The Effectiveness Dilemmas and Coordination Paths of Environmental Provisions in International Financial Investment——From the Perspective of Bilateral Investment Treaties

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ABSTRACT

Against the backdrop of the imbalance between global international investment and environmental protection and the difficulties in applying and enforcing environmental provisions in Bilateral Investment Treaties (BITs), this paper studies the effectiveness dilemmas and coordination paths of environmental provisions in international financial investment from the perspective of BITs, aiming to resolve the aforementioned application and enforcement difficulties and provide theoretical and practical references for constructing an international investment order that balances investment protection and ecological conservation. By systematically sorting out three types of core conflicts between international financial investment and environmental law, and in-depth analyzing the effectiveness problems and underlying causes of environmental provisions in BITs in terms of content, enforcement and conclusion, the paper clarifies that the core dilemmas of the effectiveness of environmental provisions lie in the ambiguity of content, defects in the Investor-State Dispute Settlement (ISDS) mechanism and interest divergences between developed and developing countries. It further proposes three solutions, namely the refinement of provisions, the professionalization of dispute settlement and the normalization of international cooperation, for the improvement of environmental provisions in BITs, and offers optimized suggestions for China's participation in the formulation of global investment and environmental rules. This research provides new ideas for achieving the dual goals of sustainable investment and ecological protection and improving the overall legal framework for international investment and the environment.

Keywords: Bilateral Investment Treaties; international financial investment; environmental provisions; effectiveness dilemmas; Investor-State Dispute Settlement

1. INTRODUCTION

1.1 Research Background and Significance

Against the backdrop of economic globalization, the scale of international financial investment has continued to expand, and the balance between investment and environmental protection has become a crucial issue in global governance. As a key system for regulating international investment and promoting sustainable investment, Bilateral Investment Treaties (BITs) attach great importance to the role of their environmental provisions. However, in practice, the effectiveness of environmental provisions in BITs is compromised due to ambiguous expressions, subjective interpretation under the ISDS mechanism, and interest games between developed and developing countries in treaty conclusion. In recent years, with the intensification of global climate change, the improvement and implementation of such provisions have become an important direction for the reform of international investment rules.

Theoretically, this study systematically analyzes the effectiveness dilemmas and causes of environmental provisions in BITs by combining the background of the international investment pattern and climate governance, and constructs coordination paths from multiple dimensions. It can improve the research in the interdisciplinary field of international investment law and international environmental law, and provide jurisprudential support and theoretical references for the refined development of provisions and the green reform of international investment rules. In practice, the solutions proposed in this study can serve as practical basis for resolving international investment and environmental disputes, and provide references for countries to revise BIT provisions and improve global investment and environmental rules. Meanwhile, combined with China's practice, it offers suggestions for China to optimize environmental provisions in BITs and participate in the formulation of global investment rules. Ultimately, it promotes the implementation of such provisions, balances the relationship between international financial investment and environmental protection, and achieves the dual goals of sustainable investment and ecological conservation.

This paper comprehensively adopts the case analysis method, comparative research method and literature research method.

Due to the limitations of space and research materials, this paper has certain shortcomings: the proposed coordination paths are only limited to core directions and cannot be elaborated in detail; the number of selected cases is limited, failing to cover disputes in more regions and of more types. Future research can further study more cases and specify the coordination paths in detail.

1.2 Literature Review of Domestic and International Research

Scholars at home and abroad have conducted in-depth and multi-dimensional research on environmental provisions in BITs and achieved certain research results. In domestic research, scholars such as Fan Xiaoyu point out that environmental provisions in international investment agreements need to strengthen the connection with climate governance [1], but the current provisions are insufficient in pertinence and lack enforcement mechanisms. Yu Jinsong and other scholars point out that there is an inherent tension between investment protection provisions in BITs and the environmental regulatory power of host countries, and propose that the applicable conditions of “environmental exceptions” should be clarified to build a balance mechanism. [2] Some studies also analyze China’s practice and point out that most environmental provisions in BITs signed between China and countries of the Global South are principled expressions without specific rights and obligations, making it difficult to implement them in practice [3]. In summary, domestic research focuses on the existing problems and balance mechanisms of environmental provisions, but there is a gap in the analysis of the dilemmas of enforcement effectiveness in relation to international investment and interest relations.

