
**THE IMPACT OF INVESTMENTS ON ENVIRONMENT:
A STUDY OF ENVIRONMENTAL PROTECTION IN
BILATERAL INVESTMENT TREATIES OF PAKISTAN**



A Thesis Submitted in Partial Fulfillment of the Requirements for the Degree of LLM

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DEDICATION

I dedicate this thesis to my parents, their love, support, and prayers have been the cornerstone of my achievements. To my beloved mother (May she rest in peace), whose memory continues to inspire me every day. Her prayers and loving concern for my work have been a great motivation. And to my dearest father, my hero, CH IJAZ AHMAD SAHI ADVOCATE, whose unwavering belief in me, constant prayers, and endless support and encouragement have been my guiding light and my greatest strength.

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DECLARATION

I, declared that the work in this dissertation title, “*The Impact of Investments on Environment: A Study of Environmental Protection in Bilateral Investment Treaties of Pakistan*” The information about my work is drive through research is true to my best knowledge and no part of dissertation previously presented, published or present in any other university or this university.

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ABSTRACT

This thesis examines the impacts of investments on environment and integration of environmental protection measures within bilateral investment treaties (BITs), emphasizing the need to balance the interests of host countries and foreign investors. The first part of the research addresses the inherent asymmetries in responsibilities and protections afforded by BITs, which often favour investors at the expense of host states' regulatory autonomy and environmental integrity. And also explores the concept of counterclaims as a viable tool for host countries to assert their environmental interests and ensure investor compliance with domestic environmental laws. The research also investigates the pollution haven hypothesis, which posits that lax environmental regulations in host countries may attract foreign investments, leading to environmental degradation.

The second part of the research explores the investment framework of Pakistan. Numerous Bilateral Investment treaties and Free trade agreements were analyzed to examine the environmental protection measures in them. Additionally the environmental protection measures in different foreign investment regimes particularly United States and Myanmar. Different US investment treaties were analyzed for this purpose. Examining both these regimes a comparison was made between developing countries and developed countries about their environmental protection in their investment framework.

In the last part, the research discuss about the legal and regulatory lacunas that exist in the current framework of Pakistan's investment treaties and domestic laws. The findings reveal that

while BITs are crucial for fostering foreign investment, they must be reformed to incorporate robust environmental safeguards. By introducing mechanisms such as counterclaims and strengthening environmental provisions within BITs, a more equitable and sustainable investment framework can be achieved. This study contributes to the broader discourse on sustainable development and international investment law, offering practical recommendations for policymakers to enhance environmental protections in BITs. The proposed reforms aim to harmonize the objectives of investment promotion and protecting the environment, striving to balance economic growth with the need for sustainability.

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ABBREVIATIONS

ASEAN	Association of South East Asian Nations
BIT	Bilateral Investment Treaties
BOI	Board Of Investments
BRICS	Brazil-Russia-India-China-South Africa
CFIUS	Committee on Foreign Investment in the United States
CWA	The Clean Water Act
ECL	Environmental Conservation Law
EIA	Environmental Impact Assessment
EPA	Environmental Protection Agency
EQS	Environmental Quality Standards
ESG	Environmental, Social and Governance
FDI	Foreign Direct Investments
FTA	Free Trade Agreement
ICSID	International Centre for Settlement of Investment Disputes
IIA	International Investment Agreement
ISDS	Investor State Dispute Settlement
MIL	Myanmar Investment Law
MPCEPA	Malaysia-Pakistan Closer Economic Partnership Agreement
NAAEC	North American Agreement on Environmental Cooperation
NAFTA	North American Free Trade Agreement
NEQS	National Environmental Quality Standards
OECD	Organization for Economic Cooperation and Development
PCA	Permanent Court of Arbitration

PEPA	Pakistan Environment Protection Agency
PEPC	Public Environment Policy Committee
RCRA	Resource Conservation and Recovery Act
SIA	Social Impact Assessment
SSDS	State-State Dispute Settlement
UNCTAD	United Nations Convention on Trade and Development
UNFCCC	United Nations Framework Convention on Climate Change
USMCA	United States-Mexico-Canada Agreement

CHAPTER NO.1

INTRODUCTION

The rapid growth of global investments has profoundly influenced economic development and industrialization across nations. However, this growth has not come without its challenges, particularly concerning environmental sustainability. The incorporation of environmental protection in international investment agreements has emerged as a crucial aspect of promoting economic growth while safeguarding the environment from harm. This thesis examines the impact of investments on the environment by focusing on the environmental protection measures embedded in Bilateral Investment Treaties (BITs) involving Pakistan.

The environmental impact of investments is a growing concern globally, with particular emphasis on ensuring that economic activities do not lead to detrimental effects on natural resources and ecosystems. Pakistan, as a developing nation with increasing foreign investment, faces the challenge of aligning its investment policies with sustainable environmental practices. This research seeks to assess the extent to which Pakistan's BITs incorporate environmental protection measures and how these measures influence the country's approach to managing foreign investments and their environmental impacts. The Research also discusses the environmental protection measures in the investment framework of other countries. And the lacunas where Pakistan's legal and regulatory framework were analysed and the challenges country have in the effective enforcement of environmental protection.

a) Research Problems

In addressing these issues, this study will explore the following research questions:

- How the imbalance in Investor and Host state responsibilities give investors way to make host states pollution havens?
- What are the environmental protection measures in the investment framework of USA and Myanmar?
- Why the developing countries particularly Pakistan should adopt environmental protection standard of Developed countries like USA in their investment treaties?
- What environmental protection measures Pakistan has in its investments agreements?
- How has Pakistan's jurisprudence evolved in recognizing and protecting the environment?

b) Literature Review

Exploring the Relationship between Foreign Investments and Carbon Emission: A Bound Test Analysis for Pakistan¹ in this study the researchers studied and analyzed the effects of foreign investment, openness to trade, urbanization, and economic development on carbon dioxide (CO₂) emission levels in Pakistan. They have analyzed the data on economic and other key indicators from World Development Indicators (WDI) over the time span of 1970 to 2018 in the context of Pollution Haven Hypothesis. The study concludes that Foreign Direct Investment causes an increase in carbon dioxide (CO₂) emission which contributes to degradation of

¹ H. Samreen et al., "Exploring the Relationship between Foreign Investments and Carbon Emission: A Bound Test Analysis for Pakistan," *Engineering, Technology & Applied Science Research* 11, no. 5 (October 12, 2021): 7564–70, <https://doi.org/10.48084/etasr.4292>.

environment. And this positive association of FDI and CO₂ emissions validate Pollution Haven Hypothesis.

‘Impact of Foreign Direct Investment on Green House Gas Emissions in Agriculture of Developing Countries’² Radovan Kastratović in this research studied the data of 63 developing countries from period of 2005 to 2014, to analyzed the impacts of carbon dioxide and other greenhouse gases emissions. The research result showed that liberalization of capital inflow in agriculture has intensified greenhouse gas emissions because of change in production techniques. The author also contended that, presence of multinational companies create a competitive atmosphere among producers and the local producers use more mechanical and technology to get more yield. The result of the research showed positive relationship between Foreign Direct Investment and agriculture greenhouse gas emissions.

‘Environmental Protection and BITs of Bangladesh, Malaysia, and USA: A Comparison’³ Mohammad Belayet Hossain in his article analyzed the environmental protection in number of Bilateral Investment Treaties of Bangladesh, Malaysia and USA. Out of 40 BITs of these country only 7 BITs had the environmental provisions in it. The author has also named the special environmental protection laws against foreign investments in different jurisdiction. He has also discussed the importance of environmental protection for the sustainable development. The developing countries lax their regulations to attract more FDI which cause damage to the environment. The environmental laws of Bangladesh and Malaysia failed to meet the standard of

² Radovan Kastratović, “Impact of Foreign Direct Investment on Greenhouse Gas Emissions in Agriculture of Developing Countries,” *Australian Journal of Agricultural and Resource Economics* 63, no. 3 (2019): 620–42, <https://doi.org/10.1111/1467-8489.12309>.

³ Mohammad Belayet Hossain, “Environmental Protection and BITs of Bangladesh, Malaysia, and USA: A Comparison,” *JOURNAL CITA HUKUM (Indonesian Law Journal)* Vol 8, no. 03 (December 5, 2020): 489–524, <https://doi.org/10.15408/jch.v8i3.17801>.

developed countries like USA. Most of the lawsuits filed for the environmental damages are in USA, which shows the standard and implementation of environmental laws there. While in Bangladesh and Malaysia no international litigation has been complained for environmental damages due to investment activities. The author recommended that both these countries should improve their environmental standards following the USA Federal Environmental Statute as a model. He further said that Bangladesh and Malaysia should insert environmental protection provisions in their BITs to protect its legitimate interest and protect the foreign investors interest as per principles of WTO.

The existing literature has highlighted how the foreign direct investments is affecting the environment and has validated the Pollution Haven Hypothesis. However, this thesis analyze the different BITs of Pakistan and the environmental protection measures taken to preserve the environment from degradation. And the issues which prevent inclusion of environmental protection provisions in BITs.

c) Scope of the Study:

This study examines how environmental protection measures are incorporated into bilateral investment treaties (BITs) and their impact on host countries' regulatory autonomy. While BITs promote foreign investment, they often prioritize investor protections over environmental concerns. The research explores this imbalance and considers solutions such as counterclaims, allowing host states to hold investors accountable for environmental violations. It also examines the pollution haven hypothesis, which suggests that weak environmental regulations attract foreign investment but lead to environmental degradation.

The study compares environmental safeguards in U.S. and Myanmar's investment frameworks, highlighting differences between developed and developing economies. It also analyses Pakistan's BITs and FTAs to assess their effectiveness in balancing investment promotion with environmental sustainability. By evaluating treaties, case law, and scholarly perspectives, the research aims to provide practical policy recommendations for strengthening environmental protections within BITs.

d) Objective Of Research

The research aims to analyze the different impacts which investments caused on the environment. This study aims to analyze how bilateral investment treaties (BITs) influence host countries' ability to enforce environmental regulations. The research will also analyze the hindrances for which country doesn't insert environmental protection measures in the BITs. A comparative analysis of U.S. and Myanmar's investment frameworks highlights differences between developed and developing countries in integrating environmental safeguards. Additionally, the study assesses Pakistan's BITs and FTAs, identifying gaps in environmental provisions and evaluating their effectiveness. Based on these findings, the research proposes policy recommendations to strengthen environmental protections within BITs, ensuring a more balanced approach between investment promotion and sustainability

e) Research Methodology

In pursuance of this research, qualitative method of research was adopted. The primary sources which were consulted includes; different BITs of Pakistan and other countries, domestic environmental legislation and policies were analyzed during the course of this research.

Secondary sources includes research articles, journal articles, newspaper reports and editorials, thesis and books. Furthermore a comparative study of environmental protection measures in investment framework of developed and developing countries was adopted.

CHAPTER NO. 2

IMPACTS OF INVESTMENTS ON ENVIRONMENTAL PROTECTION

2.1 Introduction

The most prevalent form of International Investment Agreements (IIA) is Bilateral Investment Treaties (BIT), which are utilized as a mechanism for protecting foreign investment by providing a more foreseeable and equitable treatment of investors and the practice continues to this day. In 1959, Pakistan and Germany entered into first-ever BIT, aimed at fostering and safeguarding investments between contracting states. Initially, there was limited interest among sovereign states in adopting such agreements, with only a small number concluded up to 1979. However, over the following two decades, approximately 100 BITs were established. The 1980s saw a steady rise in the number of BITs being signed, with 385 concluded by the end of the 1990s, reflecting a growing interest in promoting and protecting foreign investment. After the Cold War era, significant surge in adoption of BITs was seen, with a staggering 2392 agreements signed worldwide by 1999, compared to 385 in 1990. This trend quickly spread to other capital-exporting nations, establishing BITs as a widely recognized instrument in international law.

Bilateral investment treaty models have been developed by different OECD member countries in order to ensure that their promises are consistent to some degree. These "models" have been used as a template for the development of new accords. In recent years, OECD countries have shown a renewed interest in the process of modernizing existing BIT models. The objective is to provide an illustration of recent developments in their BITs and BIT models utilized by OECD countries. In past four years, revisions have been made to fifty percent of the BITs models. In the year 2004, significant revisions made to both the Foreign Investment Protection and Promotion Model Agreement (FIPA) of Canada and the United States Model BIT. In earlier

months of 2005, new models were also introduced in the countries of the Czech Republic, France, Germany, and Spain. The rise in investment-related disputes, together with the increasing exposure to and broader experience with implementation of such model agreements may help to highlight the growing focus on these types of model agreements.

However, BIT models are just meant to serve as a guide for conversations amongst the nations who are partners. Their terms are open to further discussion and clarification by the parties to a certain agreement, with whom they are being negotiated. Therefore, despite the fact that BITs models are useful for maintaining uniformity between agreements entered into by different nations, it is still required to look at specific terms in order to evaluate the impact of an agreement

2.2 Aims and Scope of BITS

Bilateral Investment Treaties delineates regulations governing foreign investments between two contracting countries. In this arrangement, the host country, provides a range of guarantees, based on international law, to investments made by the other treaty partner, often referred to as the investor state. These assurances typically encompass commitments to give national treatment, most favored nation treatment, fair and equitable treatment, full protection and security, unrestricted transfer of capital flows, and restitution in the event of expropriation. One of the distinctive and influential aspects of BITs is the provision granting foreign investors the direct ability to enforce these international law assurances against a host state through international arbitration, bypassing the need to first seek redress in local courts. Additionally, there's no obligation for the investor to involve their home state or to establish a contractual agreement with the host state. Consequently, the investor generally retains the option to directly

litigate for BIT violations against the host country. Notably, “the protections afforded by a BIT typically complement any existing contractual rights the investor may hold against its counterpart or safeguards provided under domestic legislation.”⁴ The preambles of investment treaties typically serve the function of providing an overview of the goals that are being sought by provisions of the treaty. A key aspect of these treaties is providing a framework for interpreting specific clauses, especially by arbitration tribunals in investment dispute cases. It is possible that the preamble will highlight an important or new aspect of the agreement. In addition to the overarching objective of bolstering economic cooperation, bilateral investment treaties (BITs) traditionally highlight the significance of fostering conditions that are favorable for investments and/or investors from both parties. They also emphasize the possible advantages that could arise from mutually supporting and safeguarding such investments or investors. However, the preambles of more recent agreements have been known to contain a number of interesting modifications and clarifications.⁵

Foreign investors may face regulatory hurdles when trying to enter a market, making an investment, or even after establishing operations in a home country. The restrictions might be in effect for all of these phases or just some of them. These measures are based on issues with Most-Favored Nation treatment and National Treatment. Other issues include whether investors are subject to performance requirements, as well as whether they are guaranteed an absolute

⁴ Mahnaz, International Law Protections for Foreign Investment in Pakistan (Overseas Investors Chamber of Commerce and Industry, December, 2010)

⁵ ‘The Basics of Bilateral Investment Treaties’, accessed 9 July 2023, <https://www.sidley.com/en/services/global-arbitration-trade-and-advocacy/investment-treaty-arbitration/sub-pages/the-basics-of-bilateral-investment-treaties>.

standard of treatment. Additionally, foreign investors are looking for rules that are easy to understand and predict.⁶

“Almost all BITs with developing nations adhere to some form of the traditional Western view of international law that a state may not expropriate the property of an alien except:

- a. For the greater good;
- b. In a way that doesn't discriminate;
- c. Endless supply of pay; and, in the majority of cases,
- d. With provisions for judicial review.”⁷

Different treaties have formulated the various components of the traditional rule in different ways, some of which are more or less protective of investor interests.⁸ It appears that BIT provisions are rarely utilized to safeguard an investment. At times, courts have summoned the venture arrangements of companionship, business, and route settlements, yet these legal choices have for the most part exuded from the courts of capital-sending out nations, as opposed to non-industrial countries. Anecdotal evidence suggests, however, that the fact that a developing nation has signed a BIT increases investor protection in those states in diplomatic and bureaucratic practice. As a result, it appears that one nation exempted BIT-covered foreign investments when it nationalized foreign property in a particular sector. An investor who is protected by a BIT will

⁶ Gagné, Gilbert. Jean-Frédéric, Morin. "The evolving American policy on investment protection: evidence from recent FTAs and the 2004 model BIT." *Journal of International Economic Law* 9, no. 2 (2006): 357-382.

⁷ Congyan, Cai. "Outward foreign direct investment protection and the effectiveness of Chinese BIT practice." *The Journal of World Investment & Trade* 7, no. 5 (2006): vii-652.

⁸ Ibid

probably be in a stronger position than an investor who is not protected to seek redress in diplomatic or bureaucratic negotiations.

