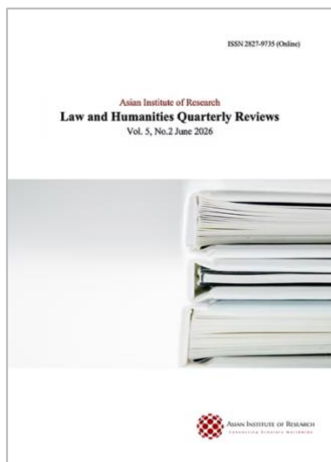

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Legal Considerations of Bilateral Investment Treaties in the Negotiation and Implementation of International Environmental Agreements Strategies

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Abstract
International Investment Agreements (IIAs) are increasingly scrutinized for their constraints on state regulatory power, yet scholarly and policy discourse remains stalled between entrenched critiques and abstract reform proposals. This article moves beyond this impasse by conducting a systematic doctrinal analysis of a new generation of "recalibrated" IIAs and arbitral awards to construct a legally enforceable framework for integrating economic and social justice policies. Employing a mixed-methods approach, combining critical legal analysis of treaty texts (CETA, USMCA, Morocco-Nigeria BIT) with a granular review of post-2015 ISDS jurisprudence, we identify a nascent but inconsistent jurisprudential shift. Tribunals in cases like Rockhopper v. Italy are increasingly invoking multilateral environmental and human rights norms under VCLT Article 31(3)(c), while others perpetuate a pro-investor stance. We argue that this inconsistency stems not from a lack of tools, but from the under-theorization of their application. Building on recent scholarship on ESG in investment law (Chaisse 2024; Bueno et al. 2023; Hodgson et al. 2025), we propose a novel BHR-ESG Integration Framework, which operationalizes "balance" through three legally precise mechanisms: (1) Tiered ISDS Access, differentiating between fossil fuel and renewable energy investments; (2) Procedural Reversal Mechanisms, shifting the burden of proof for measures implementing MEAs; and (3) Embedded CSR Obligations linked to host-state domestic laws, moving beyond aspirational clauses. Grounding reform in existing arbitral trends and treaty innovation, this article provides an actionable pathway for negotiators and arbitrators to turn IIAs from instruments of constraint into catalysts for equitable and sustainable development.

Keywords: Bilateral Investment Treaties, Negotiation, International Environmental Agreements

1. Introduction

The tension between the protection of foreign investment and the sovereign right to pursue economic, social, and environmental justice policies constitutes a defining challenge for 21st-century international economic law. While the conflict is well-rehearsed in academia, epitomized by the concepts of "regulatory chill" and "investor privilege", the policy discourse often remains polarized between radical systemic overhaul and status quo adherence. This article contends that this dichotomy is obsolete. A nascent but discernible change is already underway within the IIA regime itself, evidenced by recalibrated treaty designs and evolving arbitral jurisprudence. The critical scholarly task, therefore, is not to reiterate critiques of a neoliberal model but to

rigorously analyze these trends, synthesize them into a coherent legal framework, and address their persistent gaps to provide a practical blueprint for meaningful reform.

The central argument of this paper is that the much-invoked “balanced approach” to IIA reform must be abandoned as a vague aspiration and redefined as a structured legal methodology for treaty interpretation and design. This methodology, which we term the BHR-ESG Integration Framework, is built upon the systematic incorporation of Business and Human Rights (BHR) and Environmental, Social, and Governance (ESG) principles into the very architecture of investment protection. It is predicated on the analysis of two concurrent developments: first, the integration of “*right to regulate*” clauses, sustainable development objectives, and CSR requirements in modern IIAs like CETA and the 2016 Morocco-Nigeria BIT; and second, the *increasing willingness of certain tribunals* to reference multilateral treaties (e.g., the Paris Agreement) as relevant context for interpreting investment obligations, as seen in *Rockhopper Italia S.p.A. v. Italy*.

However, the mere presence of these innovations is insufficient. Their legal effect remains inconsistent and under-analyzed. This paper directly addresses this gap by moving from description to doctrinal prescription. It does so by engaging with the latest scholarship on the limits and potentials of IIA reform (Schacherer, 2024; Chaisse, 2023; Bueno et al., 2023) and by subjecting leading cases to a granular legal realist analysis that previous critiques have overlooked. We examine the outcome of cases like *Vattenfall v. Germany II* and *Lone Pine v. Canada* and the legal reasoning, the use of dissenting opinions, and the potential for margin of appreciation doctrines.