Overseas research has a longer history and more diverse perspectives. Choudhury, R. finds through a comparison of BIT texts of countries at different development levels that agreements led by developed countries mostly include rigid provisions such as “not lowering environmental standards”, while developing countries mainly adopt principled expressions, resulting in the failure to unify environmental provisions [4]. Sauvant, K. P. & Pelc, A. place environmental provisions under the framework of sustainable development, emphasizing that such provisions should include specific clauses such as environmental impact assessment and pollution control, and be aligned with the UN Sustainable Development Goals.[5] At the same time, some scholars reveal the practical conflicts between investment and the environment through typical cases such as the arbitration case between Ecuador and China National Machinery Equipment Group and environmental regulatory disputes in Germany, and put forward various suggestions such as refining provisions, improving the Investor-State Dispute Settlement (ISDS) mechanism and strengthening international cooperation. However, these suggestions are still mostly theoretical and need to be verified in practice.

Domestic and international research has laid a theoretical foundation for this paper, but there are still some issues worthy of in-depth analysis: first, the analysis of the root causes of the effectiveness dilemmas of environmental provisions in BITs is not in-depth enough, failing to fully combine the international political, economic and financial investment patterns for analysis and discussion; second, the coordination paths are too theoretical, and their specific pertinence and practical operability need further research, lacking analytical design combined with specific practical cases. This paper will analyze and study the above issues.

2. BASIC CONCEPTS AND PRACTICAL PATTERNS OF ENVIRONMENTAL PROVISIONS IN BILATERAL INVESTMENT TREATIES

2.1 Definition of Basic Concepts

2.1.1 Bilateral Investment Treaties (BITs)

Bilateral Investment Treaties are international treaties signed by two sovereign states/regions to mutually promote, encourage, protect and regulate two-way cross-border private investment activities. They are conducive to safeguarding the cross-border investment rights and interests of investors, maintaining the international investment order, and serving as the most fundamental and commonly used legal tool in the field of international financial investment, clarifying the rights and obligations of both parties in the investment field.

2.1.2 Environmental Provisions in BITs

Environmental provisions in BITs refer to the relevant legal clauses in bilateral investment agreements that specifically regulate the relationship between investment and environmental protection. As special clauses for balancing the relationship between the freedom of international financial investment and ecological environmental protection, they aim to set the environmental protection obligations of investors, clarify the environmental regulatory power of host countries, coordinate conflicts between investment protection and environmental regulation, guard against the environmental externalities of cross-border investment, and prevent a race to the bottom in environmental protection. Their content mainly covers compliance with environmental standards, environmental impact assessment, procedural dispute settlement mechanisms, and alignment with international environmental conventions.

2.2 Core Types of Environmental Provisions in BITs

At present, environmental provisions in BITs of various countries can be roughly divided into three types: weak mode, medium mode and strong mode. Weak mode is predominant: most BITs only mention concepts such as “sustainable development” in the preamble or general clauses, which carry no legally binding force and serve merely as value statements, failing to effectively address the environmental externalities arising from cross-border financial investment. Medium mode is increasing: this type protects the environmental regulatory power of host countries through environmental exception clauses, expropriation exceptions, and provisions banning the lowering of environmental standards, and has become the mainstream form in the new generation of BITs. Strong mode remains limited: its core contents include defining investors’ environmental obligations, requiring environmental impact assessment, and aligning with international environmental conventions. With the strongest binding force, it can systematically mitigate the environmental externalities of cross-border investment.

2.3 Practical Patterns of Environmental Provisions in BITs

2.3.1 Characteristics of Environmental Provisions in BITs of Developed Countries

BITs led and signed by developed countries generally present the characteristics of high standards, strong constraints, emphasis on procedures and sustainability. They are aligned with international environmental conventions such as the Paris Agreement, and add specific content such as investors’ environmental obligations and environmental impact assessment. Some agreements also incorporate environmental factors into the consideration of investment disputes. The provisions are targeted and binding, with dual-track constraints, and the text expressions are relatively tough.