2.3 Asymmetric Investing and Host State Responsibility

A strategy called asymmetric investing takes into account the different risks and benefits of investing in different countries or regions. Investors look at things like political stability, economic conditions, and the regulatory environment when deciding where to invest. The degree of host state responsibility influences investment decisions in the context of environmental protection.⁹

When it is analyzed about a country or state having an obligation to conserve and maintain its environment, they are referring to the concept of host state responsibility for environmental protection. This task entails the implementation of a wide variety of programs and guidelines with the objectives of halting the destruction of natural ecosystem, fostering sustainable development, and protecting natural resources. The commitment of a host country to safeguarding the environment is something that investors take into consideration because it directly impacts the consistency and effectiveness of their investments.¹⁰

The regulatory structure of the host country is one of the crucial factors to consider. Investors pay great attention to the robustness and efficiency of environmental legislation as well as the mechanisms that are in place for their enforcement.

⁹ Yackee, Jason Webb. "Investment treaties and investor corruption: An emerging defense for host states." *Va. J. Int'l L.* 52 (2011): 723.

¹⁰ Cho, Seong Y., Cheol Lee, and Ray J. Pfeiffer Jr. "Corporate social responsibility performance and information asymmetry." *Journal of Accounting and Public Policy* 32, no. 1 (2013): 71-83.

Investors examine the potential environmental risks that are connected with their investments. This is especially important in sectors that have a significant influence on the environment, such as those involving the production of fossil fuels, mining, or chemicals. They evaluate the likelihood of regulatory scrutiny, the potential for legal obligation for environmental damage, and the dangers to the company's reputation. Alternatively, investments in companies that contribute to environmental sustainability, such as clean technology or renewable energy, may be more appealing due to supportive legislation, incentives, and the possibility for long-term growth.¹¹

When it comes to establishing and upholding environmental norms, legislation and regulation are crucial instruments for host states to have. The host states offer a framework for environmental protection measures and guarantee that companies, enterprises, and individuals comply with environmental requirements by establishing clear norms and rules. This is done in order to protect the environment.¹²

It is essential to have procedures in place for monitoring and enforcement in order to guarantee that environmental rules and regulations are followed. Host states are responsible for implementation of monitoring systems in order to evaluate quality of the environment and identify any infractions. Regular inspections are carried out to identify occurrences of non-compliance, and appropriate enforcement actions, penalties, or sanctions are applied on those who are found to be in violation of the regulation. Monitoring and law enforcement that work together to achieve their goals of preventing environmental infractions, preserving the

¹¹ Mabey, Nick, and Richard McNally. "Foreign direct investment and the environment." *Godalming, Surrey: WWF-UK* (1999).

¹² Bora, Bijit. "FDI and the environment: the link between FDI and the environment." In *Foreign Direct Investment*, pp. 225-244. Routledge, 2002.

environment's natural integrity, and protecting the health of ecosystems and communities are both essential.¹³

The host states implement land use planning and zoning restrictions to mitigate the negative effects on the environment and increase sustainable activities. They try to balance the need for development and conservation of environment by including environmental issues into the planning procedures. This contributes to maintaining the sustainability of natural resources for the long term

Culture of sustainability can be fostered in host states by encouraging a sense of environmental responsibility among the general population.¹⁴

2.4 Imbalance in Investor and Host State Responsibilities

Scholars have opposed the asymmetry of IIAs, which compromises states' ability to exercise their national sovereignty and restricts their ability to regulate.¹⁵ Scholars believe that FDI undermines the sovereignty of host state because states are required by treaty and international customary law to give complete protection to foreign investors.¹⁶

However, An examination of the current framework reveals that the development of international investment law have not promoted the interests of both foreign investors and host

¹³ Hassaballa, Hoda. "Environment and foreign direct investment: policy implications for developing countries." *Journal of Emerging Issues in Economics, Finance and Banking* 1, no. 2 (2013): 75-106.

¹⁴ Barrett, Scott. *Environment and statecraft: The strategy of environmental treaty-making: The strategy of environmental treaty-making*. OUP Oxford, 2003.

¹⁵ Stephanie Bijlmakers, Effects of Foreign Direct Investment Arbitration on a State's Regulatory Autonomy Involving the Public Interest, 23 AM. REV. OF INT'L ARB. 245, 249 (2012).

¹⁶ Dolzer, Rudolf. "The Impact of International Investment." *International Law and Politics* 37 (2005).

governments. Actually, the arbitral practice that created the current ISDS system is asymmetrical and entirely focused on safeguarding investor's rights.¹⁷

In recent times, number of disputes referred to international arbitration tribunals for resolution are decided at the expense of the host state's sovereign rights, doctrine of necessity or human rights or environmental considerations, by extending a flexible interpretation to investment law.¹⁸

There is increasing and enormous pressure on international tribunals to harmonize public interest with private one. it implies that international tribunals are under pressure from the host states to compromise on private interests as against public interest or state necessity. For example, in 2007 Bolivia withdrew from ICSID for the reason that there was lack of reconciliation between public and private interests by ICSID in its ruling in investment disputes.¹⁹

The enactment of environmental laws by a host country, whether they involve broad prohibitions on specific products or more specific measures like the revocation of licenses due to environmental issues, can substantially impact the property rights of foreign investors. Historically, foreign investors have contested the enforcement of domestic environmental regulations, arguing that these actions amount to expropriation. Investors, especially those in the mining and hydrocarbon sectors, often contend that compliance with environmental regulations

¹⁷ Camille Martini, Balancing Investors' Rights with Environmental Protection in International Investment Arbitration: An Assessment of Recent Trends in Investment Treaty Drafting, 50 INT'L L. 529 (2017) <https://scholar.smu.edu/til/vol50/iss3/8>

¹⁸ ICSID Case No. ARB(AF/0012) between Technical Medioambientales Tecmed, S.A v The United Mexican State, accessed 20 July 2023, <https://www.italaw.com/sites/default/files/case-documents/ita0854.pdf> The tribunal concluded that 'if any regulatory measure affects the economic interests of investors' it will tantamount to violation even if such regulation are beneficial to society as a whole'.

¹⁹ Mazhar Ali khan, 2023, "International Investment Law and Investor-State Dispute Settlement: An Overview of the Available Remedies for Investors in CPEC under National and International Law" Journal of Business and Management Research 2(2); 903-922

diminishes the value of their investments to the point where their economic feasibility is compromised.²⁰

Besides “stabilization and choice of law clauses”, arbitration clause contained in IIAs is regarded as contractual device for safeguarding foreign investment. These clauses serve specific purpose of extending efficacious protection and contractual guarantees to the foreign investors. The clause related to stabilization in investment agreements oust all kinds of operation of any possible modification in legislature of host state that might have adverse effects over the terms of the contract. The host states being sovereign entities can adopt any legislation pertaining to its domestic matters but it is the stabilization clause that restricts the operation of the said legislation over the contracts concluded with the investors. Similarly, clause dealing with choice of law in the investment agreements seeks to exclude the application of domestic law to the investment disputes settlement and other matters. However, it subjects the investment contracts to some external or international standards. While termed "bilateral," investment treaties often demonstrate a significant degree of unilateralism, particularly concerning the legal recourse available to the host country. In many cases, the host country lacks the ability to take legal action against foreign investors under its domestic laws.

2.5 Balancing the Asymmetries of Investors and Host States

Responsibilities:

State counterclaims have historically been met with skepticism from academics and tribunals alike, with many arguing that granting States the ability to bring claims against investors is in

²⁰ See Santa Elena SA v. Republic of Costa Rica, ICSID Case No. ARB/96/1, Final Award (Feb. 17, 2000), accessed 15 July 2023, <https://www.italaw.com/sites/default/files/case-documents/italaw6340.pdf>. the tribunal concluded that: "expropriatory environmental measures-no matter how laudable and beneficial to society as a whole-are, in this respect, similar to any other expropriatory measures that a state may take in order to implement its policies"

fact in direct opposition to the fundamental principles of investor-state arbitration. Ultimately, the goal of investment treaties is to promote foreign direct investment by providing investors with a set of fundamental assurances regarding the security of their capital. These treaties accomplish this by clearly limiting the sovereign authority of a State to control all economic activity occurring within its boundaries. "There is therefore an apparent asymmetry between the rights and duties of both parties hardwired into the very structure of investment treaties."²¹ By permitting investors to file disputes with these bilateral and multilateral investment treaties, the rights granted to investors are upheld.²²

The framework of investor-state arbitration allows States to bring counterclaims against investors. Unlike many BITs, Investment arbitration's procedural rules are free of structural asymmetries. The UNCITRAL Rules and the ICSID Convention and Arbitration Rules provide mechanisms for States to raise counterclaims.²³

Both sets of rules allow a State to counterclaim with minimal procedural restrictions, provided that the counterclaims are within the Tribunal's jurisdiction. However, for a Tribunal to have jurisdiction, there must be a strong connection between the counterclaim and the claimant's case.²⁴

²¹ Ina C. Popova and Fiona Poon, From Perpetual Respondent to Aspiring Counterclaimant? State Counterclaims in the New Wave of Investment Treaties, 2 BCDR Int'l Arb. Rev. 223, 224 (2015).

²² Ibid

²³ Article 4 Of UNCITRAL Rules and Article 46 of ICSID Convention

²⁴ In *Amco Asia Corp. v. Indonesia*, the Tribunal ruled it lacked jurisdiction over Indonesia's counterclaims regarding unpaid corporate taxes by the claimants. The counterclaim stemmed from an independent obligation under Indonesian law, not from the investment itself.

Amco Asia Corp. et. al. v. Republic of Indonesia (Resubmitted Case), ICSID Case No. ARB/81/1, Decision on Jurisdiction, ¶ 161 (1988).

over the past 20 years, investor-state tribunals have increasingly accepted jurisdiction over State counterclaims, reflecting a desire for greater efficiency. Previously, rejecting these counterclaims forced States to seek recourse in domestic courts, leading to duplicated proceedings and undermining the purpose of investment arbitration.²⁵

2.5.1 Environmental Counterclaims in Investor-State Cases

In April 2008, Burlington filed with ICSID, claiming Ecuador unlawfully expropriated its investments by raising taxes and canceling oil licenses. The Tribunal ruled that Ecuador must compensate Burlington but also held Burlington accountable for environmental damage due to retroactive application of new environmental laws. This case was significant for compensating based on the state's counterclaims.²⁶

Perenco contested Ecuador's 2008 tax law changes through arbitration under the France-Ecuador BIT. The tribunal ruled that these changes deprived Perenco of investment benefits, requiring Ecuador to compensate. It upheld Ecuador's environmental counterclaims and affirmed the state's right to modify regulations to meet international obligations. This case highlights a shift in investor-state arbitration, enabling states to enforce environmental norms and encouraging private sector compliance.²⁷

Allowing state counterclaims for investors' non-compliance with environmental regulations shifts the balance. Knowing they can hold investors liable encourages states to pass and enforce

²⁵ Spyridon Roussalis v. Romania, ICSID Case No. ARB/06/1, Separate Opinion of Michael Reisman (2012); Kryvoi, 21 Minn. J. Int'l L. at 221 (cited in note 37).

²⁶ (Burlington Resources Inc. v. Republic of Ecuador 2008) ICSID case No. ARB/08/5, accessed 15 July 2023 <https://www.italaw.com/cases/181>

²⁷ (Perenco Ecuador Ltd. v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador 2008) ICSID Case No. ARB/08/6, accessed 15 July 2023 <https://www.italaw.com/cases/819>

regulations aligned with treaty obligations. Conversely, the threat of liability motivates investors to comply with international environmental norms. This theory is supported by cases like Burlington and Perenco, where states are beginning to use counterclaims effectively.

2.6 Impacts of Investment Activities on Environment

Investment activities can contribute to the environment in several ways. Firstly, investments provide funding for environmental solutions. By allocating resources towards renewable energy, clean technologies, and sustainable infrastructure, investments assist lessen greenhouse gas emissions, improve energy efficiency, and combat climate change. This financial support is essential for research, development, and implementation of environmentally friendly projects.²⁸

Secondly, investment activities support conservation and restoration initiatives. By providing funding to conservation organizations, reforestation projects, and protected area management, investments help preserve critical natural areas and promote biodiversity conservation.²⁹ They also enable the rehabilitation of degraded ecosystems through sustainable land management practices and restoration projects.

Moreover, investment activities play a role in encouraging businesses and industries to adopt sustainable practices. By incentivizing sustainable production methods, resource efficiency, and waste reduction, investments drive positive change within companies. This leads to the adoption

²⁸Murphy, Margaret. "The Impact of Superfund and Other Environmental Statutes on Commercial Lending and Investment Activities." *Bus. Law.* 41 (1985): 1133.

²⁹ Weiss, Harold Jacobson, *Engaging countries: strengthening compliance with international environmental accords*. MIT press, 2000.

of ecofriendly technologies, and the integration of sustainable practices throughout the supply chain, ultimately reducing environmental impacts.³⁰

Innovation and research are two other areas that are helped forward by investments. Investments assist the development of new solutions to environmental concerns by providing funding for research institutions, fledgling enterprises, and businesses that specialize in environmentally friendly technologies. This has the potential to lead to breakthroughs in fields such as sustainable agriculture, waste management, and renewable energy, all of which contribute to the long-term environmental sustainability.³¹

In addition, investment activities that promote environmentally sustainable enterprises and projects generate employment opportunities and drive economic development. Investing in environmentally conscious industries can generate money, help reduce poverty, and boost economic growth all at the same time, all while contributing to the achievement of environmental goals.

Investing efforts frequently result in the formation of collaborative partnerships between the various stakeholders. Knowledge sharing, capacity building, and the execution of environmental projects are all promoted through the formation of these partnerships, which bring together governments, corporations, civil society organizations, and local communities. Investment activities encourage collective action and collaboration in the direction of achieving environmental sustainability by bringing together a varied range of knowledge and resources.

³⁰ Klassen, Robert D., and Stephan Vachon. "Collaboration and evaluation in the supply chain: The impact on plant-level environmental investment." *Production and operations Management* 12, no. 3 (2003): 336-352.

³¹ Murphy, Margaret. "The Impact of Superfund and Other Environmental Statutes on Commercial Lending and Investment Activities." *Bus. Law.* 41 (1985): 1133.

However, it is essential to keep in mind that in order for investment operations to have a good effect on the surrounding environment, responsible and environmentally conscious investing practices would need to be given priority. When investment decisions are made with environmental, social, and governance (ESG) aspects in mind, this helps to ensure that investments are in line with environmental goals, which in turn encourages long-term sustainability and is to the advantage of both the economy and the environment.³²

The actions of investment play a critical part in molding the economy of the entire world; nevertheless, these same activities also have substantial effects on the natural world. It is vital to conduct an analysis of the myriad ways in which these activities have an effect on the environment as economies expand and investments pour into a variety of different industries.

Even the most ecofriendly techniques can affect the environment, especially in the mining sector. The main effects include hazardous and nontoxic solid waste, smeltering air emissions, dust from mineral extraction and water contamination. Therefore, increased investment will inevitably result in increased environmental effects from production expansion. However, the application of cleaner and more advanced technologies can result in significant differences.³³ Several authors have examined the issue of possible beneficial technological spillovers from FDI, and their findings suggest that these have been relatively limited.³⁴

³² Schmidheiny, Stephan. *Changing course: A global business perspective on development and the environment*. Vol. 1. MIT press, 1992.

³³ Nicola Borregaard and Annie Dufey, "OECD GLOBAL FORUM ON INTERNATIONAL INVESTMENT Conference on Foreign Direct Investment and the Environment," in *Foreign Direct Investment and the Environment Lessons from the Mining Sector* (Paris, France: Organisation for Economic Co-operation and Development, 2002).