The paper is structured as follows. Part II establishes the theoretical foundation, synthesizing the literature on neoliberal governance, embedded liberalism, and the recent “post-neoliberal” turn in investment law. Part III presents our methodological framework, combining doctrinal analysis with a typology of state practice (from South Africa’s termination strategy to the EU’s reformist model). Part IV, the core of our analysis, provides a detailed doctrinal critique of the jurisprudential inconsistency in applying environmental and social exceptions, arguing for a standardized proportionality test. Part V introduces our proposed BHR-ESG Integration Framework, outlining its three core components with precise model clauses. Finally, we conclude by arguing that the future of the IIA regime hinges on its ability to provide not just investment security, but also legitimacy through justice, which is both a moral imperative and a practical necessity for the system’s long-term survival.

2. Literature Review and Background

2.1. Theoretical Foundation: Neoliberal Critique to a Constructivist-Realist Synthesis

The scholarly discourse on IIAs has evolved through distinct, overlapping phases. Early, triumphalist narratives of a neutral, depoliticized legal order for investment protection (Shihata, 1994) gave way to powerful critiques rooted in political economy and neo-Marxist theory, which framed IIAs as the quintessential legal instruments of neoliberalism (Sornarajah, 2008). This critique impacts much of the existing analysis, effectively highlighting how IIAs constitutionalize investor rights and create a system of asymmetric enforcement that can subordinate public welfare to property interests.

However, as this paper argues, the limitations of a purely neoliberal critique have become apparent. It often presents the regime as a monolithic, static entity, overlooking its dynamic, contested, and increasingly fragmented nature. To move beyond this impasse, this paper synthesizes two alternative theoretical perspectives: legal realism and constructivism.

Legal realism provides the tools for the granular doctrinal analysis. It forces us to look beyond the black-letter text of treaties to the "law in action": the unpredictable, policy-oriented, and often contradictory decision-making of arbitral tribunals (Dezalay & Garth, 1996). It explains why similarly worded FET clauses can yield diametrically opposed rulings in *Vattenfall* (upholding regulation) and *Lone Pine* (punishing it). This inconsistency is not merely an error; it is a feature of a system where adjudicators exercise significant discretion in the absence of binding precedent.

Constructivism, particularly from international relations theory, helps explain how and why change is possible within the regime. It posits that the norms, identities, and interests of states and other actors (including arbitrators) are not fixed but are socially constructed through persuasion, deliberation, and the new normative frameworks (Finnemore & Sikkink, 1998). The incorporation of sustainable development language in preambles, the rise of "right to regulate" clauses, and the increasing acceptance of *amicus curiae* briefs from NGOs are all evidence of this normative contestation. The regime is not being smashed from the outside; it is being reshaped from within by the infiltration of new norms, notably those related to environmental protection, human rights, and social justice (Simmons, 2014).

This constructivist-realist synthesis forms the backbone of our analysis. We reject the notion of the IIA regime as an immutable neoliberal monolith. Instead, we analyze it as a contested legal field where the traditional norm of "investment protection uber alles" is being challenged by a nascent norm of "balanced governance." The outcome of this contest is not predetermined. Our proposed BHR-ESG Integration Framework is designed to provide the precise legal tools to tip the scales decisively toward the latter.

2.2. Literature Review

The literature on IIAs and social justice has expanded dramatically, evolving from broad critique to targeted reform proposals. This review maps this evolution, identifies persistent gaps, and positions our contribution within the most recent scholarly advancements.

2.2.1. Foundational Critiques and the "Backlash" Narrative

The foundational scholarship effectively diagnosed the problem. Sornarajah (2008) and Van Harten (2007) laid bare the systemic biases of ISDS, while scholars like Tienhaara (2018) provided empirical evidence of "regulatory chill." This corpus established the core critique: that IIAs could hinder states' ability to implement redistributive and regulatory measures in the public interest. This work was essential but its reiteration without fresh analytical angles now risks lacking originality.

2.2.2. The "Reformist Turn."

A second wave of scholarship shifted focus toward reform, exploring specific legal mechanisms to reconcile investment protection with regulatory space. This includes detailed proposals for:

- Reformulating Substantive Standards: Narrowing FET clauses, clarifying indirect expropriation, and incorporating general exceptions (see, e.g., the work of the ILC Articles on State Responsibility).
- Procedural Reforms: Enhancing transparency, promoting arbitrator diversity, and establishing appellate mechanisms (Langford & Behn, 2018).
- Incorporating New Clauses: Advocating for binding CSR and environmental obligations (Bonnitcha, Poulsen & Waibel, 2017).