2.3.2 Characteristics of Environmental Provisions in BITs of Developing Countries

BITs of developing countries generally start late with low coverage. Driven by the demand for economic development, investment attraction is the core orientation in signing such treaties. Environmental provisions are mostly principled and declaratory expressions, such as “recognizing the coordination between investment and environmental protection” and “promoting sustainable development”, without clarifying specific environmental obligations, implementation standards and dispute settlement methods. The provisions are highly compromising and weak in binding force, and some countries even relax environmental supervision to attract foreign investment.

2.3.3 Practical Status of Environmental Provisions in China’s BITs

Environmental provisions in China’s BITs have evolved from being blank to gradually strengthened, and are generally in the transition stage from principled expressions to initial constraints, with certain regional differences. Early agreements hardly involved environmental protection. In recent years, the new version of agreements has incorporated principled expressions in the preamble, and some agreements mention the coordination between investment and the environment, but still lack specific operational rules and liability clauses. Compared with the BITs of developed countries, the provisions still have a large room for improvement in pertinence and binding force, and it is difficult to cope with environmental conflicts in cross-border financial investment.

3. EFFECTIVENESS DILEMMAS AND UNDERLYING CAUSES OF ENVIRONMENTAL PROVISIONS IN BITS

3.1 Core Effectiveness Dilemmas of Environmental Provisions in BITs

3.1.1 At the Content Level: Ambiguity and Lack of Practicability

Most of the current environmental provisions in BITs have no legal binding force and mostly use soft obligation expressions. They neither clarify the specific environmental obligations of investing countries, host countries and investors, nor have unified application standards and legal consequences for violating the provisions, leading to difficulties in accurate citation in practice. For example, some agreements include content such as “not lowering environmental standards” but do not explain the definition and scope of application of “environmental standards”, which is easy to cause divergent understanding among all parties, and the normative effect of the provisions will be greatly reduced as a result.

3.1.2 At the Enforcement Mechanism Level: Lack of Professional and Unified Application Paths

The Investor-State Dispute Settlement (ISDS) mechanism is the main enforcement carrier of BIT provisions, but this mechanism has obvious defects in the application of environmental provisions, which is not conducive to the entry into force of environmental provisions. First, the members of the arbitration tribunal are mostly experts in investment law, lacking professional background in environmental law, and strong subjectivity leads to different award results in similar cases, resulting in the lack of stability and predictability in the application of provisions. Second, environmental protection measures are often identified as “indirect expropriation”, leading to an extremely high probability of host countries losing lawsuits. In addition, there is no special environmental dispute mechanism in the mechanism, resulting in extremely low justiciability. Finally, the mechanism does not set the priority application rule of environmental provisions, and investment protection provisions are often cited first, which further weakens the actual enforcement effect of environmental provisions.

3.1.3 At the Application Level: Fragmentation Due to Interest Games

Due to the differences in interest demands between developed and developing countries, the design and application of environmental provisions in BITs present obvious global fragmentation characteristics. Agreements led by developed countries have strong binding provisions, while agreements of developing countries tend to have compromising expressions. The inconsistent standards and application scope of provisions in different agreements make it difficult to form a globally coordinated governance effect. The mobility of cross-border investment conflicts with the fragmentation of environmental provisions, and some investors take advantage of the differences in provisions of different countries to engage in “regulatory arbitrage”, which exacerbates the application dilemma of environmental provisions.

3.2 Underlying Causes of the Effectiveness Dilemmas of Environmental Provisions

3.2.1 Imbalanced Interest Demands Between Developed and Developing Countries

Developed countries have completed the industrialization process and now pay more attention to environmental protection and the leading power of global environmental governance, therefore emphasizing strict environmental provisions in BITs.In contrast, developing countries still take economic development as the core and regard attracting foreign investment as an important development means. They worry that strict environmental provisions will increase investment thresholds and affect the inflow of foreign capital, thus weakening the constraints of environmental provisions in the agreements. As a result, the interest divergence between developed and developing countries has become the core contradiction in the design and enforcement of provisions.