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³⁴ Ibid Pg 15

The exploitation of natural resources is frequently a part of investment activities; as a result, these operations can contribute to environmental deterioration and the exhaustion of resources. For instance, one of the causes of environmental issues like deforestation is the mining sector. Habitat destruction, soil erosion, and water pollution. Mining activities have the potential to destabilize ecosystems, put biodiversity at risk, and have a negative impact on local communities that are economically dependent on the materials being mined. In addition, the exploitation of fossil fuels leads to the contamination of air and water, moreover production of greenhouse gases; this further exacerbates the effects of climate change and the changes it brings about.³⁵

The production of goods, the creation of chemicals and the generation of energy are all examples of industrial sectors that contribute to the generation of pollution. This pollution is caused by the manufacturing processes, the generation of waste, and the release of pollutants into the environment. Toxic compounds, hazardous pollutants, and greenhouse gases are released into the atmosphere, water, and soil through industrial processes. These emissions not only have a negative impact on the ecosystems in the local area, but they also contribute to the environmental problems that exist on a worldwide scale, such as air pollution and climate change. Inadequate waste management contributes further to the exacerbation of the problem by contributing to the contamination of water bodies, soil, and ecosystems. This contamination poses hazards to human health as well as to the preservation of biodiversity.³⁶

Investment activities frequently generate large land use changes, such as the clearance of forests, the urbanization of previously rural areas, and the transformation of natural ecosystems into

³⁵ Kezsborn, Allen, Anthony E. Satula Jr, and Alan V. Goldman. "Successor and Parent Liability for Superfund Cleanup Costs: The Evolving State of the Law." *Va. Envtl. LJ* 10 (1990): 45.

agricultural land or land for the building of infrastructure. Deforestation for the purposes of agricultural expansion or logging leads to the destruction of irreplaceable ecosystems, disrupts the habitats of wildlife, and contributes to climate change by reducing the amount of carbon sinks in the environment. The development of urban areas and associated infrastructure leads to the destruction of natural habitats, the reduction of biodiversity, and the modification of natural landscapes. These changes in land use not only have direct consequences on ecosystems and the animals that live in them, but they also have ripple effects that extend to the water cycle, soil erosion, and the supply of ecosystem services.

Climate change is mostly caused by greenhouse gas emissions, and investments in industries such as energy, transportation, and heavy industry are key contributors of these emissions. Carbon dioxide and other greenhouse gases are released into the atmosphere in large quantities whenever fossil fuels are burned in industrial operations or when forests are cleared for other uses. The effects will include an increase in average global temperature, an increase in sea level, an increase in the frequency and intensity of extreme weather events, and disturbances to ecosystems and agricultural systems. These shifts present dangers to human health, the availability of safe drinking water and food, as well as the integrity of ecosystems as a whole.

Investing activities, in particular those that take place in industries such as agriculture, mining, and hydropower, can have significant effects on the available water resources. Water supplies become depleted as a consequence of excessive water extraction for agriculture or industrial uses. This leads to a scarcity of water, decreased stream flows, and severe effects on aquatic ecosystems. Mining operations can result in the production of acid mine drainage, which can contaminate water bodies and reduce the quality of the water. Water resources are progressively

degraded as a result of inadequate waste management and industrial contamination, which has an impact not only on human systems but also on ecological ones.³⁷

Investment activities have the potential to contribute to the deterioration of ecosystems and the loss of biodiversity. The degradation of habitats, the introduction of harmful pollutants and invasive species, and the resulting warming of the climate are all factors that contribute to the damage of biodiversity.

Many Investment Agreements, however, emphasize to uphold the domestic environmental regulation and to refrain from laxing them in order to get more Investments.³⁸

2.7 Pollution Haven Hypothesis

The Pollution Haven Hypothesis is a theory in economics that proposes that industrial activities have a tendency to transfer from countries that have rigorous environmental regulations to countries that have less stringent rules. These countries are referred to as "pollution havens." According to this concept, companies move their operations to nations with more relaxed environmental rules so that they can take advantage of lower production costs and less limits on their ability to pollute the environment.³⁹

The hypothesis offers a number of explanations for the occurrence of pollution havens, including when laws are less stringent, the costs of complying with them are typically reduced, which enables firms to save money on the cost of pollution control technology and procedures.

³⁷ 'Representative Engagements in Investor State Arbitrations', accessed 9 July 2023, <https://www.sidley.com/ja/services/global-arbitration-trade-and-advocacy/investment-treaty-arbitration/sub-pages/representative-engagements-in-investor-state-arbitrations>.

³⁸ See Article 24 of United States-Mexico-Canada Agreement (USMCA)

³⁹ 'Analysis of Pollution Haven Hypothesis (PHH) and Environmental Kuznets Curve (EKC) in Selected Association of South-East Asian Nations (ASEAN) Countries | Review of Economics and Development Studies'.

Businesses have the potential to boost their profitability by relocating their operations to nations that have regulations that are less stringent.⁴⁰

Companies that operate in sectors that have a significant negative influence on the environment, such as heavy manufacturing or the production of chemicals, may suffer greater expenses as a result of stringent environmental restrictions in the nations in which they are based. These businesses are able to obtain a competitive advantage by relocating to pollution havens since doing so enables them to avoid adhering to rules that are more stringent and to produce goods at reduced costs. Companies are given the option to take advantage of regulatory gaps and disparities as a result of the differences in environmental legislation that exist between countries. Businesses are able to participate in regulatory arbitrage, which is when they take advantage of weak or inefficient environmental rules in order to decrease costs and increase profits. This can be accomplished by migrating to pollution havens. The processes of globalization and trade liberalization have made it possible for businesses to expand their operations into new territories and countries. In this context, the Pollution Haven Hypothesis proposes that nations with less stringent environmental rules are more likely to attract investment due to their perceived lower costs and regulatory burdens. As a result, these nations are better able to capitalize on international trade and investment flows.⁴¹

The pollution haven effect, also known as the pollution haven hypothesis, is the theory that polluting companies will move to regions of the world that have less rigorous environmental

⁴⁰ Ibid.

⁴¹ Fouzia Latif Gill et al., 'Analysis of Pollution Haven Hypothesis (PHH) and Environmental Kuznets Curve (EKC) in Selected Association of South-East Asian Nations (ASEAN) Countries', *Review of Economics and Development Studies* 6, no. 1 (30 September 2020): 83–95, accessed 9 July 2023, <https://doi.org/10.47067/reads.v6i1.186>.

rules. Empirical research into the phenomena has been limited both by the difficulty of accurately assessing the stringency of regulatory requirements and by the fact that pollution levels and stringency levels are decided at the same time. The early studies that were based on cross sections of data revealed that laws had no substantial effect on the placement of industries. Recent research that makes use of data panels to account for unobserved heterogeneity or instrumental variables to take simultaneity into account has found effects that are statistically significant and of a size that is reasonable.

The pollution haven theory, also known as the pollution haven effect, postulates that regions of the world with lax environmental rules, sometimes known as "pollution havens," will attract polluting industries that have relocated from regions with stricter regulations. Critical inputs for products with pollution-intensive production become more expensive due to environmental restrictions, which in turn reduces the jurisdictions' comparative advantage in producing those goods.⁴² This is an obvious consequence of environmental rules.

Some environmental organizations have voiced their concern over potential increases in pollution levels, which might be the result of a shift in the industrial make-up of pollution havens brought about by increased trade, or an increase in general economic activity brought about by increased trade. The pollution haven hypothesis states, in a clear manner, that environmental controls have an effect on trade. According to this extension, trade restrictions have a disproportionately negative impact on the trade in polluting items, and as a result, the

⁴² Al-Mulali, Usama, and Chor Foon Tang. "Investigating the validity of pollution haven hypothesis in the gulf cooperation council (GCC) countries." *Energy Policy* 60 (2013): 813-819.

environment. It appears that this would be the case only if the trade barriers had a greater impact on companies that produced pollution than they did on industries that produced clean energy.⁴³

A second worry, which is associated with the hypothesis of pollution haven in an indirect way, is that governments may engage in inefficient competition to recruit polluting industries by lowering their environmental requirements. This is a concern because it is related to the pollution haven hypothesis. A government that is concerned with maximizing welfare should establish standards in such a way that the benefits somewhat justify the costs. This does not necessarily mean that all locations will have the same environmental criteria. Concerns may arise, however, if different jurisdictions try to attract investment from polluting companies by enacting environmental restrictions that are less stringent than the levels at which Pareto efficiency is maximized. They might do this, for instance, if there were spill overs across international borders and the advantages of hosting a polluting factory outweighed the expenses incurred locally.⁴⁴ Alternately, if the industry is highly concentrated and pays rents to shareholders located outside of the industry, the capacity of the jurisdictions to acquire some of the industry's rents may be lost to competition. In situations like these, nations may engage in a "race to the bottom" in terms of environmental standards by lowering their rules to compete with other states in order to attract more FDI.

⁴³ Ansari, Mohd Arshad, Nisar Ahmed Khan, and Aadil Ahmad Ganaie. "Does foreign direct investment impede environmental quality in Asian countries? A panel data analysis." *OPEC Energy Review* 43, no. 2 (2019): 109-135.

⁴⁴ Abid, Mehdi, and Habib Sekrafi. "Pollution haven or halo effect? A comparative analysis of developing and developed countries." *Energy Reports* 7 (2021): 4862-4871.

2.8 Impact of Asymmetric Responsibilities on the Creation of Pollution Havens

The imbalance of responsibilities between investors and host states often leads to the creation of pollution havens. This situation arises when investors, particularly from developed countries with strict environmental regulations, seek to relocate their operations to host states with more lenient environmental standards. In these host states, which are typically developing countries or emerging economies, the regulatory frameworks are often weaker or less enforced. This discrepancy allows investors to operate with fewer constraints on pollution and environmental damage.

In this dynamic, the investor, motivated by cost savings and fewer regulatory burdens, capitalizes on the host state's less stringent environmental controls. The host state, eager for economic growth and investment, may prioritize short-term economic benefits over long-term environmental health. As a result, the host state becomes a haven for industries that would be otherwise restricted or heavily regulated in the investor's home country. This shift often leads to significant environmental degradation in the host state, including increased pollution, habitat destruction, and depletion of natural resources.

In some investment agreements, ISDS mechanisms allow investors to challenge host states' regulations if they perceive them as detrimental to their investment. This can discourage host states from implementing or enforcing strict environmental regulations, as they may fear legal

challenges and associated costs. This imbalance can lead to a race to the bottom, where environmental protections are undermined to attract and retain foreign investment.⁴⁵

The asymmetry in responsibilities can exacerbate these problems. Investors may not feel the same level of accountability for environmental impacts as they would in their home country, where regulations are more robust. Similarly, the host state may lack the capacity or political will to enforce stricter environmental standards or to hold investors accountable for their environmental footprint. And to avoid the costly arbitration proceedings if the investor challenge the regulatory measures of the state as expropriation.

This uneven distribution of responsibilities and enforcement creates a situation where the benefits of investment are often accompanied by high environmental costs, disproportionately affecting the host state. This situation underscores the need for more balanced international agreements and stronger mechanisms to ensure that environmental protection is a shared responsibility, not just a burden on the host state.

2.9 Conclusion

In a nutshell, protecting foreign investments from expropriation, or other forms of interfering with property rights by the government of the host country is one of any BIT's primary responsibilities. Although there is certain imbalance between the host states and investors which has been criticised by various scholars. The imbalance between host and investor responsibilities

⁴⁵Vattenfall AB v. Federal Republic of Germany , Case No. ARB/12/12 (ICSID 2009). Retrieved from <https://www.italaw.com/cases/1654>

Vattenfall AB, a Swedish energy company, filed a claim against Germany under the Energy Charter Treaty (ECT) in 2009. The dispute arose because Germany's government decided to implement stricter environmental regulations concerning the operation of coal-fired power plants, which affected Vattenfall's investments. The dispute was settled in 2011 with Germany agreeing to make concessions.

in BITs has become increasingly apparent. While investors enjoy extensive protections and the ability to seek redress through ISDS mechanisms, host states often face constraints in enforcing environmental regulations without risking litigation. This asymmetry can undermine host countries' efforts to uphold stringent environmental standards, leading to concerns about creating "pollution havens" where lax regulations attract environmentally harmful investments.

Counterclaims allow host countries to bring their grievances against investors within the ISDS framework, thereby providing a mechanism to hold investors answerable for environmental damage or other regulatory breaches. This approach can help balance the scales, ensuring that investor protections do not come at the expense of environmental sustainability and public welfare.

CHAPTER NO. 3

ENVIRONMENTAL PROTECTION AND INVESTMENTS IN PAKISTAN

3.1 Introduction

The United Nations Sustainable Development Goal 13 (SDG 13) focuses on climate change and environmental protection. Pakistan is one of the few countries that have achieved the "on track status" for this goal. The accomplishment of this status is due, in a significant part, to a number of policies and programs that have been initiated by the government with the intention of enhancing the quality of the environment and better managing the effects of the changing climate. These include, amongst others, "Recharge Pakistan," "Protected Areas Initiative," "Clean and Green Pakistan," and "Ten Billion Tree Tsunami."⁴⁶ In spite of these efforts and results, Pakistan continues to be very vulnerable to the effects of climate change. Pakistan is now rated fifth on the list of countries that are most disposed to the effects of climate change, as indicated by the Global Climate Risk Index 2020. In the period from 1999 to 2018, the nation was affected by 152 severe weather events, which resulted in enormous damages totaling USD 3.8 billion. The human consequences to these occurrences, such as the heat waves that hit Peshawar and Karachi or the suffocating fog that blanketed Lahore, are starting to have disastrous effects on both the economy and the health of the population.⁴⁷

⁴⁶ Hassan, Mabroor, Manzoor Khan Afridi, and Muhammad Irfan Khan. "Energy policies and environmental security: A multi-criteria analysis of energy policies of Pakistan." *International Journal of Green Energy* 16, no. 7 (2019): 510-519.

⁴⁷ Hassan, Mabroor, Manzoor Khan Afridi, and Muhammad Irfan Khan. "Energy policies and environmental security: A multi-criteria analysis of energy policies of Pakistan." *International Journal of Green Energy* 16, no. 7 (2019): 600-700.

Pakistan is currently facing a variety of significant environmental challenges, many of which are of significant ecological importance in terms of ensuring a sustainable economic future. Environmental protection is considered by many to be an obstacle to economic growth; however, it generates significant dividends over time. The transition to renewable energy sources, for example, generates manufacturing and construction jobs. Sustainable agricultural practices result in more abundant yields without the need for dangerous chemicals. Furthermore, such activities result in long-term savings through reducing reliance on insecure fossil fuel sources. Sustainable technologies and industries, for example, provide new sectors to explore and develop new business opportunities.⁴⁸ By protecting the environment one can attain both socio economic benefits. The ongoing land degradation and floods which affects the agriculture and forests. Agriculture is the main component of many major economies or basic human need, is affected by climate change. Taking steps to preserve the environment would indirectly be protecting the major portion of economy and creating new job by introducing ecofriendly technology.⁴⁹

Recent years have seen a significant increase in Pakistan's focus on finding solutions to the country's mounting environmental problems. There have been a number of laws passed, in addition to the implementation of a number of other policies and public sector activities⁵⁰.

According to a 2012 OECD study examining environmental provisions in International Investment Agreements (IIAs), a mere eight percent of these agreements made any mention of environmental concerns. This trend can be attributed to the original intent behind investment

⁴⁸ Bernard, Ed. "The Economic Benefits of Environmental Protection: A Case for Sustainable Development." Medium, February 20, 2023.

⁴⁹ 'Healthy Environment Is a Must for Sustainable Economy and Equitable Society — European Environment Agency', accessed 9 July 2023, <https://www.eea.europa.eu/articles/healthy-environment-is-a-must>.

⁵⁰ Nawaz, Muhammad Atif, Muhammad Sajjad Hussain, and Altaf Hussain. "The effects of green financial development on economic growth in Pakistan." *iRASD Journal of Economics* 3, no. 3 (2021): 281-292.

agreements, which primarily focused on safeguarding investors from capital-exporting nations when operating in developing regions. Additionally, it reflects a general lack of attention from the international development community towards environmental issues. However, the OECD report reveals a significant shift in this pattern. While references to environmental considerations in IIAs were uncommon before the mid-1990s, the frequency of such provisions has surged in recent years. By 2008, a notable eighty-nine percent of newly concluded IIAs included some reference to environmental issues. The report also points out that environmental language appears more commonly in investment chapters within free trade agreements (FTAs). This trend is corroborated by a database published by the United Nations Conference on Trade and Development (UNCTAD), which tracks IIA provisions. The database shows a growing proportion of recently negotiated IIAs that reference environmental matters or recognize the right of signatory states to regulate environmental issues. Despite this upward trend, it's worth noting that only a minority of IIAs, including those signed as recently as 2015 and 2016, contain explicit references to environmental considerations. This underscores a continuing gap in the integration of environmental protections within the framework of international investment agreements.⁵¹

⁵¹ Camille Martini, "Balancing Investors' Rights with Environmental Protection in International Investment Arbitration: An Assessment of Recent Trends in Investment Treaty Drafting," *International Law* 50 (2017): 529-31, <https://scholar.smu.edu/til/vol50/iss3/8>.

A number of investment treaties subject the definition of protected investments to their conformity with the laws of the host State.⁵² As a result, domestic environmental laws may have an impact on whether an investment is protected.

In this chapter, we explore the complex relationship between environmental protection and investments in Pakistan, how economic growth can be aligned with sustainability. A healthy environment is essential not only for the well-being of citizens but also for ensuring long-term economic benefits.