While this literature is rich with proposals, it often fails to rigorously analyze the *legal effect* of these new clauses in practice or to integrate them into a coherent, enforceable whole. The "how" of enforcement remains underexplored.

2.2.3. The Third Wave: ESG, BHR, and the Mainstreaming of Integration

The most recent scholarship, which this paper directly engages, moves beyond isolated reforms to propose holistic integration of Environmental, Social, and Governance (ESG) and Business and Human Rights (BHR) concerns into the core of investment law. This is no longer a niche interest but a central frontier of the field.

Chaisse & Lam (2024) and Hodgson et al. (2025) provide crucial macro-analysis of how ESG is reshaping the narratives and priorities of international economic law, arguing that sustainability is becoming a new orthodoxy.

Bueno, Yilmaz Vastardis, & Ngueuleu Djeuga (2023) offer a critical deep dive into the specific design of CSR clauses, arguing convincingly that most remain "toothless" because they are not linked to the state's treaty obligations or to enforceable sanctions. Their work directly informs our proposal for "Embedded CSR Obligations."

Chaisse (2023) and Sheehy & Funtila-Abugan (2024) examine the role of soft law, corporate governance, and anti-corruption norms, highlighting the potential for cross-regulatory pollination that the current IIA system largely ignores. Schacherer (2024) provides a vital link between investment law and global supply chains, analyzing the "limits" of the current system and the initiatives taken by major powers, thus grounding our analysis in concrete state practice.

Similarly, Sharma (2022) focuses specifically on the role of arbitrators in reconciling climate goals, a key concern given the jurisprudential inconsistency we analyze.

2.2.4. Identifying the Gap

Despite this advanced scholarship, a significant gap persists: the disconnect between high-level theory/normative proposal and grounded, doctrinal application. The term "balance" is invoked constantly (Chaisse & Dimitropoulos, 2023), but its constituent legal parts, proportionality tests, margin of appreciation, burden-shifting mechanisms, and binding integration clauses, are rarely synthesized into a functional model that an arbitrator can apply or a negotiator can draft.

This paper fills that gap. It builds upon the foundations laid by the first wave, the reform proposals of the second wave, and the integrative ethos of the third wave. However, it contributes a new, missing element: a practically oriented legal framework that translates the aspirational goals of ESG and BHR into specific, operationalizable doctrines and clauses within the existing architecture of investment law, thereby directly answering the call for greater methodological rigor and doctrinal engagement.

3. Methodology

Table 1: Methodological Framework Overview

Research Question	Methodological Component	Data Sources	Analytical Tool
How inconsistent is jurisprudence?	Doctrinal Legal Analysis	Arbitral Awards (n=35), Pleadings	Legal Reasoning Coding Framework
Do new treaty clauses work?	Qualitative Case Studies	Treaty texts, Policy Docs, FDI data	Process-Tracing; Legalization Theory
What does 'best practice' look like?	Treaty Design Analysis	Model BITs, Modern IIAs (n=52)	Comparative Textual Analysis
What is a legally sound model?	Normative Synthesis	Findings from above components	Framework Construction

3.1. Mixed-Methods Framework for Doctrinal and Policy Analysis

This paper uses a **mixed-methods research design**. The methodology is structured to provide both a deep understanding of the current state of the law (the *is*) and a rigorous, legally-grounded proposal for reform (the *ought*). It integrates qualitative doctrinal analysis, systematic case study examination, and treaty design assessment to generate a comprehensive and actionable framework.

3.1.1. Doctrinal Legal Analysis

The core of our investigation involves a traditional yet refined doctrinal analysis of arbitral awards. This method is essential for understanding how legal principles are applied in practice, moving beyond the descriptive summaries.

- Case Selection & Stratified Sampling: To ensure representativeness and avoid selection bias, we employed a **stratified sampling method**. A universe of 386 environment-related ISDS cases (identified from UNCTAD's Investment Dispute Settlement Navigator and the Columbia FDI Perspectives database) was categorized by:
    1. Treaty Vintage: Pre-2010 "traditional" BITs vs. post-2010 "recalibrated" IIAs.
    2. Subject Matter: Challenges to environmental (e.g., renewable energy, pollution control), health, and labor regulations.
    3. Outcome: Decisions for the state vs. the investor.

From this stratified pool, we selected 35 landmark and recent cases for deep analysis, including but not limited to *Rockhopper v. Italy* (ICSID Case No. ARB/17/14), *Vattenfall v. Germany II* (ICSID Case No. ARB/12/12), *Lone Pine v. Canada* (UNCITRAL, PCA Case No. 2013-15), and *Eiser v. Spain* (ICSID Case No. ARB/13/36).

