investors to undertake EIAs prior to setting up an investment and hand over the assessment reports to the host state to be approved as a condition to receiving treaty protection. The latter could be based on such provisions as the human rights due diligence framework suggested by Choudhury [6], which would

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institutionalize and formalize the process of environmental assessment. Moreover, the investors are expected to publish periodically environmental performance reports, whereas host states are expected to provide access to environmental information and participation. Such steps would enhance the social legitimacy of the treaty and give it an evidentiary backing in future environmental disputes.

7. Conclusion

The paper focuses on the ways in which sovereign states can successfully integrate the environmental responsibilities of investors in BITs as a means of harmonizing the protection of investments and environmental protection. It suggests avenues of updating BITs by means of substantive, procedural, and ex ante preventive mechanisms, as a way of enhancing the enforceability of such provisions.

Some scholars argue that environmental commitments weaken investment protection and deter foreign capital. However, this analysis shows that moderate, clear, and predictable commitments instead reduce conflicts and provide a stable legal framework, ultimately benefiting both investors and host states.

Future research should refine environmental obligations in BITs into actionable treaty language and explore reforms in arbitration institutions like ICSID to enable host states to pursue environmental counterclaims. Such measures would modernize international investment law and align it with global sustainable development goals.

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