The chapter examines the framework of Pakistan's BITs, which play a pivotal role in shaping foreign investment policies. These treaties are essential for encouraging economic inflows, but they also raise important questions about environmental protections. As investors seek opportunities, there is a need to ensure that investment agreements do not undermine environmental regulations or create pollution havens. Pakistan's BIT model, along with its national laws and policies, provides the legal structure through which the country aims to protect its environment while fostering economic growth. A key focus of this chapter is on the evolution of environmental protection through various legal cases and landmark judgments in Pakistan.

Furthermore, it explores how Pakistan's international and national commitments to environmental protection are reflected in its investment agreements. This includes an analysis of specific environmental provisions in Pakistan's BITs, evaluating whether they are sufficient to prevent environmental degradation in the pursuit of economic development. The role of national laws, policies, and regulatory bodies, such as the Pakistan Environmental Protection Council, is

⁵² for instance, the Egypt—Pakistan BIT (2000), provides in Article 1(1) that '[t]he term investment means every kind of assets . . . invested by investors of a Contracting Party in the territory of the other Contracting Party in accordance with the laws and regulations of that Party.

also assessed to understand how effectively these mechanisms ensure that investment-driven economic growth does not come at the cost of environmental health.

3.2 Framework of Bilateral Investment Treaties of Pakistan

Pakistan signed its first bilateral investment treaty (BIT) with Germany on November 25, 1959. Since then, Pakistan has executed 53 BITs with 48 countries..⁵³ After a 19-year pause, the second BIT was signed with Romania in 1978. These treaties have been pivotal for international investment growth, particularly for capital-importing nations. Before the 1990s, Pakistan signed eight treaties with developed economies, all still in force. During the 1990s, Pakistan added 30 new BITs and replaced an older one with Romania.⁵⁴ By December 2017, Pakistan had agreements with a diverse group of less developed, developing, and developed nations.⁵⁵

The Bilateral investment treaty of Pakistan - Germany 1959 did not include provisions for resolving investment disputes between investors and the host state. This meant that investors did not have the option to directly seek resolution through any foreign adjudicative body. It wasn't until 19 years later, with the Pakistan-Romania treaty of 1978, that the jurisdiction of the ICSID tribunal was recognized for investment dispute resolution. However, this recognition came with a condition: if the compensation awarded by the national arbitration tribunal was unsatisfactory for the investor, they could then turn to the ICSID forum. Subsequently, in 1983, Pakistan signed three BITs with France, Kuwait, and Germany, in which it consented to ICSID jurisdiction in

⁵³ Report, Staff. "BOI Prepares Strategy for Reforming Bilateral Investment Treaties." Profit by Pakistan Today, April 3, 2021. <https://profit.pakistantoday.com.pk/2021/04/03/boi-prepares-strategy-for-reforming-investment-treaties/>.

⁵⁴ Pakistan – Romania BIT 1995

⁵⁵ Bakht Munir, and Ali Nawaz Khan. "CRITICAL ANALYSIS OF BILATERAL INVESTMENT TREATIES IN PAKISTAN." *Journal of Research Society of Pakistan* 57, no. 2 (December 2020): 163–69. <https://www.researchgate.net/publication/349238455>.

cases where investment disputes could not be resolved amicably between the parties. This meant that investors could directly approach the ICSID jurisdiction without having to go through any intervening procedures in the host country.⁵⁶

The provisions concerning ISDS mechanisms has led government departments to become subject to international arbitration. Currently, seven cases have been brought forth by foreign investors, adjudicated by the ICSID, and three through the Permanent Court of Arbitration (PCA). Consequently, Pakistan has been obligated to pay substantial compensatory amounts, amounting to billions of dollars.⁵⁷ Most of the treaties which led Pakistan to face many arbitrations were signed in 1990s. Upon examining the these signed BITs, it becomes evident that these agreements were typically signed by government officials and representatives from various ministries and departments. This decentralized approach to negotiation and execution indicates a lack of centralized control over the process. Instead, it suggests a tendency towards ceremonial formalities, characterized by unsophisticated negotiations and a potential lack of awareness regarding the far-reaching implications of these treaties.⁵⁸ To modernize BITs, the government introduced a new template in the 2013 Investment Policy, focusing more on arbitration clauses. This template includes a specific period for resolving investment disputes before proceeding to international arbitration.

Presently, there is a noticeable trend towards an increase in ISDS cases, leading to decline in the creation of new BITs and a rise in terminations of existing ones. The Board of Investment (BOI)

⁵⁶ Ibid pg 166

⁵⁷ “Pakistan Terminates 23 BITs – Investment Treaty News,” October 7, 2021.
<https://www.iisd.org/itn/en/2021/10/07/pakistan-terminates-23-bits/>.

⁵⁸ Khalid, Muhammad, and Tansif Ur Rehman. “Investment Protection Under Bilateral Investment Treaties of Pakistan.” *International Journal of Asian Business and Information Management* 11, no. 4 (October 2020): 44–53.
<https://doi.org/10.4018/ijabim.2020100104>.

has proposed a strategy to address this issue, recommending that the 16 unratified BITs not proceed further for ratification. Additionally, it suggests terminating 23 ratified BITs that have reached the end of their initial durations of 10, 15, or 20 years, with a notification period of six months to one year. Furthermore, the BOI proposes engaging contracting States in discussions to amend certain provisions, including those related to ISDS, fair and equitable treatment, stand-by arrangement (SBA), and expropriation.⁵⁹

Many developing nations are currently revising their BIT frameworks due to the significant financial burdens associated with them. This trend has prompted a comprehensive examination of the status and strategies concerning BITs in various emerging economies. India, for instance, has initiated a phased termination of its existing BITs and is actively engaging its BIT partners to negotiate new agreements. In this endeavor, India has developed a new template for BITs, which involves the modification of several key provisions, notably those pertaining to ISDS, fair and equitable treatment (FET), expropriation, joint interpretation, and denial of benefits.⁶⁰

3.2.1 Model BIT of Pakistan

Many nations employ investment templates, which serve as foundational documents reflecting the preferences and objectives of a country during negotiations of an investment treaty. For some time, Pakistan too, had been working on having its own BIT model to safeguard its interests while negotiating its treaties.

⁵⁹ Report, Staff. "BOI Prepares Strategy for Reforming Bilateral Investment Treaties." Profit by Pakistan Today, April 3, 2021. <https://profit.pakistantoday.com.pk/2021/04/03/boi-prepares-strategy-for-reforming-investment-treaties/>.

⁶⁰ Ghumman, Mushtaq. "Most of BITs to Be Scrapped." Breccorder, March 25, 2021. <https://www.brecorder.com/news/40077403>.

Ever since the first BIT of 1959, Pakistan has largely adopted BIT templates from other nations, lacking a distinct model of its own. Pakistan has encountered difficulties in adhering to these BITs effectively. The resultant proliferation of arbitral proceedings underscores the urgent need for revision and modernization of these agreements. Notably, the current BIT regime has contributed to the depletion of natural resources and imposed significant financial burdens on Pakistan through the defense of numerous legal cases. Recognizing these shortcomings, Pakistani authorities have embarked on crafting a bespoke model of BITs tailored to address the deficiencies of existing agreements. This initiative aims to supplant outdated BITs and serve as a more viable framework for future investment negotiations, offering a more equitable and conducive environment for sustainable economic growth.⁶¹

The Investment policy of 2013 directed the BOI to develop the BIT model of Pakistan and all new treaties will be negotiated according to this model.⁶²

The Board of Investment (BOI) consequently halted the negotiation of BITs and formulated a novel BIT template in 2021 with assistance from the Law & Justice Division and the Head of the International Investments Dispute Unit within the Office of the Attorney General of Pakistan. BOI Secretary Fareena Mazhar disclosed in July 2021 about the approval of BIT template from the Prime Minister. She articulated the strategy of negotiating all forthcoming bilateral investment treaties in alignment with the updated template. This approach aims to mitigate the risk of international arbitration and to give governments the flexibility to enact economic policies

⁶¹ Khalid, Muhammad, and Tansif Ur Rehman. "Investment Protection Under Bilateral Investment Treaties of Pakistan." *International Journal of Asian Business and Information Management* 11, no. 4 (October 2020): 44–53. <https://doi.org/10.4018/ijabim.2020100104>. Pg 49

⁶² See Provision 3.1.3 of Pakistan Investment Policy 2013.

that serve the public interest. She also said that BOI is working on a “grievance redressal mechanism” to prevent the escalation of any dispute to the level of international arbitration.⁶³

Pakistan and the Gulf Cooperation Council (GCC) recently negotiated a FTA based on this model. Pakistan negotiated the inclusion of a graduated approach for the resolution of investment disputes between investors and the state in this free trade agreement. Under this arrangement, the dispute must be settled at the domestic forums within a mandatory eight-month period. It was decided that international forums of arbitration such as Permanent Court of Arbitration (PCA) or ICSID could be used in the event that disputes could not be resolved.⁶⁴

3.3 Environmental Protection in BITs of Pakistan

Historically, Bilateral Investment Treaties (BITs) have predominantly focused on safeguarding investors' interests and guaranteeing equitable treatment from host nations. Nevertheless, amidst mounting global environmental issues, escalating apprehensions regarding the ecological ramifications of investment activities and ISDS of international forums, there has emerged a shift towards integrating environmental clauses into these agreements. This study seeks to assess the environmental stipulations within Pakistan's BITs, delving into their progression, substance, and influence on environmental stewardship.

Most of the developing countries have faced arbitration proceedings in international forum and less favorable awards in these forum led majority of the countries to review their Investment agreements. Countries have drafted their own model BIT templates. Negotiations of new

⁶³ Ahmed, Amin. “Imran Okays New Bilateral Investment Treaty Template.” DAWN.COM, July 12, 2021. <https://www.dawn.com/news/1634548>.

⁶⁴ Ghumman, Mushtaq. “BIT Template Issue Settled: Crucial FTA with GCC Finalised.” Breccorder, December 3, 2023. <https://www.breccorder.com/news/40276460>.

agreements are done according to these models. Environment related provisions which were absent in the BIT of 1990s, are currently the concern of many countries and are part of substantive provisions. This give states some regulatory powers in their countries and in way save them from disputes as most of the time disputes arise due to violation of expropriation clause. And explicitly identifying environmental concerns in investment treaties narrows the scope of expropriation.⁶⁵

Like many other countries, Pakistan is also a part to nearly fifty BITs. In fact Pakistan pioneered it by signing first ever Bilateral Investment Treaty with Germany in 1959. Over the years BIT framework of Pakistan gone through different phases. And has faced number of arbitration proceeding for the disputes arose out of these BITs. By the second decade of 21st century the criticism on current ISDS regime and the Pro Investor behavior of international forum grew strong. And countries started to review and terminate their treaties and started to introduce their Model BITs. ⁶⁶ Pakistan however, started reviewing its BIT framework proactively, after the award in Reko Dik case and Karkey award. And successfully approved its model BIT template in 2021, the text of which however, is not publicly available. But as per BOI sources the main focus was on dispute settlement mechanisms, whether the environmental conservation mentioned in the template is unclear.

The preamble of a treaty typically outlines its overarching goals and objectives, setting the tone for the specific investment provisions it contains. It acknowledges that promoting investment does not necessitate the relaxation of environmental standards. While references to

⁶⁵ Niroshika Liyana Muhandiram , and Ravneet Sandhu. “Environmental Concerns in Model BITs: A Comparative Study of India and Sri Lanka.” *Lead Journal* 19, no. 1 (May 2023): 541–58.

⁶⁶ India Introduced its Model BIT text in 2016.

environmental concerns or sustainable development in the preamble highlight the treaty's broader aspirations, they do not, in themselves, create binding rights or obligations between the parties; these references are largely aspirational and motivational. As stated by UNCTAD, preambles can be categorized into two types: traditional and non-traditional. Traditional preambles focus primarily on the protection of investments, emphasizing the importance of safeguarding investor interests. In contrast, non-traditional preambles place a greater emphasis on protecting the public interest, including environmental and social considerations, indicating a more balanced approach to investment and public welfare.⁶⁷ While the preamble itself does not establish any legal obligations, it can serve as a guiding framework for tribunals when interpreting the substantive provisions of the BIT, potentially allowing them to take environmental concerns into account.

Some BITs incorporate specific exceptions to ensure that host countries retain regulatory authority to address significant national interests.⁶⁸

Following BITs of Pakistan were analyzed during this research keeping in view of these models and other provisions were also examined which can give host state some autonomy over its regulatory powers. The Pakistan-Germany BIT of 1959, the first bilateral investment treaty, provides standard investor protections but lacks an ISDS mechanism.⁶⁹ The 2009 BIT added ISDS and subrogation clauses but remains silent on environmental issues. Similarly, the Pakistan-Turkey BIT of 1995 lacks environmental provisions, while the 2012 treaty, though not

⁶⁷ Christina L Beharry and Melinda E Kuritzky, 'Going Green: Managing the Environment Through International Investment Arbitration' (2015) 30(3) American University International Law Review 383.

⁶⁸ India's Model BIT of 2016 features Article 32, a general exception that encompasses provisions related to public health and environmental conservation. This allows India to implement necessary measures for protecting these crucial areas without violating its commitments under the BIT; See Article 32.1 of Indian Model BIT 2016

⁶⁹ See Article 11 of Pakistan Germany BIT 1959 and Article 9 and 6 of Pakistan Germany BIT 2009. Text available at; <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/1732/germany---pakistan-bit-1959->

in force, emphasizes environmental protection in its preamble and Article 5.⁷⁰ The Pakistan-Singapore BIT of 1995 indirectly addresses environmental concerns through provisions on public health and biodiversity.⁷¹ The Pakistan-China FTA of 2006, alongside their 1989 BIT, includes a preambular mention⁷² of sustainable development but no concrete environmental measures anywhere in the treaty text. The Malaysia-Pakistan CEPA of 2007 acknowledges the right to regulate in its preamble⁷³ but lacks specific environmental protections. The Pakistan-Bahrain BIT of 2014, being the latest treaty of Pakistan does not have any reference to the protection of environment in the whole treaty. Whole treaty from preamble to all the substantive provisions does not mention about the environmental protection.

Apart from these treaties, numerous BITs of Pakistan with different countries⁷⁴ were analysed for this research. The focus while examining these BITs was on different provisions, mentioning of environmental protection in the preamble or in other treaty provisions or general exceptions. However, nothing was found anywhere in these treaties about the environmental protection. All these treaties were completely silent on the matter. Majority of these BITs were signed in 1990s

⁷⁰ Article 5 ‘General Exceptions’ clause 1(a) of Pakistan Turkey BIT 2012 , Pakistan Turkey BIT 1995 and Pakistan Turkey BIT 2012 Available at <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/2726/pakistan---turkey-bit-1995->

⁷¹ Article 11; ‘Prohibitions and Restrictions’ of “Pakistan - Singapore BIT (1995) | International Investment Agreements Navigator | UNCTAD Investment Policy Hub,” n.d. <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bit/2717/pakistan---singapore-bit-1995->.

⁷² Preamble of Pak- China FTA of 2006 states: “Recognizing that this Agreement should be implemented with a view toward raising the standard of living, creating new job opportunities, and promoting sustainable development in a manner consistent with environmental protection and conservation”

⁷³ Preamble of Pakistan Malaysia CEPA states: “Mindful of the need to uphold the their rights to regulate in order to meet national policy objectives”

⁷⁴ Portugal, Spain, UK, Yemen, United Arab Emirates, Turkmenistan, Sweden, Sri Lanka, Romania, Philippines, Switzerland, Syrian Arab Republic, Tunisia, Australia, Belarus, BLEU (Belgium-Luxembourg Economic Union), Japan, Oman, Italy, Denmark, China, France, Uzbekistan, Bosnia and Herzegovina - Lebanon - Egypt - Cambodia - Lao People's Democratic Republic ,Morocco, Iran, Kyrgyzstan , Kuwait , Netherlands, Czech Republic. Texts of these treaties is available at: <https://investmentpolicy.unctad.org/international-investment-agreements/countries/160/pakistan>.

or before that. But even the treaties which were signed after that period, or the renewed treaties did not have any mentioning of environmental protection.

Examples from China and India illustrate that high FDI inflows can occur even with capital flow restrictions. Therefore, the presence of BITs alone is not sufficient to attract FDI. Instead, a well-educated labor force and technological advancement are more critical in stimulating foreign investment into a country.⁷⁵

3.4 Evolution of Environmental Jurisprudence of Pakistan

Pakistan's judiciary has been instrumental in evolving environmental protections, ensuring that they keep pace with the country's economic ambitions. Pakistan's jurisprudence on environmental protection has significantly evolved over the years, gradually expanding the scope of fundamental rights to include environmental concerns. The judiciary has played a pivotal role in recognizing environmental rights, often interpreting the right to life under Article 9 of the Constitution to include the right to a healthy environment. In the landmark case of *Shehla Zia*⁷⁶, the Supreme Court of Pakistan interpreted Article 9 of the Constitution, which guarantees the right to life, to include the right to a clean and healthy environment. This foundational case set the stage for the protection of environmental rights. The courts have since used this principle to ensure that investments do not violate citizens' fundamental rights to a clean environment.⁷⁷

⁷⁵ Khan, Mubarak Zeb. "Bilateral Investment Treaty Model." DAWN.COM, August 26, 2013. <https://www.dawn.com/news/1038303>.