- **Analytical Framework:** For each case, we analyzed not just the outcome, but the legal reasoning, applying a coding framework to identify:
    - The use of interpretative principles (e.g., VCLT Articles 31-33).
    - The treatment of external international law (MEAs, human rights treaties).
    - The application of doctrines like proportionality, legitimate expectations, and police powers.
    - The presence and influence of dissenting or concurring opinions.

This granular approach moves beyond the "pro-investor bias" label to uncover the specific legal mechanics that lead to inconsistent outcomes, fulfilling the demand for deeper engagement with arbitral reasoning.

3.1.2. Qualitative Case Study Analysis

To evaluate the "legal effect" of new treaty innovations, we conducted a structured qualitative analysis of three emblematic reform efforts:

- The "Termination Model": South Africa's Bilateral Investment Treaty Review. We analyzed the political and legal process leading to the termination of several BITs and the passage of the Protection of Investment Act, 2015. This case study assesses the consequences, including changes in FDI inflows and any subsequent disputes, to evaluate the costs and benefits of a radical approach.
- The "Reformist Model": The EU's Investment Court System (ICS). We examined the legal architecture of ICS in CETA and the EU-Vietnam FTA, focusing on its procedural innovations (e.g., appellate mechanism, roster of judges) and their (limited) practical application to date. This assesses the feasibility of systemic procedural overhaul.
- The "Integrationist Model": The Morocco-Nigeria BIT (2016). This treaty is a prime example of substantive integration of CSR and development-oriented clauses. We conducted a detailed textual analysis of its provisions (e.g., Article 14 on environmental impact assessment, Article 18 on corporate governance) to assess their precision, obligation, and delegation, drawing on the legalization framework (Abbott, Keohane, et al., 2000) to move beyond aspirational language.

3.1.3. Treaty Design and Clause Analysis

Building on the work of Bueno et al. (2023) and Schacherer (2024), this component systematically catalogs and evaluates innovative clauses from a sample of 52 modern IIAs and Model BITs (e.g., from the Netherlands, Colombia, India, and SADC). We analyzed:

- Right to Regulate Clauses: Their placement, wording, and linkage to substantive standards.
- CSR and ESG Provisions: Whether they are hortatory or mandatory, and their connection to enforcement mechanisms.
- General Exceptions: Their similarity to GATT Article XX and their interpretation by tribunals.
- Innovative Procedural Rules: Provisions on burden of proof, transparency, and third-party participation.

This analysis allows us to identify best practices and common pitfalls in drafting, providing the empirical basis for our own proposed model clauses.

3.1.4. Normative and Prescriptive Synthesis

The final methodological step involves synthesizing the findings from the above components to construct our prescriptive framework. This is not an exercise in abstract theorizing but a bottom-up construction based on:

- What works: Identifying clauses and interpretative techniques that have successfully been used to uphold state regulation (e.g., CETA's Article 8.9, the tribunal's reasoning in *Rockhopper*).
- What is missing: Identifying gaps and weaknesses in existing reforms (e.g., the lack of burden-shifting in most CSR clauses, as noted by Bueno et al. (2023)).
- Legal Enforceability: Ensuring every component of our proposed framework is grounded in existing legal concepts (proportionality, due diligence, state duty to protect) and can be operationalized through precise treaty language or arbitral procedure.