3.2.2 Conflicts in the International Legal System

International investment law and international environmental law belong to different legal systems, and there is an inherent tension between their legislative purposes and rule design: the core of international investment law is to protect the rights and interests of investors and promote investment liberalization; the core of international environmental law is to safeguard the ecological public interest and regulate environmental behavior. At present, the two have not formed an effective connection mechanism. Environmental provisions in BITs lack the rule support of international environmental conventions and have not clarified their priority application status within the framework of international investment law, leading to frequent conflicts between such provisions and investment protection provisions in application.

3.2.3 Mechanism Defects in Treaty Conclusion and Supervision

On the one hand, most BITs adopt a bilateral treaty conclusion model, but lack a unified multilateral rule-making mechanism, making it difficult to form a globally applicable standard for environmental provisions and exacerbating rule fragmentation. On the other hand, the environmental supervision of cross-border investment is limited by “territorial jurisdiction”, and investing countries and host countries cannot conduct collaborative environmental supervision, making it difficult to regulate the environmental externalities of cross-border investment effectively. Therefore, even if BITs include relevant environmental provisions, they are difficult to implement due to the lack of cross-border supervisory support.

3.2.4 Deviated Goal Orientation in Provision Design

In concluding BITs, some countries only take environmental provisions as “symbolic clauses” and do not truly regard balancing investment and environmental protection as the core goal of provision design. Therefore, in the formulation of provisions, specific rules are not designed in combination with the actual environmental risks of cross-border investment, and corresponding supervision and accountability mechanisms are not supported, resulting in environmental provisions being merely formal and lacking practical binding force.1

4. PRACTICAL VERIFICATION OF THE EFFECTIVENESS DILEMMAS OF ENVIRONMENTAL PROVISIONS IN BITS —A CASE ANALYSIS OF TYPICAL CASES

4.1 Conflict Between Investment Freedom and Environmental Regulation: The Arbitration Case of Junefield Gold Investments Limited v. The Republic of Ecuador

The core dispute of this case is the boundary between the adjustment of environmental regulation by the host country and the protection of investors’ rights and interests. Ecuador tightened the environmental regulations for mineral investment to protect its local ecology, and China National Machinery Equipment Group filed an arbitration based on the investment protection provisions in BITs, claiming that the environmental measures of the host country damaged its investment interests. In this case, the environmental provisions in the BIT relied on by both parties were only principled expressions, which did not clarify the exercise boundary of the host country’s environmental regulatory power nor stipulate the scope of investors’ right relief after the adjustment of environmental laws and regulations. The arbitration tribunal could not accurately define the rights and responsibilities, and the award was ultimately biased towards the protection of investors’ rights and interests. This reflects the imbalance between environmental regulation and investment freedom caused by the ambiguity of provision content, and the effectiveness dilemma that environmental provisions are difficult to confront traditional investment protection provisions in practice. [6]

4.2 Conflict Between Investment Protection Standards and Environmental Public Interest: The Investment Dispute Case Relating to Environmental Regulation in Germany

The German government, as the host country, implemented strict environmental supervision on the projects of foreign investors to safeguard regional ecological security. Investors filed an arbitration on the grounds of the “fair and equitable treatment” and “expropriation compensation” provisions in BITs, claiming that the environmental supervision measures of the host country constituted indirect expropriation. The BIT involved in this case did not set clear “environmental exception” provisions, nor define the balance principle between investment protection standards and environmental public interest. Due to the lack of a specific provision basis, the arbitration tribunal insufficiently considered the environmental public interest and ultimately supported the investors’ compensation claim. This case directly reflects the rule tension between environmental provisions in BITs and investment protection provisions, as well as the insufficient effectiveness of environmental provisions in the face of investment protection standards. [7]

4.3 Environmental Externalities of Cross-border Investment: A Project-based Controversy over Chinese Enterprises’ Investment in Myanmar