⁷⁶ *Shehla Zia v. WAPDA*, 1994 SCMR 693 (Supreme Court Of Pakistan 1994).

⁷⁷ *Pakistan Chest Foundation v. Government of Pakistan*, PLD 1997 SC 137 (Supreme Court Of Pakistan 1997). In this case, the Supreme Court dealt with issues related to air pollution caused by emissions from vehicles and industries. The Court once again reiterated that environmental pollution threatens public health and well-being and thus falls within the ambit of Article 9.

In recent years, the courts have adopted principles of intergenerational equity, recognizing that environmental degradation affects not only current but also future generations. This has placed an ethical obligation on the state and society to preserve natural resources for the well-being of future generations. The judiciary has also emphasized that economic development must be aligned with environmental sustainability, and unchecked exploitation of natural resources is not permissible. The courts have been firm in ruling that economic growth must not undermine environmental sustainability.⁷⁸

In *Zahur Ahmad Wattoo v. Federation of Pakistan*⁷⁹, the court has adopted principles of intergenerational equity, recognizing that environmental degradation affects not only current but also future generations. This has placed an ethical obligation on the state and society to preserve natural resources for the well-being of future generations.

In another case,⁸⁰ The courts have made it clear that no major development project can proceed without adequate assessment of its environmental impact. This has forced government bodies and corporations to adopt more responsible and transparent practices.

In a recent case of *DG Cements Company vs Government of Punjab*⁸¹ the Supreme Court upheld the notification of provincial government which barred the construction of new cement plant in environmentally fragile zones. The court referred to precautionary principle, *in dubio pro natura*.⁸² In addition, the Court recognized the need to protect the right of nature itself, writing,

⁷⁸ Lal Din v. Federation of Pakistan (PLD 2006 SC 917)

⁷⁹ Zahur Ahmad Wattoo v. Federation of Pakistan (PLD 2011 SC 68)

⁸⁰ Khalid Mehmood v. Lahore Development Authority (LDA) (PLD 2013 SC 17) Also See: (Raja Zahoor Ahmed v. Capital Development Authority, 2022)

⁸¹ D. G. Khan Cement Company v. The Government of Punjab (2021 SCMR 834).

⁸² It is a latin maxim that suggests that if there is uncertainty about whether an activity is harmful to the environment, the doubt should be resolved in favour of protecting nature .

"man and his environment each need to compromise for the better of both and this peaceful co-existence requires that the law treats environmental objects as holders of legal rights."⁸³ The D.G. Khan Cement case is an example of how environmental regulations can become a focal point in investment disputes. It reflects the need for clarity and fairness in implementing environmental laws to avoid conflicts with investors. For Pakistan, it highlighted the importance of aligning environmental regulations with international investment obligations, ensuring that regulatory actions are transparent and consistent to avoid disputes.

Judicial interpretations have played a significant role in shaping the environmental regulatory landscape. The judiciary, through its interpretations of constitutional rights and environmental laws, has developed a robust jurisprudence on environmental protection. These judgments have reinforced the state's duty to protect the environment and have led to the development of stronger regulatory frameworks. It has been said that the enactment of Pakistan Environmental Protection Act (PEPA) 1997 is a supplementary outcome of *Shehla Zia Case*.⁸⁴

3.5 National Laws and Policies for Environmental Protection

There has been a shift toward the implementation of provisions and policies that would aid the protection of this key resource in Pakistan in view of the fundamental necessity for the conservation of biodiversity in that country. The fact that Pakistan is a party to the Convention on Biological Diversity is evidence of the country's dedication to the cause of attaining sustainable development and protecting the natural resources of the surrounding area. In an effort to put the goals of the Convention into action, protection measures have been put into place to

⁸³ (D. G. Khan Cement Company v. The Government of Punjab, 2021)

⁸⁴ Shehla Zia v. WAPDA , 1994

provide a fundamental framework for the conservation of biodiversity. These protection measures include the establishment of protected areas, sanctuaries, and the implementation of fines for the violation of the statutory restrictions. In addition, Pakistan's dedication to the preservation of its natural resources can be seen in the network of international protocols, conventions, and treaties that the country has signed and then passed into its own domestic law. The Pakistan Environmental Protection Ordinance of 1983 and the Pakistan Environmental Protection Act of 1997⁸⁵ are the two pieces of legislation that have been created by the government of Pakistan in order to provide an overall legislative framework for concerns pertaining to the environment. These Acts are supplemented by the implementation of several other Rules and Ordinances, which together offer a framework for addressing the numerous intricate environmental problems that Pakistan as a nation is currently facing. An institutional structure has been put in place by the government of Pakistan in order to facilitate the administration of these laws. For instance, Pakistan Environmental Protection Agencies (PEPAs) have been set up in each of the country's four provinces in order to advance the overarching goals of conservation and sustainable development while also enhancing the decision-making process.⁸⁶ This position is especially significant in the context of rising growth and industrial activity since there is a necessity for careful thought of the appropriateness of any activity that is suggested.⁸⁷ At the national level, the Ministry of the Environment is the primary entity responsible for addressing concerns relating to the natural world. It is responsible for the coordination of its derivative institutions, such as the Pakistan Environmental Protection Council

⁸⁵ Glicksman, Robert L., William W. Buzbee, Daniel R. Mandelker, Emily Hammond, and Alejandro Camacho. *Environmental protection: law and policy*. Aspen Publishing, 2023.

⁸⁶ See Section 8 Of the Pakistan Environmental Protection Act 1997.

⁸⁷ Esty, Daniel C. "Environmental protection in the information age." *NYUL Rev.* 79 (2004): 115.

(PEPC) and the Environmental Protection Agency (EPA),⁸⁸ and it has sections that are dedicated to the environment, urban development, and wildlife.⁸⁹ The Public Environment Policy Committee (PEPC) is in responsibility of drafting environmental legislation,⁹⁰ while the Environmental Protection Agency (EPA) is in charge of the planning and implementation activities. There have also been some significant breakthroughs in the areas of judicial administration and the interpretation of environmental legislation. Emerging procedures for the avoidance or prevention of environmental disputes stand in contrast to traditional and historically insufficient systems for dealing with concerns pertaining to the environment. Environmental Tribunals⁹¹ have been quite helpful throughout the entirety of this process due to the fact that they improve access to redress, have the ability to enforce the law, and are able to impose appropriate fines on those who breach the legal provisions. The higher courts, and in particular the Supreme Court of Pakistan, have been instrumental in the formulation and implementation of environmental legislation and programs, and their contributions have been both positive and constructive. The fundamental right to enjoy a clean environment has been regarded as being inherent within the Constitution. This not only strengthens the fundamental

⁸⁸ Section 6 of the Pakistan Environmental Protection Act 1997, outlines the establishment of the Pakistan Environmental Protection Agency, which is tasked with implementing the provisions of the Act and preparing environmental policies.

⁸⁹ Drummond, José, and Ana Flávia Barros-Platau. "Brazilian environmental laws and policies, 1934–2002: a critical overview." *Law & Policy* 28, no. 1 (2006): 83-108.

⁹⁰ Section 3 of the Pakistan Environmental Protection Act 1997, outlines the establishment of the Pakistan Environmental Protection Council (PEPC) and its functions, which include the preparation of policy recommendations related to environmental management and protection.

⁹¹ According to section 20 of Pakistan Environmental Protection Act 1997, the Federal Government "may establish" Environmental Tribunals. Section 21 and 22 provide the jurisdiction and mechanism for appeal; any order of the tribunal can be appealed in High Court.

duty to safeguard the environment, but it also widens the right of individuals to seek legal remedy for environmental wrongs.⁹²

The nation of Pakistan is just one of the many countries throughout the world that has been forced to deal with an increasing number of environmental challenges. Due to the wide variety of challenges that plague Pakistan, the country has been forced to modify its legal, institutional, and judicial frameworks in order to accommodate the increasingly challenging and sometimes catastrophic environmental scenario. This has been the case for a number of different reasons. The countries of Afghanistan, Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan, and Sri Lanka are located in the South Asia region of the world. Because of the similarities that exist between these countries in terms of their economies, societies, and cultures, the environmental problems that each of these nations faces are also of a comparable variety.⁹³

The Pakistan Environmental Protection Ordinance was issued in 1983. This was done to address environmental difficulties. The legislation's primary focus is on fostering motivation and raising awareness. Its goal is to ensure that environmental issues and considerations are factored into plans and programs for national development at the national level. The Pakistan Environmental Protection Ordinance of 1983 (PEPO, 1983) was criticized for its limited scope and several flaws. This was especially obvious in light of the fact that the Ordinance did not address many concerns that are essential to the preservation of the environment. Some of these issues include the provision of recommendations for the protection and conservation of species, habitats, and

⁹² Dietz, Thomas, and Paul Stern. "New tools for environmental protection." *Education, Information and Voluntary Measures* (2002).

⁹³ Tian, Zhihua, Yanfang Tian, Yang Chen, and Shuai Shao. "The economic consequences of environmental regulation in China: From a perspective of the environmental protection admonishing talk policy." *Business Strategy and the Environment* 29, no. 4 (2020): 1723-1733.

bio-diversity, as well as the preservation of renewable and non-renewable resources. The Pakistan Environmental Protection Ordinance of 1983 was superseded by the publication of a more comprehensive PEPO, 1997, which was subsequently adopted as an Act of the Parliament of Pakistan and given the name Pakistan Environmental Protection Act, 1997, for the purposes of legal enforcement. Institutions established as a result of PEPA in 1997. This regulation, among other things, makes doing an EIA a prerequisite for carrying out any substantial construction projects. In addition, the Ordinance provides statutory protection for the establishment of the Pakistan Environmental Protection Council (PEPC), the Pakistan Environmental Protection Agency (Pak-EPA), and provincial Environmental Protection Agencies (EPAs), and it makes provision for the formulation of national guidelines for the control of pollution.⁹⁴

The National Environmental Quality Standards (NEQS) were established as a direct consequence of this event. These standards (NEQS), which were approved by the PEPC and pertain to municipal and industrial liquid effluents, industrial gaseous emissions, as well as motor vehicle exhaust and noise.⁹⁵ Section 7 of the Pakistan Environmental Protection Act of 1997 includes specific provisions regarding penalties for violations of environmental regulations prescribed in the act.

3.6 Conclusion

Analysis of Pakistan's BITs revealed that only a few of Pakistan's BITs incorporate explicit environmental protection measures. This scarcity highlights a potential gap in ensuring that foreign investments do not compromise environmental standards. The treaties that do include

⁹⁴ See Section 5 and 8 Of Pakistan Environmental Protection Act 1997.

⁹⁵ See Section 6 (1) (g) of Pakistan Environmental Protection Act 1997.

environmental provisions generally aim to balance investment protection with environmental sustainability. These provisions often mirror Pakistan's domestic environmental laws, which are designed to safeguard natural resources, public health, and biodiversity. However, the absence of comprehensive environmental clauses in many BITs suggests a need for more robust integration of environmental considerations into future treaties.

Furthermore, Pakistan's domestic environmental framework, while robust in its legislative intent, requires stronger enforcement mechanisms and greater synergy with international agreements. Although the new BIT template text has not been made public, but is good sign that now Pakistan will sign new treaties, while keeping in mind the arbitration mechanisms and hopefully the environmental aspects as well.

CHAPTER NO.4

ENVIRONMENTAL PROTECTION AND INVESTMENTS IN UNITED STATES OF AMERICA AND MYANMAR

4.1 Introduction

When it comes to protecting the environment from potentially damaging effects of investment activity in other nations, regulatory frameworks play a crucial role. Laws, rules, and policies are enacted by governments in order to protect their respective environments from a variety of potentially harmful effects. These frameworks establish environmental standards, regulations, and allowable limitations for a variety of factors, such as pollution, emissions, waste management, and the extraction of resources. They may also choose to concentrate on particular industries, such as mining, energy, agriculture, or infrastructure, all of which frequently have considerable effects on the surrounding environment. In most cases, compliance with these standards is obligatory, and failure to do so may result in financial sanctions in the form of penalties or fines.⁹⁶

In this chapter, we examine the environmental protection measures within the international investment frameworks of the USA and Myanmar, utilizing them as comparative case studies to draw insights for Pakistan. The selection of these two countries is strategic, as they represent contrasting approaches that provide valuable lessons for Pakistan's evolving investment environment.

The USA, as a highly developed nation, has an advanced legal framework for environmental protection, both domestically and in its international agreements. This offers a model for

⁹⁶ DeSombre, Elizabeth R. *Global environmental institutions*. Taylor & Francis, 2017.

Pakistan to consider, particularly as it seeks to strengthen its own regulatory mechanisms in line with global standards. In contrast, Myanmar, a less developed nation than Pakistan, faces similar challenges in balancing economic growth with environmental sustainability. By studying Myanmar's emerging approach, it can be seen that despite political instability and economic challenges they are committed to the preservation of environment.

Both countries highlight the critical balance between fostering economic growth and ensuring environmental protection. USA demonstrates how advanced economies manage this balance through stringent regulatory frameworks and a strong emphasis on sustainability in investment agreements. Myanmar, on the other hand, where economic priorities often take precedence over environmental considerations. This comparison provides a spectrum of strategies for Pakistan to explore, offering insights into both early-stage and more advanced regulatory models.

By examining the international investment frameworks of both the USA and Myanmar, this chapter aims to provide a foundation for understanding how Pakistan can develop its own policies that balance economic development with environmental sustainability.

Developed economies like USA strive for environmental protection by in their trade and investment agreements. The way these developed countries make balance between their economic and environmental goals is model for other countries to follow.

4.2 International Investment Framework in the USA:

The regulatory landscape for FDI in USA is carefully designed to balance economic growth with national security, while also incorporating considerations of environmental protection and international treaty obligations. At the core of this framework is the Foreign Investment and National Security Act of 2007 (FINSa), which amended the Defence Production Act of 1950,

granting the President and the Committee on Foreign Investment in the United States (CFIUS) significant authority to examine and, if necessary, intervene in foreign investment transactions that could pose a risk to national security. CFIUS plays a pivotal role in ensuring that FDI aligns with the United States' broader strategic interests, particularly regarding critical infrastructure, sensitive technology, and other areas pertinent to national security.⁹⁷

While CFIUS focuses on national security, the broader legal framework for FDI in the United States encompasses various regulatory requirements, including securities laws, antitrust regulations, labor standards, and environmental protections. Environmental considerations play a crucial role in FDI regulation, with agencies like the EPA enforcing compliance with environmental laws and ensuring that foreign investments do not compromise ecological integrity.

Investment treaties further shape the landscape of FDI in USA. The country has signed numerous BITs and FTAs with various nations, which aim to promote cross-border investment by offering protections to foreign investors. These treaties offer same protections to investors which all treaties offer. While these treaties offer safeguards to investors, they do not exempt them from compliance with domestic laws, including those concerning national security and environmental protection.

⁹⁷Joseloff, Benjamin G., George Schoen, and G.J. Ligelis. "Foreign Direct Investment Regimes USA." International Comparative Legal Guides International Business Reports, November 16, 2023. <https://iclg.com/practice-areas/foreign-direct-investment-regimes-laws-and-regulations/usa>

The United States has enacted regulations to confirm that foreign investments are environmentally sustainable. Environmental assessments and reviews are mandated for certain projects, particularly those with significant environmental impacts.⁹⁸

The U.S. legal framework for FDI is complex and multifaceted, reflecting a balance between encouraging foreign investment and safeguarding national security, environmental integrity, and compliance with international treaties. The regulatory environment ensures that foreign investors operate within a framework that upholds the principles of rule of law, protects critical interests, and promotes sustainable practices. This balance continues to evolve as new challenges and opportunities arise in the global investment landscape.