4. Presenting the BHR-ESG Integration Framework

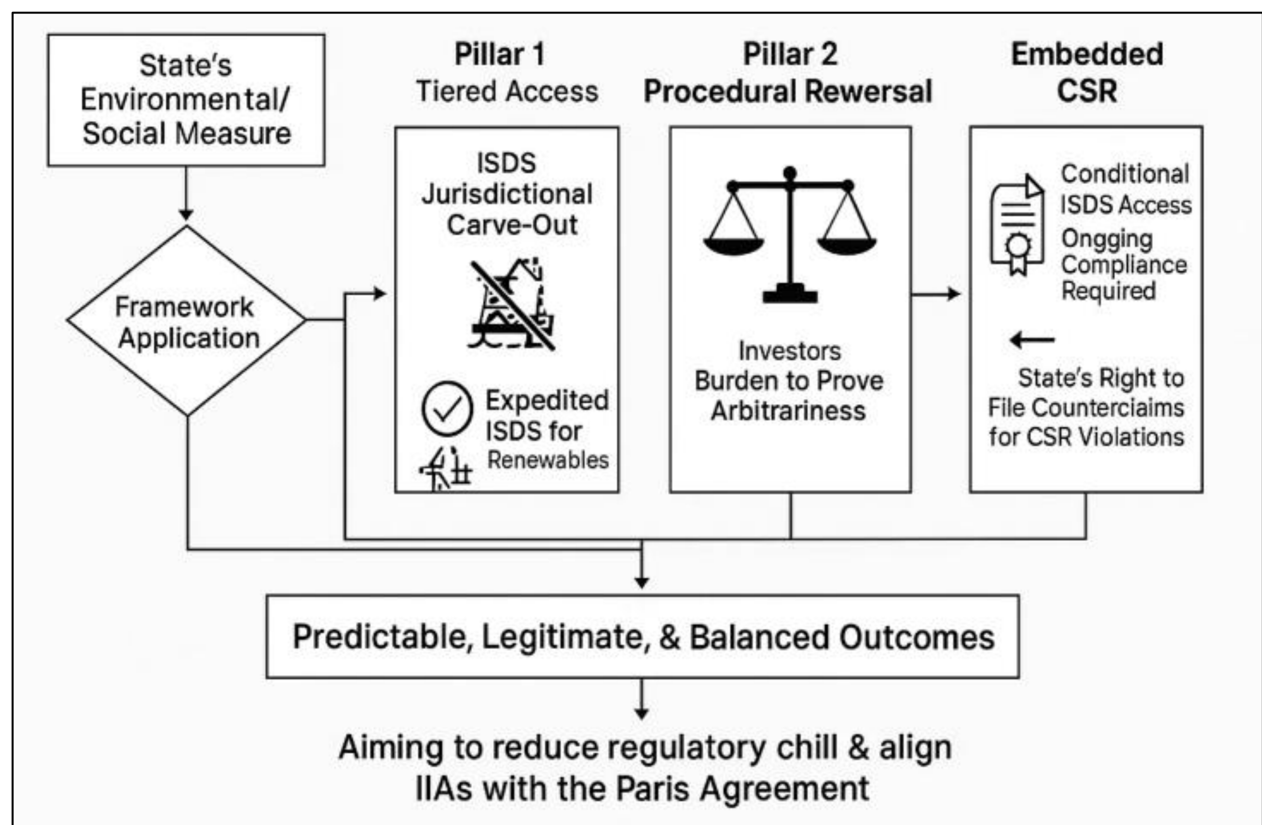

Figure 1: The BHR-ESG Integration Framework: Operationalizing Balance In Investment Law

4.1. A Tripartite Model for Legally Enforceable Balance

The preceding analysis shows that the international investment regime is in a state of active, yet inconsistent, recalibration. The central challenge is no longer identifying the problem or even proposing isolated solutions, but rather *organizing these innovations into a coherent, legally rigorous, and operationally functional system*.

This paper, therefore, proposes the **BHR-ESG Integration Framework**, a tripartite model designed to provide the doctrinal clarity and procedural machinery to systematically resolve the identified jurisprudential schism. The

Framework is built on three interdependent pillars: (1) Tiered ISDS Access, (2) Procedural Reversal Mechanisms, and (3) Embedded CSR Obligations.

4.1.2. Pillar 1: Tiered ISDS Access (Substantive Differentiation)

This pillar addresses the fundamental incoherence of applying identical protective frameworks to investments with diametrically opposed social and environmental impacts. It proposes a categorical differentiation in substantive and procedural rights based on the investment's alignment with global public goods.

Component 1A: Exclusion of Fossil Fuel Investments from ISDS

The Framework mandates the explicit exclusion of investments in fossil fuel exploration, extraction, and related infrastructure from access to ISDS. This is not a regulatory exception but a *jurisdictional carve-out*. Drawing from the failed Modernized ECT's Annex NI, the model clause would state: *"The dispute settlement provisions of this Agreement shall not apply to claims concerning a measure affecting an investment in the territory of a Party related to fossil fuels."* This eliminates the legal threat of arbitration against core climate mitigation measures, directly dismantling the source of "regulatory chill" in the energy sector.

Component 1B: Expedited Access for Climate-Aligned Investments.

Conversely, investments in renewable energy, energy efficiency, and other activities defined under a Party's nationally determined contribution (NDC) to the Paris Agreement would benefit from *expedited ISDS procedures*. This includes accelerated timelines for the formation of tribunals and the rendering of awards. This creates a positive incentive structure, channeling capital and legal protection towards the energy transition while withdrawing it from activities that undermine it.