In the resource development investment of some Chinese import and export enterprises in Myanmar, due to the weak local environmental supervision system and the absence of specific provisions such as cross-border environmental supervision and environmental damage compensation in the BITs between the two countries, the investment activities have caused local ecological damage, pollution transfer, and other problems. Since there are no clear provisions on cross-border environmental obligations and liabilities in BITs, both the investing country and the host country lack an effective regulatory basis, making it difficult to hold enterprises accountable for their environmental violations and properly resolve the compensation issues caused by cross-border environmental damage. This exposes the lack of regulation of environmental externalities of cross-border investment by environmental provisions in BITs, as well as the problem of ineffective enforcement of provisions due to the lack of bilateral supervision and coordination mechanisms. [8]

4.4 Common Enlightenments from Typical Cases

The above three cases all confirm the effectiveness dilemmas of environmental provisions in BITs mentioned above, and their common problems are mainly reflected in the following aspects: first, the principled expression of provisions leads to the lack of applicable basis in practice, making it impossible to balance the core conflicts between investment and environmental protection; second, the ISDS mechanism lacks a professional perspective on the environment, and arbitration awards tend to ignore environmental public interest; third, the provisions lack stipulations on cross-border environmental supervision, division of rights and responsibilities and other contents, making it impossible to cope with the environmental externalities of cross-border investment. At the same time, it can be seen that the effectiveness of environmental provisions in BITs not only depends on the targeted and refined design of the provisions themselves, but also requires supporting effective dispute settlement rules and cross-border supervision and coordination mechanisms.

5. COORDINATION PATHS FOR IMPROVING THE EFFECTIVENESS OF ENVIRONMENTAL PROVISIONS IN BITS

5.1 At the Provision Design Level: Promote the Refinement and Standardization of Content

5.1.1 Clarify Core Rights and Responsibilities and Application Standards

Abandon single principled expressions, and clearly define the environmental obligations of investing countries, host countries, and investors in BITs, as well as the definition scope and application scenarios of “environmental standards” and the specific legal consequences for violating the provisions, such as liability determination and compensation standards, so that environmental provisions have the practicality of being citeable and applicable. For cross-border investment, the environmental due diligence obligations of investors should be separately listed, requiring the completion of environmental impact assessment before the launch of investment projects to prevent environmental risks from the source.

5.1.2 Add “Environmental Exception” and Rigid Constraint Provisions

Clearly define the applicable circumstances of “environmental exceptions” in BITs, stipulate that the environmental supervision measures taken by host countries to safeguard ecological public interest do not constitute “indirect expropriation” or a violation of “fair and equitable treatment”, and clarify the boundary between investment protection and environmental regulation. At the same time, introduce rigid provisions such as “not lowering environmental standards”, prohibiting contracting parties from unilaterally lowering their national environmental regulatory requirements to attract foreign investment, and adhering to the bottom line of environmental protection.

5.1.3 Align with International Environmental Conventions and Sustainable Development Goals

Integrate the relevant requirements of core international environmental conventions, such as the Paris Agreement into the environmental provisions of BITs to promote the coordination between bilateral rules and global environmental governance rules; clarify the alignment direction of environmental provisions with the UN Sustainable Development Goals in the provisions, and take green investment and low-carbon development as important directions for provision design.

5.2 At the Dispute Settlement Level: Improve the Environmental Adaptability of the ISDS Mechanism

5.2.1 Establish an Environmental Expert Consultation System

Add an environmental expert consultation system to the ISDS arbitration procedure. When the arbitration tribunal hears investment disputes involving environmental provisions, it is required to solicit professional opinions from environmental experts and must take them as an important reference for the award to make up for the lack of professional environmental knowledge of the arbitration tribunal and improve the scientificity and impartiality of the award.

5.2.2 Elevate the Status of Environmental Public Interest

Clearly stipulate in BITs that when the ISDS arbitration tribunal hears environmental disputes, it shall consider environmental public interest and investors’ interests on an equal footing to avoid the arbitration tendency of only favoring investment protection. At the same time, strengthen the standardization of the interpretation of environmental provisions by the arbitration tribunal, unify the judgment standards, and improve the stability and predictability of the application of environmental provisions.