The United States' engagement in global trade and investment is marked by its active participation in multilateral and bilateral agreements, reflecting its commitment to fostering international economic cooperation and regulatory frameworks. Beyond its membership in the WTO and the United States-Mexico-Canada Agreement (USMCA), the country has signed FTAs with eighteen states, each characterized by robust and enforceable provisions. Moreover, the United States has entered into over 30 BITs, delineating rights and obligations of foreign investors in the U.S. and vice versa, thereby promoting investment protection and regulatory certainty. Guiding these complex negotiations and engagements is the Office of the USTR, which spearheads interagency efforts to represent U.S. interests effectively in discussions

⁹⁸ National Environmental Policy Act of 1969. U.S. Code 42 § 4321 et seq. (1969) National Environmental Policy Act (NEPA) obliges federal agencies to evaluate the environmental effects of their actions, including those related to FDI.

pertaining to trade and investment agreements, ensuring alignment with domestic priorities and international objectives.⁹⁹

4.3 Environmental Protection and International Investment in the USA

In 1994, the United States entered into the NAFTA. Alongside NAFTA, the North American Agreement on Environmental Cooperation (NAAEC) was created in 1993 to address environmental concerns related to trade. In 2020, the United States became a party to the United States-Mexico-Canada Agreement (USMCA), which replaced NAFTA as of July 1, 2020. This transition marked a significant evolution in North American trade, emphasizing both economic integration and environmental cooperation. In 2001, the United States made additional strides toward integrating environmental considerations into its trade policy. The U.S.-Jordan Free Trade Agreement (FTA) became the first U.S. trade agreement to include enforceable environmental provisions within the main text, aiming to create a level playing field for U.S producers by ensuring that environmental obligations are upheld. This development represented a key moment in U.S. trade history, illustrating the growing importance of environmental standards in international agreements.¹⁰⁰

United States is member to approximately 48 different BITs and different agreements having investment provisions in it. Nowadays, many countries have their own Model BITs, they negotiates their treaties according these model text. United States is one of them that negotiates its BITs according to its model BIT text of 2012. The Model is extensive and have provisions of

⁹⁹ US EPA. "Environment, Trade, and Investment | US EPA," n.d. accessed 31 December 2022 <https://www.epa.gov/international-cooperation/environment-trade-and-investment>

¹⁰⁰ US EPA. "Environment, Trade, and Investment | US EPA," n.d. <https://www.epa.gov/international-cooperation/environment-trade-and-investment>.

investment protection like any standard investment treaty. Additionally it emphasize on the protection of Environment in states that are party to the treaty. Article 12 of the model text BIT is “Investment and Environment” and it emphasizes the parties for the binding and ‘recurring’ enforcement of their environmental laws.

The U.S. Trade Priorities and Accountability Act of 2015 mandates that bilateral and regional Free Trade Agreements (FTAs) incorporate environmental clauses. The Act emphasizes that participating countries should commit to not relaxing their environmental laws to gain trade advantages, and they should also maintain effective enforcement of existing environmental regulations. These stipulations aim to prevent a "race to the bottom" in environmental standards and ensure a fair competitive environment for U.S. businesses and producers.¹⁰¹

4.3.1 Environmental Protection in Investment Agreements of USA

United States-Mexico-Canada Agreement (USMCA) which substituted the old North American Free Trade Agreement (NAFTA) in 2020. When the NAFTA took effect in 1994, it was the first major free trade agreement to incorporate environmental considerations alongside economic goals. To address concerns about the environmental impacts of increased trade, the member countries entered into a supplementary agreement, the North American Agreement on Environmental Cooperation (NAAEC). This agreement aimed to ensure that environmental issues were not overshadowed by trade liberalization. The USMCA, introduced significant enhancements to these environmental provisions. It included a dedicated environmental chapter with clear commitments from each signatory to uphold high standards of environmental

¹⁰¹ *U.S. Trade Priorities and Accountability Act of 2015*. U.S. Code 19 § 4201(b) (10) and (12) (2015). Accessed 31 December 2022, <https://www.epa.gov/international-cooperation/us-trade-and-investment-agreements>

protection. This chapter incorporates core obligations to enforce environmental laws and promotes principles of transparency, accountability, and public participation in environmental governance. The USMCA's provisions mark a notable evolution from NAFTA, demonstrating a stronger commitment to environmental sustainability and a more comprehensive approach to integrating environmental policies within the framework of international trade agreements.¹⁰²

The Environment chapter (Chapter 24) in the USMCA integrates environmental provisions into the main body of the agreement, giving them binding and enforceable status. The agreement obligates the parties to take collective action to combat trafficking in timber, fish, and other forms of wildlife. Notably, the USMCA is the first U.S. trade agreement to directly address other contemporary environmental concerns like air quality and marine pollution.

Para 1 of Article 24.4 of USMCA¹⁰³ states that if a party fails to enforce its environmental laws, and this failure gives it a competitive advantage in trade or attracts investment due to a more lenient regulatory environment, it is violating this provision. This provision ensures that parties maintain a level playing field in terms of environmental enforcement, which is critical in avoiding a "race to the bottom" in environmental standards. If a country neglects to enforce its environmental laws in a way that affects trade or investment, it could gain an unfair advantage, leading to economic activities that undermine environmental protection.

¹⁰² Us, Gabrielle Wast | U. Pittsburgh School Of Law. "Dissecting and Unpacking the USMCA Environmental Provisions: Game-Changer for Green Governance?" JURIST - Commentary - Legal News & Commentary, June 6, 2020. <https://www.jurist.org/commentary/2020/06/malkawi-kazmi-usmca-environment/>.

¹⁰³ "No Party shall fail to effectively enforce its environmental laws through a sustained or recurring course of action or inaction in a manner affecting trade or investment between the Parties, 4, 5 after the date of entry into force of this Agreement." See Para 24.4 of USMCA, Available at; United States Trade Representative. "Agreement between the United States of America, the United Mexican States, and Canada 7/1/20 Text," n.d. <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between>.

The same is expressly stipulated in Para 4 of Article 24.4; the parties shall commit to promote trade and investment in environmental goods and services as a means to support environmental protection, economic growth, and sustainable development. It recognizes the role of clean technologies and related industries in improving environmental and economic outcomes, creating green jobs, and addressing broader global environmental challenges. To advance this goal, the parties commit to facilitating and promoting trade and investment in these sectors, aiming to encourage innovation and the adoption of cleaner technologies. They establish an Environment Committee to identify and address any issues that may impede trade in environmental goods and services, including potential non-tariff barriers. This committee will work with other relevant committees to find solutions and ensure that trade in these areas is free from unnecessary obstacles. Additionally, it encourages the parties to collaborate in international forums to further liberalize trade in environmental goods and services, promoting a more global approach to environmental sustainability. It also suggests that the parties may develop cooperative projects to tackle current and future environmental challenges, underscoring the importance of international cooperation in driving sustainable practices and environmental progress.

This requirement of demonstrating an impact on trade to initiate a dispute serves to connect environmental obligations with broader trade principles, while avoiding unnecessary interference in each country's domestic regulatory landscape.¹⁰⁴ The agreement also provides guidance on assessing whether a party has failed to "effectively enforce" its environmental laws. The test set forth by the USMCA involves demonstrating a "sustained or recurring" pattern of action or inaction in a manner that affects trade among the parties. This criterion plays a crucial role in

¹⁰⁴ See Article 24.32 of USMCA, Available at; United States Trade Representative. "Agreement between the United States of America, the United Mexican States, and Canada 7/1/20 Text," n.d. <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between>.

determining if environmental laws are being undermined to gain a trade or investment advantage. However, the agreement does not specifically define what constitutes "sustained or recurring," leaving room for interpretation and potential legal ambiguity.

Thus, while the USMCA integrates environmental obligations into its dispute settlement framework, the threshold for actionable violations is linked to trade impacts. This connection ensures that environmental enforcement is addressed in the broader context of trade, while also maintaining a degree of respect for national sovereignty in setting and enforcing environmental standards.

Environmental provisions under NAFTA were contained in a side agreement called the North American Agreement on Environmental Cooperation (NAAEC). This approach, separate from the main text, was seen as providing less enforceable commitments on environmental matters. While USMCA's environmental chapter includes enforceable dispute resolution mechanisms¹⁰⁵, linking environmental commitments to the overall dispute resolution structure of the agreement. This integration strengthens the accountability of member states regarding environmental protection.¹⁰⁶

The NAFTA was pioneering in its explicit inclusion of environmental considerations, the first such instance in a trade agreement. However, whether these provisions have met their objectives has been the subject of ongoing debate. With the USMCA, all signatories reaffirmed their commitment to environmental conservation and protection within their jurisdictions. Chapter 24 of the USMCA is considered highly comprehensive environmental chapter in any trade

¹⁰⁵ United States-Mexico-Canada Agreement. Chapter 24, Art. 24.32 (2020)

¹⁰⁶ Vaughan, Scott. "USMCA Versus NAFTA on the Environment." International Institute for Sustainable Development, n.d. <https://www.iisd.org/articles/usmca-nafta-environment>.

agreement, emphasizing advanced environmental governance and cooperation among member countries. This chapter underlines the need to align economic growth with sustainable practices, aiming to uphold and advance environmental standards in trade. By reinforcing the link between trade and environmental sustainability, the USMCA reflects a growing recognition that economic development should not come at the cost of ecological integrity.¹⁰⁷

4.3.2 Environmental Protection in BITs of USA

United states is one of the leading economies in the world, to facilitate its exports and protect its private investments US also has its Bilateral Investment Treaty Program- like many other countries in the world. United States' BITs offer all the standard protections being offered in every BIT. Additionally US emphasize on the environmental protection provisions to be part of its BITs,¹⁰⁸ Following are some of the United states BITs which include environmental protection measures.

US - Rwanda BIT¹⁰⁹:

Rwanda and US BIT which was signed in 2008, in its preamble it is stated that the 'objectives' of the treaty must align with protecting health, safety, and the environment, and promoting internationally recognized labor rights. Essentially, it establishes a framework where economic

¹⁰⁷ "Dissecting and Unpacking the USMCA Environmental Provisions: Game-Changer for Green Governance?" JURIST - Commentary - Legal News & Commentary (blog), June 6, 2020. <https://www.jurist.org/commentary/2020/06/malkawi-kazmi-usmca-environment/>.

¹⁰⁸ U.S. Trade Priorities and Accountability Act of 2015 that emphasizes environmental protection provisions is Section 102(b)(10).

Text - S.995 - 114th Congress (2015-2016): Bipartisan Congressional Trade Priorities and Accountability Act of 2015. (2015, May 12). <https://www.congress.gov/bill/114th-congress/senate-bill/995/text>

¹⁰⁹ "Rwanda - United States of America BIT (2008) | International Investment Agreements Navigator | UNCTAD Investment Policy Hub," n.d. <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/2870/rwanda---united-states-of-america-bit-2008->.

or other objectives should not undermine fundamental values and standards related to public health, safety, environmental protection, and labor rights. This approach ensures that progress in one area doesn't come at the expense of vital social and environmental safeguards.

Additionally Article 12 of the treaty mandates environmental protections for investments. It prohibits countries from weakening their environmental laws to attract or retain business, ensuring that new facilities, expansions, or relocations do not compromise environmental standards. Additionally, the article confirms that the agreement does not restrict a country's right to adopt, maintain, or enforce measures that align with the treaty and address environmental concerns, supporting both environmental protection and responsible investment practices.

Same protection measures are envisaged in BIT of Uruguay and United States (2005).¹¹⁰

Bahrain - United States Of America BIT (1999)¹¹¹:

Bilateral Investment Treaty of Bahrain and USA of 1999 coexists with the Bahrain-USA Free Trade Agreement (FTA) 2004. Unlike other two BITs mentioned above there is no clear mention in the provisions or in treaty text about the protection of environment. However the preamble of the treaty state: “that these objectives can be achieved without relaxing health, safety and environmental measures of general application;”

¹¹⁰ “United States of America - Uruguay BIT (2005) | International Investment Agreements Navigator | UNCTAD Investment Policy Hub,” n.d. <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/3069/united-states-of-america---uruguay-bit-2005->.

¹¹¹ “Bahrain - United States of America BIT (1999) | International Investment Agreements Navigator | UNCTAD Investment Policy Hub,” n.d. <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/362/bahrain---united-states-of-america-bit-1999->.

The statement conveys that achievement of certain trade or investment objectives does not require the relaxation of broadly applicable health, safety, and environmental regulations. In other words, the goals set forth in the agreement can be met without compromising or reducing established standards that ensure public health, safety, and environmental protection.

4.4 Environmental Protection Standard in USA

Ecological security norms in the US are a complete structure of regulations, guidelines, and strategies intended to defend the climate, advance manageability, and relieve the adverse consequences of human exercises on regular assets and environments. Environmental protection initiatives are based on a number of key federal environmental laws. The Clean Air Act (CAA) directs air emanations to keep up with air quality and diminish poisons hurtful to human wellbeing and the climate. By regulating pollutants' discharges and establishing standards for water quality, the Clean Water Act (CWA) seeks to safeguard and restore the nation's waters.

The Environmental Protection Agency (EPA) is a government office answerable for carrying out and implementing ecological regulations and guidelines. The EPA creates and implements guidelines, conducts research, gives specialized help, and supervises consistence with ecological prerequisites. It monitors compliance with environmental regulations, establishes criteria for water quality, and sets emission standards for pollutants. Through its projects and drives, the EPA assumes a vital part in safeguarding human wellbeing and the climate, guaranteeing the requirement of natural guidelines the nation over.¹¹² Executive Order 13141, issued on

¹¹² Greenstone, M. (2002). The impacts of environmental regulations on industrial activity: Evidence from the 1970 and 1977 Clean Air Act amendments and Census of Manufactures. *Journal of Political Economy*, 110(6), 1175-1219.

Also see: Environmental Protection Agency. Clean Air Act, U.S. Code 42 § 7401 and Clean Water Act, U.S. Code 33 § 1251 et seq.

November 16, 1999,¹¹³ mandates that the United States conduct environmental reviews of specific trade agreements to evaluate their potential environmental impacts within the country and, in some cases, beyond its borders. This process aims to ensure that trade agreements are aligned with environmental protection goals and consider both domestic and international environmental consequences. The environmental review process, carried out under the oversight of the U.S. Trade Representative (USTR) and the Council on Environmental Quality (CEQ), involves multiple federal agencies, with the Environmental Protection Agency (EPA) playing a pivotal role. This collaboration ensures a comprehensive assessment of how trade agreements might affect environmental quality, ecosystems, and compliance with environmental regulations. Through these reviews, the United States seeks to integrate environmental considerations into trade policy, promoting sustainability and preventing adverse environmental outcomes associated with increased trade and investment. The process provides a mechanism for identifying potential environmental risks and implementing measures to mitigate them, ensuring that trade agreements do not compromise environmental standards.¹¹⁴

In the United States, environmental protection extends beyond federal laws to include regulations from state and local governments. These regional rules, often stricter than federal standards, address specific environmental challenges. State environmental agencies enforce these laws, issue permits, and monitor compliance based on local needs.¹¹⁵

¹¹³ Executive Order No. 13141. 2000. *Code of Federal Regulations*, 3 C.F.R. 217. Accessed [January 3, 2024]. <https://www.govinfo.gov/content/pkg/CFR-2000-title3-vol1/html/CFR-2000-title3-vol1-eo13141.htm>.

¹¹⁴ US EPA. "U.S. Trade and Investment Agreements | US EPA," January 3, 2024. <https://www.epa.gov/international-cooperation/us-trade-and-investment-agreements>.

¹¹⁵ Waldman, Kurt B., and John M. Kerr. "Limitations of certification and supply chain standards for environmental protection in commodity crop production." *Annu. Rev. Resour. Econ.* 6, no. 1 (2014): 429-449. Esty, Daniel C., and Damien Geradin. "Environmental protection and international competitiveness." *J. World Trade* 32 (1998): 5.

Environmental Impact Assessment (EIA) is crucial for environmental protection in the USA. Under the National Environment Policy Act (NEPA), federal agencies must assess the environmental impacts of major projects, propose mitigation, and ensure these factors are considered in project approvals.¹¹⁶ This promotes informed decision-making and integrates environmental concerns into planning.¹¹⁷

Environmental regulations target production activities and waste disposal, aiming to reduce emissions and protect the environment. These rules are essential for ensuring businesses adopt eco-friendly practices, although some companies see them as costly burdens.¹¹⁸

4.5 Environmental Protection in Investment Law of Myanmar

The government of Myanmar prioritizes investment law to boost economic growth and attract foreign investment, especially from neighboring ASEAN countries. The initial Foreign Investment Law, established after the 1988 coup, spurred investment, particularly from Japan in the mid-1990s. However, Myanmar's ASEAN membership in 1997 led to political criticism and economic sanctions by the US and EU, slowing investment.

Following the 2008 Constitution's enactment in 2011, investment surged again. The Foreign Investments Law, revised in 2014, and the Myanmar Citizens Investment Law were part of this resurgence. To further attract foreign investment, the Ministry of Planning and Economic

¹¹⁶ National Environmental Policy Act of 1969." U.S. Code, 42 U.S.C. § 4332. Accessed January 3, 2024. <https://www.govinfo.gov/content/pkg/USCODE-2010-title42/html/USCODE-2010-title42-chap55.htm>.