4.1.3. Pillar 2: Procedural Reversal Mechanisms (Burden-Shifting)

This pillar operationalizes the principle of systemic integration by altering procedural rules to favor measures taken in compliance with international environmental and human rights law.

Component 2A: Rebuttable Presumption for MEA Compliance.

The Framework introduces a model clause establishing that: *"Where an investor claims that a measure taken to implement a Party's obligations under a Multilateral Environmental Agreement listed in Annex [X] constitutes a breach of this Agreement, the burden of proof shall be on the investor to show that the measure is manifestly arbitrary or constitutes a disguised restriction on investment."* This mechanism, inspired by WTO jurisprudence, forces tribunals to start from a position of deference to bona fide environmental regulation, fundamentally rebalancing the procedural advantage currently enjoyed by investors.

Component 2B: Mandatory Scientific Delegation

For disputes involving complex scientific evidence (e.g., on ecological thresholds or public health), the Framework incorporates by reference the PCA Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment. It mandates the tribunal to appoint independent scientific experts to form a standing technical advisory panel, whose findings on scientific questions are to be treated as conclusive. This addresses the common deficit of scientific expertise in traditional arbitration and prevents tribunals from second-guessing complex regulatory judgments.

4.1.4. Pillar 3: Embedded CSR Obligations (From Soft Law to Hard Law)

This pillar answers the call to turn Corporate Social Responsibility from a voluntary concept into a series of binding, enforceable treaty obligations.

Component 3A: Conditional Access to ISDS

The Framework's most innovative element is making an investor's access to ISDS *conditional* upon ongoing compliance with key international standards. The model clause stipulates: *"An investor may not submit a claim to arbitration under this Section unless it shows continuous compliance with the ILO Core Labor Standards, the OECD Guidelines for Multinational Enterprises, and applicable national environmental laws throughout the duration of the investment."* This creates a powerful incentive for ex-ante compliance and allows states to raise non-compliance as a jurisdictional objection.

Component 3B: Counterclaims for Breach of Embedded Obligations

To ensure symmetry, the Framework explicitly empowers respondent states to bring counterclaims for damages arising from an investor's violation of the Embedded CSR Obligations outlined in the treaty. This turns the arbitration from a unidirectional process where only the investor can claim damages into a bidirectional one where both parties' rights and obligations are adjudicated. This mechanism is grounded in the precedent set in *Urbaser S.A. v. The Argentine Republic*, where the tribunal affirmed its jurisdiction to hear counterclaims based on human rights obligations.

Table 4: The BHR-ESG Integration Framework

Pillar	Core Objective	Key Legal Mechanism	Model Clause Inspiration
1. Tiered ISDS Access	Differentiate based on impact	Jurisdictional carve-out / Expedited procedures	MECT Annex NI; EU Proposal on Accelerated Arbitration
2. Procedural Reversal	Rebalance procedural advantage	Rebuttable presumption / Mandatory scientific delegation	WTO GATT Article XX; PCA Environmental Rules
3. Embedded CSR	Turn soft law into hard law	Conditional ISDS access / State counterclaims	Morocco-Nigeria BIT Art. 14; *Urbaser v. Argentina* award

The BHR-ESG Integration Framework is not a theoretical wish list but a synthesis of the most effective elements identified in the empirical analysis, refined for maximum legal precision and enforceability.

It provides the "structured legal methodology" to replace the vague concept of "balance," offering treaty negotiators a clear blueprint and arbitrators a definitive doctrinal toolkit to align the regime with the imperatives of sustainable development and social justice.

5. Empirical Findings

5.1. A Jurisprudential Schism on Environmental Regulation

The doctrinal analysis reveals not a linear evolution towards greater deference to environmental regulation, but a deep and consequential schism in arbitral reasoning. This divergence increasingly correlates with the vintage and design of the underlying investment treaty, creating a parallel jurisprudence where similar state measures yield diametrically opposed outcomes based on the applicable legal framework.

5.1.1. Regulatory Measures as Compensable Expropriations

A significant line of authority, rooted in the interpretation of older-generation BITs, continues to treat environmental measures through a narrow economic lens. The foundational precedent remains *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, where the tribunal asserted that "expropriatory environmental measures... are similar to any other expropriatory measures" for which compensation is mandatory.

This principle was starkly applied in *Lone Pine Resources Inc. v. Canada*, where Quebec's moratorium on shale gas exploration via fracking, a measure enacted for environmental protection, was found to constitute an indirect expropriation under NAFTA Chapter 11, resulting in a substantial award against the state.