5.2.3 Restrict the Abuse of Arbitration Right by Investors

Set preconditions for investors to file environment-related arbitration, requiring investors to exhaust local administrative and judicial remedies in the host country before applying for arbitration. Meanwhile, if a dispute is caused by an investor's failure to perform its environmental obligations, the arbitration tribunal may dismiss its claim to prevent investors from abusing the arbitration right by virtue of the adjustment of environmental laws and regulations and safeguard the environmental sovereignty of the host country.

5.3 At the International Cooperation Level: Resolve Rule Fragmentation and Supervision Vacancy

5.3.1 Promote the Unification of Environmental Rules

Based on bilateral investment agreements, promote the incorporation of unified basic standards for environmental provisions into multilateral investment agreements, take into account the environmental governance needs of developed countries and the economic development demands of developing countries, formulate environment rule guidelines adapted to local conditions, resolve the problem of global fragmentation of investment and environmental rules, and provide a unified reference for all countries to formulate environmental provisions in BITs.

5.3.2 Construct a Cross-border Environmental Supervision Mechanism Between Investing and Host Countries

Clearly define the cross-border environmental supervision responsibilities of both parties in BITs, and establish an environmental supervision and law enforcement coordination mechanism. For environmental damage caused by investment projects, clarify the division of responsibilities and dispute settlement procedures between the two parties, so that the enforcement of environmental provisions is supported by a cross-border supervision system.

5.3.3 Strengthen Treaty Conclusion Negotiations and Interest Balance Between Developed and Developing Countries

Promote equal negotiations between developing and developed countries in signing BITs. Developed countries should respect the economic demands of developing countries and not compulsorily set environmental provisions beyond their development level; developing countries can gradually enhance the binding force of environmental provisions to promote the coordinated development of investment and environmental protection. Both parties make joint efforts to promote interest alignment and reduce the compromise of provisions caused by games.

5.4 From a Chinese Perspective

China should conform to the green development trend of international investment rules, promote the transformation of environmental provisions from "principled expressions" to "refined constraints", and add specific contents such as environmental impact assessment and cross-border supervision coordination. Combined with the actual cooperation with different countries, formulate differentiated environmental provisions: align with the rules of international environmental conventions with developed countries, and design environmental obligations and supervision coordination with developing countries. In addition, China should actively participate in the formulation of multilateral environmental rules, enhance its discourse power in global environmental governance, and promote the construction of a new international investment order that balances development and environmental protection.

6. CONCLUSION AND PROSPECT

This paper studies the effectiveness dilemmas and coordination paths of environmental provisions in international financial investment from the perspective of Bilateral Investment Treaties (BITs), and draws the following conclusions: environmental provisions in BITs are key clauses for balancing international investment and environmental protection, but at present they face problems such as ambiguous content, imperfect mechanisms and fragmented application of rules. The causes lie in the unbalanced interests between developed and developing countries, insufficient coordination between international investment law and environmental law, and defects in treaty conclusion and supervision mechanisms. Revising provisions alone cannot change the current situation; it is necessary to promote the refinement of provisions, improve the ISDS mechanism and construct a cross-border supervision and coordination system to effectively enhance the effectiveness of the provisions. China should optimize the design of provisions, participate in the formulation of multilateral investment and environmental rules, and promote the coordinated development of cross-border investment and ecological conservation.

Against the backdrop of the adjustment of global climate governance and international investment pattern, environmental provisions in BITs will develop towards refinement, greenization and coordination, and content related to climate governance and green investment will become the focus of provision design. In the future, resolving the interest divergence between developed and developing countries, promoting the incorporation of unified environmental rules into multilateral investment agreements, and improving the cross-border environmental supervision and coordination mechanism will be the core directions of global investment and environmental governance. China can combine the investment cooperation practice under the “Belt and Road” Initiative, refine the differentiated design of environmental provisions in China’s BITs with other countries, and standardize the environmental obligations of enterprises in cross-border investment. Future research can be further carried out on the formulation of multilateral investment and environmental rules and the design of the environmental expert system under the ISDS mechanism, so as to provide more practical references for the practical improvement of environmental provisions.

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