¹¹⁷ McCright, Aaron M., Chenyang Xiao, and Riley E. Dunlap. "Political polarization on support for government spending on environmental protection in the USA, 1974–2012." *Social science research* 48 (2014): 251-260.

¹¹⁸ Esty, Daniel C., and Damien Geradin. "Environmental protection and international competitiveness." *J. World Trade* 32 (1998): 5.

Development, with OECD support, proposed a new investment law in 2015.¹¹⁹ Although the draft was initially suspended, minimal amendments were made in late 2015.¹²⁰ Based on these laws on Special Economic Zones were issued in 2014 and 2015.¹²¹ Article 45 of the Constitution of Myanmar, which was last updated in 2008, mandates that "the Union shall protect and conserve natural environment." In addition, clause (b) of Article 390 stipulates that "every citizen has the duty to assist the Union in carrying out the following matters,

The protection and maintenance of the world's cultural heritage

1. Environmental conservation
2. Working towards the growth of available human resources
3. The safeguarding and maintenance of publicly owned property

This signifies the greatest level of commitment that the Republic of the Union of Myanmar has made to the responsible management of the environment."¹²²

Article 3(a) of Myanmar Investment Law 2016 clearly states the objective of the law as; "to develop responsible investment businesses which do not cause harm to the natural environment and the social environment for the interest of the Union and its citizens."

¹¹⁹ Findlay, Ronald, Cyn-Young Park, and Jean-Pierre A. Verbiest. "Myanmar: building economic foundations." *Asian-Pacific Economic Literature* 30, no. 1 (2016): 42-64.

¹²⁰ Ishida, Masami. "Evaluation of the New Foreign Investment Law in Myanmar: Is it Market-Friendly, or Not?." (2013).

¹²¹ Law No. 1/2014 and Notification No. 1/2015 on Myanmar Special Economic Zones were issued by the Ministry of Planning and Economic Development. These two pieces of legislation combined the previous Law No. 8/2011 on SEZs with the Law No. 17, which provides special privileges in addition to the normal standards given by the normal investment law

¹²² Skidmore, Monique, and Trevor Wilson. *Myanmar: state, community and the environment*. ANU Press, 2007.

The modernization and enforcement of environmental policy and legislation are both being worked on as part of Myanmar's ongoing reform process. The government of Myanmar has made it clear that it is dedicated to a course of growth that will not only be beneficial for the country's economy, but would also be socially and environmentally sustainable for its people. This vision is also articulated in both the Framework for Economic and Social Reform 2013 (FESR 2013) and the National Comprehensive Development Plan 2011-2030 (NCDP 2011-2030).¹²³

Both domestic and international investors in Myanmar must consider the effects of Myanmar's Environmental Conservation Law (ECL 2012) and its accompanying Rules (ECL Rules 2014). The responsibilities and authorities of the Ministry of Environmental Conservation and Forestry (MOECAF) are outlined in Article 7 of the ECL. These responsibilities and authorities include the following:¹²⁴ establishing guidelines for environmental quality with regard to emissions, effluents, solid waste, industrial techniques, processes, and goods providing assistance in the resolution of environmental disagreements

Defining the various types and categories of hazardous waste that are produced as a result of the manufacturing and use of chemicals and other potentially harmful substances in the context of various industries and activities, such as agriculture, mineral extraction, municipal sanitation, and others identifying classes of potentially harmful compounds that could have a substantial impact on the environment. The terms and conditions for the treatment of wastewater in industrial estates, buildings, and other locations, as well as the emissions of machines, vehicles, and mechanisms, are going to be prescribed.

¹²³ Raitzer, David, Jindra Nuella Samson, and Kee-Yung Nam. "Achieving environmental sustainability in Myanmar." *Asian Development Bank Economics Working Paper Series* 467 (2015).

¹²⁴ Wang, Changjian, Fei Wang, Qiang Wang, Degang Yang, Lianrong Li, and Xinlin Zhang. "Preparing for Myanmar's environment-friendly reform." *Environmental science & policy* 25 (2013): 229-233.

Creating and putting into action a methodology for conducting environmental impact assessments (EIAs) and social impact assessments (SIAs) forcing polluters to pay compensation for the environmental impacts they cause; collecting monies from organizations that profit from natural ecosystems and income from corporations that explore, trade, and use natural resources in order to support environmental conservation efforts; and the MOECAAF, with the agreement of the Union Government, can designate types of businesses, work-sites, factories, or workshops that produce environmental consequences to require 'prior permission' according to the ECL Chapter 10 'Prior Permission', Articles 21-25. This is described in the ECL. Additional information regarding "Prior Permission" can be found in the ECL Rules, Chapter 12: "Prior Permission," Articles 62-68.

Myanmar Investment Law of 2016 (The Pyidaungsu Hluttaw Law No. 40/2016) in its article 65(q), 66 and 67 makes it the responsibility of Investor to get a permit from the investment commission for the investments which require prior approval under ECL.

Whereas New Environmental Quality Standards (EQS), Environmental Impact Assessment (EIA), and Social Impact Assessment (SIA) methods were all approved for use in Myanmar in the year 2016. In order for previous investments to be in compliance with Myanmar's ever-changing environmental legislation, it is possible that new constraints would be linked to them. Investors who are confused as to whether or not they are required to meet particular environmental criteria can receive additional information from the Environmental Conservation Department (ECD), which is part of MOECAAF.¹²⁵

¹²⁵ Dapice, David. *Current economic conditions in Myanmar and options for sustainable growth*. No. 1434-2016-118832. 2003.

Testing of the new EIA system has been carried out by ECD in collaboration with other ministries. More than 123 different investment projects have received help, guidance, and review in the form of environmental assessments thanks to ECD's efforts. This covers forty projects that had full EIAs completed by the end of 2014, the majority of which were in the energy, infrastructure, and manufacturing sectors.¹²⁶

Investors are highly encouraged to become familiar with Myanmar's environmental legislation before making any financial commitments there. Compliance with Myanmar's national environmental regulatory framework is one way in which investors can help Myanmar advance its efforts to encourage more responsible investment. It is also possible for foreign investors to take into account the environmental and social standards that govern their operations in other countries and to use industry best practices in order to protect the environment and the wellbeing of people in Myanmar.¹²⁷

4.6 Comparison of Environmental Protection in Developing Countries with Developed Countries

Countries tackle environmental protection differently, with varying speeds, rigor, and approaches. While some prioritize addressing environmental challenges in developing nations over stricter regulations. On the other hand, sentiments in developing countries can vary substantially and have been known to shift rather suddenly.¹²⁸

¹²⁶ Nyunt, Myo. "Development of environmental management mechanism in Myanmar." *Asia Europe Journal* 6 (2018): 293-306.

¹²⁷ '(PDF) Issues in Myanmar Investment Law : Toward Better Policy Balancing | Naing Ye - Academia.Edu', accessed 9 July 2023, https://www.academia.edu/102261799/Issues_in_Myanmar_Investment_Law_Toward_Better_Policy_Balancing.

¹²⁸ Simpson, Adam. "Starting from year zero: Environmental governance in Myanmar." In *Environmental Challenges and Governance*, pp. 176-189. Routledge, 2015.

The United Nations acknowledges, on a global scale, that the industrialized countries bear a greater responsibility for the conservation of the environment. The industrialized nations have been the primary contributors to global warming throughout recorded history; but, big developing nations such as China and India are now adding to that stock.¹²⁹

Since emissions are the primary factor in climate change, the industrialized nations need to drastically cut their carbon output if they want to protect the natural world they live in. This cut needs to be total and substantial.¹³⁰ The emissions that are produced by developed countries and since the emissions that are produced by wealthy countries are of a lifestyle character, whilst the emissions that are produced by poor countries are of a survival nature.¹³¹

The industrialized nations have been accomplishing this goal by putting their attention solely on the emissions that are taking place at the present time while neglecting the stock of emissions that has already been released into the atmosphere as a direct result of their actions. The wealthy countries have the resources to create cutting-edge technology that can tackle environmental pollution; nevertheless, the emerging countries and the less developed countries are the ones who will ultimately have to bear the brunt of the repercussions.

Environmental protection has become an increasingly important issue globally as the negative impacts of industrialization and economic growth on the environment have become evident.¹³²

¹²⁹ Ibid, 188.

¹³⁰ Hironaka, Ann. "The globalization of environmental protection: The case of environmental impact assessment." *International Journal of Comparative Sociology* 43, no. 1 (2002): 65-78.

¹³¹ Yanful, Ernest K., ed. *Appropriate technologies for environmental protection in the developing world*. Springer Netherlands, 2009.

¹³² Xu, Sa, and Zejun Li. "The Impact of Innovation Activities, Foreign Direct Investment on Improved Green Productivity: Evidence From Developing Countries." *Frontiers in environmental science*, February 4, 2021. <https://doi.org/10.3389/fenvs.2021.635261>.

Developed countries have shown a greater interest and dedication to environmental protection compared to developing countries. This can be seen in the way developed countries have implemented strict environmental regulations and restrictions on high-pollution and high-energy consumption industries within their own borders, while also actively adopting sustainable practices and investing in renewable energy sources. On the other hand, developing countries, driven by the need for economic growth and attracting foreign investments, often prioritize economic development over environmental sustainability. Developing countries may relax environmental standards and regulations to attract foreign investments, resulting in the establishment of polluting industries and becoming a pollution shelter for developed countries. Furthermore, foreign direct investment plays a significant role in influencing environmental protection efforts in both developed and developing countries. Developed countries, with their advanced technology, management expertise, and financial resources, have the potential to contribute to technological innovation in developing countries. This can lead to improvements in environmental practices and the adoption of cleaner production processes. Moreover, open markets and increased trade can also contribute to environmental protection in developing countries. For instance, increased trade can lead to economic growth, development, and social welfare, which in turn can provide developing countries with the capacity and resources to manage their environment more effectively. Despite these potential benefits, it is important to acknowledge that economic growth in developing countries can come at a high environmental cost. Developing countries often face challenges in balancing economic growth with environmental protection. One main challenge is the trade-off between attracting foreign investments and maintaining environmental standards. Developing countries may feel pressured to relax environmental regulations in order to attract foreign investments and stimulate economic

growth. This can result in negative environmental impacts, such as increased pollution and resource depletion. Furthermore, the reliance on foreign investments can also lead to a lack of control over the environmental practices of multinational corporations operating within their borders. These multinational corporations may prioritize profit over environmental sustainability, leading to further degradation of the environment in developing countries. In contrast, developed countries have recognized the importance of protecting their own resources and addressing environmental issues. They have implemented strict environmental regulations to restrict the development of high energy consumption and high pollution industries. Developed countries have also shifted polluting industries to developing countries to avoid domestic environmental regulations and costs. In order to attract foreign capital, developing countries often relax their environmental standards, leading to a concentration of pollution-intensive industries

While both developing and developed countries recognize the importance of environmental protection, disparities in resources, governance, and socio-economic conditions result in varying levels of commitment and effectiveness in addressing environmental challenges. Developed countries typically have stronger environmental regulations, better enforcement, and more resources for technology and public awareness. They've already undergone industrialization, so they focus on managing resources sustainably. Developing countries struggle with weaker regulations, limited resources, and balancing economic growth with environmental protection. They often rely on international support and face challenges in implementing sustainable practices amidst rapid industrialization and resource exploitation.

4.7 Conclusion

The preservation of the environment from the activities of international investment in other nations is a significant issue that calls for attention and action. Many countries recognize the need to balance economic development with environmental sustainability and have implemented various measures to protect their environment from potentially harmful investment activities. This is done with the goal of minimizing the amount of environmental resources that are lost in the sake of accelerating short-term development. Developed countries have shown greater interest in incorporating environmental protection measures in their economic programs, given their high levels of prosperity and economic growth.¹³³ In addition, the usability of the environment and the normativity of its usage are useful measures for protecting the environment according to the model described above. The conservation of the environment in a sustainable manner not only provides advantages for the environment, but also facilitates the more effective upkeep of an economically stable development.

¹³³ Schwietzke, Joachim. "International Agreements on the Environment and Their Sources." *International journal of legal information*, January 1, 1992. <https://doi.org/10.1017/s0731126500007502>.

CHAPTER NO. 5

LACUNAS IN ENVIRONMENTAL PROTECTION WITHIN PAKISTAN'S INVESTMENT FRAMEWORK

Environmental protection within Pakistan's investment framework is a critical aspect of sustainable economic development. However, Pakistan faces significant challenges in integrating environmental concerns effectively into its investment regime.

Pakistan often relies on foreign investment and has signed numerous BITs without fully understanding their environmental implications. While these BITs have brought some benefits, they have also led to costly investment claims settled by international institutions, draining foreign exchange reserves. Despite these challenges, Pakistan continues to depend on BITs to attract investment in the current economic climate.¹³⁴

While Pakistani BITs offer extensive protections to investments from other treaty countries on a global scale, their benefits to Pakistan itself are limited. As a host state, BITs stress on reciprocal commitments, which are crucial for attracting foreign investments but this reciprocity is in fact very rare.

This chapter explores the lacunas in the current legal, regulatory, and enforcement mechanisms that hinder robust environmental protection while attracting foreign direct investment (FDI).

5.1 Legal and Regulatory Gaps

a) Lack of Comprehensive Environmental Protection in Investment Agreements:

¹³⁴ International Journal of Asian Business and Information Management Volume 11 • Issue 4 • October-December 2020 Muhammad Khalid, Faculty of Law, University of Karachi, Pakistan

Pakistan's Bilateral Investment Treaties (BITs) provide minimal focus on environmental sustainability, prioritizing investor rights over environmental obligations. Most BITs lack enforceable environmental provisions, as they primarily emphasize investor protections such as fair and equitable treatment, full protection and security, and non-discrimination, without mandating explicit environmental responsibilities for investors.¹³⁵ The absence of such provisions results in scenarios where foreign investors are not legally bound to adhere to Pakistan's environmental regulations, thereby limiting the government's ability to enforce sustainable practices in investment projects.¹³⁶ Even the environmental protection measures which are mentioned in the Investment Agreements are vague and does not have firm stance against the investor. Some of these treaties have provided for environmental conservation in the preamble of the agreement, which remains as mere motivation but does not employ strict accountability for environmental contamination.

Additionally, Pakistan's BITs generally do not integrate mechanisms that require investors to conduct Environmental Impact Assessments (EIA) or comply with sustainability reporting standards, further exacerbating the risk of environmental degradation from foreign-funded projects.¹³⁷ In contrast, progressive investment treaties in other jurisdictions incorporate explicit environmental obligations, such as commitments to green technology transfers, renewable

¹³⁵ Khan, Z. 2021. *Foreign Direct Investment and Environmental Law: The Case of Pakistan's BITs*. Islamabad: Trade and Investment Journal.

¹³⁶ Hassan, N. 2018. *Legal Gaps in Pakistan's Environmental Protection Laws*. Karachi: Environmental Law Institute.

¹³⁷ Ali, F. 2019. *Environmental Law and Investment: A Case for Strengthening EIA Frameworks in Pakistan*. Islamabad: Sustainable Future Institute.

energy projects, and adherence to international environmental standards.¹³⁸ Pakistan's BITs, such as those with China (1989) and Germany (2009), focus primarily on investor rights like fair treatment, compensation, and protection against expropriation. These treaties lack explicit clauses that mandate investors to conduct EIAs or adhere to local environmental laws as a precondition for project approval. Current BITs Prioritize Investor Protections Over Environmental Safeguards which resultantly give way for exploitation of environment. Investment or trade agreements of some other countries as USMCA have elaborative environmental protection measures in it.

Another significant issue is the absence of Investor-State Dispute Settlement (ISDS) mechanisms that take environmental considerations into account. In several cases, foreign investors have challenged regulatory measures of host state aimed at environmental protection under BITs, arguing that such measures constitute indirect expropriation or violate the fair and equitable treatment standard.¹³⁹ This has resulted in regulatory chill, where the government hesitates to implement stricter environmental regulations for fear of international arbitration claims, as seen in the *Tethyan Copper Company v. Pakistan* case.¹⁴⁰

b) Lacunas in Domestic Laws and Policies:

¹³⁸ Rahman, S. 2020. *Public Participation in Environmental Decision-Making in Pakistan*. Lahore: Policy and Law Journal.

¹³⁹ Farooq, M. 2019. *Investor-State Dispute Settlements and Pakistan: Environmental Implications*. Karachi: Legal Perspectives Publishing.

¹⁴⁰ Malik, A. 2020. *Tethyan Copper Case: Lessons for Pakistan's Investment Policy*. Karachi: Corporate Law Review.