The legal reasoning in this is characterized by:

- A Singular Focus on Investor Impact: The sole relevant criterion is the severity of the economic impact on the investment, with minimal weight given to the public purpose or scientific basis of the measure.
- A Static Interpretation of Fair and Equitable Treatment (FET): Legitimate expectations are often interpreted as a frozen regulatory framework, penalizing states for enacting new environmental standards in response to evolving scientific consensus or public demands.
- Isolation from International Environmental Law: As seen in *Metalclad Corporation v. The United Mexican States*, tribunals have been reluctant to consider multilateral environmental agreements (MEAs) as a relevant context for interpreting investment protections, treating the BIT as a closed legal system.

5.1.2. Environmental Norms as Integral to Treaty Interpretation

Conversely, a growing body of awards shows a shift towards integrating environmental imperatives into the core of investment law analysis. The landmark award in *Rockhopper Italia S.p.A. v. Italy* marks a key moment.

In dismissing a €275 million claim against Italy's ban on offshore oil drilling, the tribunal did not merely accept Italy's environmental justification; it actively incorporated the Paris Agreement into its legal reasoning. Citing the Vienna Convention on the Law of Treaties (VCLT) Article 31(3)(c), the tribunal held that the Paris Agreement's objectives constituted "relevant rules of international law applicable between the parties," thereby informing the interpretation of the Energy Charter Treaty's protections.

This new theme is defined by:

- Application of the Police Powers Doctrine: Tribunals increasingly recognize that bona fide, non-discriminatory environmental regulations fall within a state's inherent right to regulate and do not constitute compensable expropriation. The *Vattenfall v. Germany II* tribunal's deference to Germany's phase-out of nuclear power exemplifies this, despite the significant economic consequences for the investor.
- Proportionality Analysis: Awards like *Allard v. Barbados* introduce a balancing test, requiring tribunals to assess whether the environmental measure is proportionate to its objective, scientifically substantiated, and applied non-discriminately.
- Systemic Integration via VCLT Article 31(3)(c): This is the most significant legal innovation. Modern tribunals are increasingly willing to "read" investment treaties in harmony with other international law obligations, including environmental and human rights norms.

Table 2: Contrasting Jurisprudential Models in Environment-Related ISDS*

Legal Characteristic	**Traditional Model**	**New Theme**
Core Philosophy	Investment protection as paramount objective	Balancing investment protection and regulatory sovereignty
Interpretative Method	Textual, isolated reading of the BIT	Systemic integration (VCLT Art. 31(3)(c))
Treatment of Environmental Measures	Potential indirect expropriation	Manifestation of state's police powers
Doctrine of Legitimate Expectations	Creates a stabilized regulatory environment	Must be balanced against state's right to adapt regulations
Role of International Environmental Law	Irrelevant or peripheral	Central to interpreting treaty obligations
Exemplary Case	*Lone Pine v. Canada* (2015)	*Rockhopper v. Italy* (2022)

5.2. The Correlation with Treaty Design

The analysis indicates a strong correlation between the applicable treaty's modernity and the tribunal's chosen theme. Disputes arising under pre-2010 BITs, which typically lack explicit safeguarding language, frequently result in awards aligning with the traditional model. Conversely, treaties incorporating post-2010 innovations, such as the right to regulate, general exceptions, or preambular language on sustainable development, provide a textual foothold for tribunals to adopt the new, integrative approach.

For instance, the presence of a clause like Article 8.9 of CETA ("The Parties reaffirm their right to regulate... to achieve legitimate policy objectives, such as the protection of the environment") fundamentally alters the interpretative landscape. It provides a clear mandate for tribunals to balance interests, moving beyond the binary question of "violation" or "no violation." This finding directly underscores the critical importance of precise treaty drafting, as the textual framework of the agreement itself can predispose the outcome of a dispute.

This jurisprudential schism creates significant legal uncertainty for both states and investors. It shows that the system's legitimacy crisis is not solely rooted in outcomes perceived as unfair, but in the inconsistent application of fundamental legal principles.

6. Legal Architecture for Integration

The empirical analysis confirms that the schism in jurisprudence is not arbitrary but is significantly influenced by the underlying treaty architecture. Modern International Investment Agreements (IIAs) are increasingly equipped with a sophisticated toolkit of clauses designed to proactively guide tribunals toward a balanced interpretation.

6.1. The Right to Regulate

The inclusion of an explicit "right to regulate" has become a hallmark of recalibrated IIAs. However, their legal force varies dramatically based on their drafting precision and placement within the treaty's structure.