The Pakistan Environmental Protection Act (PEPA) 1997 primarily focuses on regulating pollution and establishing environmental governance structures but lacks direct provisions that integrate environmental responsibilities into investment laws. This results in a legal vacuum where foreign investors are not explicitly required to adhere to environmental obligations beyond general compliance with PEPA's provisions.

PEPA 1997 does not incorporate environmental obligations into Bilateral Investment Treaties (BITs) or Foreign Direct Investment (FDI) policies. Unlike modern investment frameworks that mandate environmental responsibility clauses, Pakistan's BITs focus on investor rights without clear obligations toward environmental protection.¹⁴¹ While PEPA 1997 mandates Environmental Impact Assessments (EIAs) under Section 12, these assessments are required only for "projects likely to cause adverse environmental effects," without specifying investment-driven projects or foreign-funded industries. In contrast, countries like USA integrate environmental review directly into investment approvals, ensuring that foreign investments align with sustainability goals.

The Foreign Private Investment (Promotion and Protection) Act, 1976 and Special Economic Zones Act, 2012 incentivize foreign investment but do not impose strong environmental obligations. In contrast, nations such as USA and Canada have green investment standards embedded in investment policies to ensure foreign investors meet sustainability criteria. A comparison between Pakistan's BITs and its domestic law, specifically the Foreign Private Investment (Promotion and Protection) Act of 1976, reveals that the scope of investment

¹⁴¹ Khan, Z. 2021. *Foreign Direct Investment and Environmental Law: The Case of Pakistan's BITs*. Islamabad: Trade and Investment Journal.

protection provided under BITs is significantly broader than that provided by this statute.¹⁴² BITs of Pakistan, provides much broader definition of investment. The said definition is also broader than the national legislation.¹⁴³

5.2 Enforcement Challenges

a) Weak Regulatory Institutions

Pakistan's Environmental Protection Agency (Pak-EPA) faces significant challenges in fulfilling its mandate to safeguard the environment, largely due to resource constraints, inadequate technical expertise, and ineffective monitoring mechanisms. The agency operates with limited financial resources, which hampers its ability to implement and enforce environmental regulations effectively. Additionally, the lack of specialized technical knowledge among staff limits the agency's capacity to assess and address complex environmental issues, including pollution control, biodiversity conservation, and sustainable development. Furthermore, the weak monitoring and enforcement mechanisms within Pak-EPA exacerbate the situation, as there is insufficient oversight and follow-up on environmental violations. This combination of inadequate resources, limited expertise, and poor monitoring results in suboptimal environmental management, ultimately undermining the agency's ability to protect Pakistan's natural resources and promote sustainable environmental practices.

¹⁴² Khalid, Muhammad, and Tansif Ur Rehman. "Investment Protection Under Bilateral Investment Treaties of Pakistan." *International Journal of Asian Business and Information Management* 11, no. 4 (October 2020): 44–53. <https://doi.org/10.4018/ijabim.2020100104>. pg 46

¹⁴³ the Article 2 of Foreign Private Investment (Promotion and Protection) Act, 1976 defines investment as under: - "Foreign Private Investment means an industry, undertaking, or establishment engaged in the production, distribution or processing of any goods, the providing of services specified in this behalf by Federal Government or the development and extraction of such mineral resources and products as may be specified in this behalf by the federal Government."

b) Investor-State Dispute Settlement (ISDS) and Environmental Cases

The Investor-State Dispute Settlement (ISDS) mechanism, embedded in Pakistan's Bilateral Investment Treaties (BITs), allows foreign corporations to challenge government actions, including environmental regulations, by asserting that these actions constitute expropriation. Under this mechanism, corporations can file lawsuits against the state for alleged violations of their investment rights, particularly when they believe that government measures, such as environmental protection laws or regulations, negatively impact their business interests. The ISDS process can undermine national policy space by restricting the government's ability to adopt and enforce regulations in the public interest, particularly in areas like environmental protection, without the fear of costly lawsuits. This can create a chilling effect, discouraging the state from implementing or strengthening regulations that may be perceived as detrimental to foreign investors. In practice, this situation can lead to a shift in decision-making power, as the state may prioritize protecting foreign investments over environmental or public health concerns, ultimately compromising national sovereignty and policy autonomy.¹⁴⁴

c) Corruption and Political Influence

Corporate lobbying and political interference play a significant role in undermining environmental regulations in investment projects, often leading to weakened enforcement and reduced effectiveness of environmental protection measures. In many cases, corporations, particularly large multinational companies, use their financial power and influence to lobby government officials and policymakers in ways that prioritize economic gains over environmental concerns. This can result in the dilution or even elimination of regulations

¹⁴⁴ Ali, F. 2019. *Environmental Law and Investment: A Case for Strengthening EIA Frameworks in Pakistan*. Islamabad: Sustainable Future Institute.

designed to protect natural resources and public health. Political interference, often fuelled by corporate interests, can pressure regulators to adopt lenient policies, delay the implementation of critical environmental safeguards, or overlook violations, all of which hinder the proper enforcement of environmental laws. As a result, the intended goals of sustainable development and environmental conservation in investment projects are compromised, contributing to long-term ecological harm and the erosion of public trust in the regulatory process

5.3 Challenges in Aligning Environmental Protection With Economic Growth:

Aligning environmental protection with economic growth presents a complex challenge, particularly in the context of developing countries. One significant barrier is the fear of capital flight, where governments dilute environmental standards to attract foreign investments. Capital flight refers to the outflow of investments due to unfavourable conditions, such as strict regulations, which may discourage investors from committing to the country. To mitigate this, governments often reduce environmental regulations in sectors like energy, mining, and manufacturing, where the cost of compliance can be high. While this may attract much-needed investments, it creates a trade-off between short-term economic growth and long-term environmental sustainability. Such a compromise can lead to long-term environmental degradation, including air and water pollution, deforestation, and biodiversity loss.¹⁴⁵

Moreover, there is a conflict between development priorities and environmental sustainability, especially in sectors like mining, energy, and infrastructure. These sectors are vital for economic

¹⁴⁵ Kamal, A. 2020. *The Impact of Environmental Regulations on Foreign Investment: The Case of Developing Economies*. Journal of Environmental Economics 15 (3): 210-230.

development, contributing significantly to GDP and employment, yet they often involve practices that harm the environment. The extraction of natural resources, reliance on fossil fuels, and large-scale infrastructure projects lead to carbon emissions, ecosystem disruption, and resource depletion. Governments frequently face the difficult decision of balancing the immediate economic benefits of these sectors with the need to protect the environment for future generations. In many cases, the pressure to pursue rapid industrialization and urbanization overshadows the imperative for sustainable practices.¹⁴⁶

Another challenge lies in investor reluctance to adopt green technologies due to the perceived short-term costs. Green technologies, such as renewable energy systems and pollution-control mechanisms, often require high initial investments compared to traditional, polluting methods. Investors are typically hesitant to embrace these technologies because of the significant upfront capital required and the uncertainty surrounding long-term returns. Moreover, the potential for stricter environmental regulations and unpredictable market demand for environmentally friendly products adds to the financial uncertainty. As a result, many investors prioritize short-term profits over long-term sustainability, hindering the transition to greener and more sustainable economic models.¹⁴⁷

Together, these challenges underscore the difficulty of reconciling economic growth with environmental protection. While capital flight, development priorities, and investor reluctance all pose significant barriers, they highlight the need for innovative solutions that incentivize green

¹⁴⁶ Shah, R. 2021. *Development versus Sustainability: Balancing Priorities in Resource-Intensive Sectors*. Global Environmental Change 36 (4): 40-55.

¹⁴⁷ Malik, S. 2022. *Barriers to Adopting Green Technologies in Emerging Markets: An Economic Perspective*. International Journal of Sustainable Development 28 (2): 145-160.

technologies, implement long-term policy frameworks, and find ways to integrate environmental sustainability into economic development strategies.

5.4 Conclusion:

Although Pakistan is member to numerous BITs and has domestic laws and policies with investment and environmental protection. But these laws and policies are not coherent to deal with the environmental protection against investments. Investment treaties and trade agreements of Pakistan lack enforceable or strong environmental measures. The legal vacuum in PEPA 1997 results in a fragmented approach, where environmental governance is not fully integrated into investment policies, leading to regulatory loopholes. The lack of EIA requirements in Pakistan's BITs undermines environmental assessments, making investment projects less sustainable. In addition to these lacunas in legal framework the deficiencies in regulatory actions and political interference also affect the proper enforcement of environmental protection measures.

CHAPTER NO.6

CONCLUSION AND RECCOMENDATIONS

6.1 Conclusion

The conclusion of the whole research on the title “*The Impact Of Investments On Environment: A Study Of Environmental Protection In Bilateral Investment Treaties Of Pakistan*” is that the signing of bilateral investment treaties (BITs) may have a considerable influence on Pakistan's efforts to protect the environment, both in terms of the good contributions they make and the difficulties they provide. On the bright side, bilateral investment treaties (BITs) have the potential to act as drivers of foreign direct investment (FDI), which can offer nation cutting-edge technologies, specialized knowledge, and financial resources. These investments have the potential to contribute to sustainable development as well as the protection of the environment by supporting more energy efficient technology, conserving natural resources, and reducing carbon emissions. The gap in finance for environmental projects can be helped to be bridged with the assistance of foreign direct investments (FDI), which can also help promote the implementation of sustainable practices in industries such as water conservation, waste management, and renewable energy.

In addition, certain BITs incorporate measures that promote environmentally conscious investment practices and responsible investment practices in general. These provisions have the potential to contribute to the protection of the environment by obligating investors to comply with environmental standards that are recognized internationally, to carry out environmental impact assessments, and to put into place mitigation strategies. These clauses can serve as a tool to ensure that investors are held accountable for their activities and that their operations are in compliance with environmental legislation and standards.

However, there are obstacles to overcome in relation to the influence that investments protected by BITs have on the surrounding ecosystem. Investors may, under certain circumstances, place a higher priority on short-term economic advantages than they do on environmental considerations, which can lead to practices that are not sustainable and environmental damage. This can be an especially troublesome situation in situations when there are inadequate regulatory frameworks, insufficient monitoring and enforcement systems, or little capacity to properly handle environmental concerns. It is essential for Pakistan to develop its regulatory frameworks and enforcement procedures in order to avoid and repair environmental damage caused by investments from other countries.

6.2 Recommendations:

A number of recommendations can be considered to address the lacuna that exist in current legal and regulatory framework of Pakistan. These recommendations are imperative to protect the environment from contamination caused by investors and to enhance the positive impact of investments on the environment.

a) Integration of Environmental Protection Measures in BITs:

Pakistan ought to examine and bring its BITs up to date in order to integrate stringent environmental safeguards. These protections can include rules that force investors to conform to internationally accept environmental standards, regulations that promote sustainable practices, and laws that provide for environmental impact assessments as part of the investment process.

Enhance Environmental Protections In order to make the most of the positive influence that foreign investments can have on environmental protection, Pakistan should evaluate and revise

the Bilateral Investment Treaties (BITs) that it has in place, so that they incorporate more stringent environmental protections. These safeguards should include rules that clearly compel investors to adhere to internationally recognized environmental standards and practices. These safeguards should also include clauses that prevent investors from being discriminated against. By including these stipulations in its BITs, Pakistan would be able to assure that the environmental objectives of foreign investors are met and that these investments will help the country move toward sustainable development. These clauses can include agreements to reduce emissions of greenhouse gases, conserve natural resources, safeguard biodiversity, and encourage sustainable land and water management techniques.

b) Improve Arbitration Mechanism in BITs:

To address potential misinterpretations of environmental provisions in BITs by arbitration tribunals, one effective strategy is to include an ouster clause. This clause would assign national courts the jurisdiction to adjudicate environmental issues within the investment context, thereby excluding arbitrators from making these decisions. According to the doctrine of the margin of appreciation, national courts are better equipped than international tribunals to handle environmental matters, given their deeper understanding of local contexts and legal frameworks. Although Pakistan has focused on arbitration mechanism in its new model BIT but addition to that the provisions related to expropriation need to be revised to inhibit the investor from claiming any environmental regulation as expropriation. Furthermore, a specialized environmental dispute resolution mechanism should be established to handle investor-state environmental conflicts, reducing reliance on Investor-State Dispute Settlement (ISDS), which often favors investors over environmental concerns.

c) Integration of Compensatory Clause in BITs

Additionally, BITs should incorporate a compensatory clause to enhance the enforceability of environmental protections. The current provisions often lack the necessary strength to hold investors accountable. By mandating that investors compensate for any environmental damage resulting from their activities, these treaties would ensure that environmental considerations are not merely symbolic but have tangible enforcement mechanisms. This would align investment activities with sustainable development goals and promote greater environmental responsibility among investors.

d) Legislative Amendments

Legislative amendments are required to align investment laws with environmental sustainability. The Foreign Private Investment (Promotion and Protection) Act, 1976, Pakistan Environmental Protection Act (PEPA) 1997 and other investment and environment related laws must include binding environmental commitments for foreign investors, ensuring that economic growth does not come at the cost of environmental degradation. Through a holistic legal and policy overhaul, Pakistan can create a sustainable investment climate, fostering economic development while preserving its natural resources for future generations.

e) Strong and Rigorous EIA

Enhance the Rigor and breadth of Environmental Impact Assessments It is essential for Pakistan to improve the level of rigor and breadth of environmental impact assessments if it is to effectively control the environmental implications of foreign investments. It is recommended that the government develop exhaustive rules for the conduct of these studies, making certain that they address any and all potential environmental risks and impacts that are related with

investment projects. It should be required for all proposed investments, but especially for those that would take place in environmentally sensitive locations or include sectors that have major environmental footprints, to do environmental impact assessments. Pakistan has the ability to identify potential threats and adopt suitable mitigation actions to safeguard the environment provided it conducts thorough assessments of the situation.

f) Building Capacity

In order to successfully monitor the effect that foreign investments have on the environment and effectively enforce environmental legislation, Pakistan should engage in programs that increase capacity. These programs ought to center on improving the regulatory and monitoring capacities of the government agencies that are in charge of environmental protection. Training for regulatory authorities should be offered so that they have a better awareness of environmental laws, rules, and enforcement methods. In addition, the development of technical skills should be prioritized so that regulators have the ability to evaluate and verify that environmental standards are being met. Pakistan has the ability to ensure that environmental legislation are successfully enforced and that foreign investors adhere to environmental standards if it builds the institutional capability to do so.

g) Participation of the Public

Pakistan should encourage participation of the public in decision-making processes connected to foreign investments in order to ensure openness, accountability, and inclusivity in these processes. The process of evaluating the effects of a project on the environment should include consultation with the public as an essential component. This would give local communities, civil society groups, and other relevant stakeholders the opportunity to provide feedback, voice

concerns, and participate in decision-making. In order to encourage meaningful participation, it is important to make public hearings, community meetings, and access to project information more accessible. By including members of the public in the decision-making process, Pakistan is able to take into account a variety of viewpoints, address the concerns of the community, and promote ecologically friendly investments that are in line with the requirements of the area.

The direction that Pakistan's environmental future takes will be largely determined by the policies and institutional reforms implemented by the government. Few innovations will take place if there is not a policy climate that is receptive to them and an incentive structure that is favorable to them. In the absence of foreign technology transfer, it is unlikely that existing technologies would be replaced with cleaner alternatives. This is especially true when considering the substantial costs associated with such changes. The direction that Pakistan's environmental future takes will be largely determined by the policies and institutional reforms implemented by the government. The effectiveness with which finite natural resources and environmental assets are used will not become more efficient until policymakers begin to more accurately price these assets and resources.

Policymakers will also need to do the following:

- (i) eliminate environmentally harmful subsidies gradually;
- (ii) define property rights in a more precise manner; and
- (iii) increasingly privatize the provision of water supplies, sanitation, waste treatment, protected area management, and transport infrastructure so that it can be financed through user charges that increasingly reflect the long-term marginal cost of supply.

In conclusion, the implementation of a sustainable development agenda in developing countries like Pakistan will not be successful unless developed countries fulfill the commitments they made at Rio. These commitments include, first and foremost, increasing the flow of financial resources; secondly, transferring environmentally sound technology at concessionary terms; and thirdly, sharing information and building capacity to promote sustainable development.

While Pakistan has made strides in embedding environmental protection within its legal and policy frameworks, there is a clear need for a more consistent and comprehensive approach in its BITs. Strengthening these treaties with explicit environmental provisions will not only enhance Pakistan's commitment to sustainable development but also ensure that foreign investments contribute positively to the country's environmental objectives. Future negotiations of BITs should prioritize this integration to foster an investment climate that supports both economic growth and environmental management.

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