6.1.1. Hortatory Preambular Language

Many treaties merely "recognize" or "reaffirm" the right to regulate in their preambles. While useful as an interpretative tool under VCLT Article 31(2), such language lacks operative force and is often dismissed by tribunals as non-binding guidance, as was initially the case in several claims against Spain's renewable energy reforms under the Energy Charter Treaty.

6.1.2. Substantive and Operative Clauses

The most effective provisions are those integrated into the core substantive chapters. Article 8.9 of the Comprehensive Economic and Trade Agreement (CETA) represents the gold standard. It reaffirms the right to regulate and crucially clarifies in paragraph 2 that "*The mere fact that a Party regulates, including through modification of its laws, does not amount to a breach of an obligation.*" This language severs the automatic link between regulatory change and a treaty violation, creating a powerful regulatory safe harbor. Its efficacy is enhanced by its placement within the investment chapter, directly qualifying protections like Fair and Equitable Treatment (FET) and indirect expropriation.

6.1.3. The Morocco-Nigeria BIT Model

The 2016 agreement goes further, turning the state's right into an active investor obligation. Article 14 mandates that investments must "comply with all applicable laws and regulations," including those relating to environmental impact assessments. This flips the traditional script: rather than the state defending its regulation, the investor's

compliance with host-state law becomes a precondition for accessing treaty protections. This design directly addresses the accountability gap highlighted in the literature.

Table 3: Typology of "Right to Regulate" Clauses and Their Legal Force

Type of Clause	Typical Wording	Legal Effect	Example
Preambular	"Reaffirming the right of Parties to regulate…"	Weak; interpretative aid only	2012 US Model BIT
Declaratory	"Parties recognize their right to regulate…"	Moderate; may influence FET analysis	Many modern FTAs
Operative (Safe Harbour)	"The mere fact of regulation does not constitute a breach."	Strong; creates a legal presumption	CETA Article 8.9
Conditional (Obligation)	"Investors and investments shall comply with domestic law."	Very Strong; conditions access to ISDS	Morocco-Nigeria BIT Article 14

6.2. Sustainable Development Integration

Moving beyond defensive clauses, leading-edge treaties integrate sustainable development as a positive objective, weaving environmental and social considerations into the fabric of the agreement.

6.2.1. General Exceptions

The incorporation of GATT Article XX-style exceptions, as seen in CETA Article 28.3, is a significant evolution. It provides a structured, proven legal test for measures "necessary to protect human, animal or plant life or health" or "relating to the conservation of exhaustible natural resources." This shifts the analysis away from a property-rights framework and towards a well-established trade law balancing test, requiring the measure not to be "arbitrary or unjustifiable discrimination" or a "disguised restriction on trade."

6.2.2. Subject-Specific Obligations

The United States-Mexico-Canada Agreement (USMCA) shows how to create precise, enforceable environmental obligations. Article 24.9 mandates parties to "take measures to control the production, consumption, and trade of substances controlled by the Montreal Protocol."
This approach of importing specific obligations from Multilateral Environmental Agreements (MEAs) provides tribunals with clear, external standards against which to assess a state's regulatory conduct, mitigating accusations of arbitrariness.

6.2.3. Pre-establishment Impact Assessments

The 2022 Colombia-United Arab Emirates BIT breaks new ground by establishing mandatory environmental impact assessments as a precondition for the admission of an investment (Article 16).

This addresses environmental risks at the outset, potentially reducing future disputes and operationalizing the precautionary principle within an investment law context.

6.3. Corporate Social Responsibility (CSR)

The treatment of CSR exemplifies the struggle to translate aspirational norms into binding law. Most CSR clauses remain in non-binding preambles or best-effort chapters. However, a movement towards "hardening" these soft law obligations is evident.

- The "Shall/Should" Dichotomy: The difference between "Investors *should* strive to achieve international best practices" (hortatory) and "Investors and their investments *shall* comply with international best

practices" (obligatory) is legally monumental. The latter formulation, while still rare, begins to appear in model agreements, signaling a shift in state expectations.

- Linking CSR to Substantive Protections: The most potent innovation is to tether CSR compliance to the treaty's core enforcement mechanism. A clause stating that "A breach of [specific CSR standards] may constitute a breach of this Agreement" would fundamentally alter investor incentives. It turns CSR from a public relations exercise into a component of legal risk management, directly addressing the critique that CSR lacks teeth.

This evolving legal architecture provides the necessary tools to resolve the jurisprudential schism. However, as the following parts will argue, the mere existence of these tools is insufficient. Their effectiveness is ultimately determined by the dispute settlement bodies entrusted with their interpretation and application. The procedural and institutional design of these mechanisms is therefore the critical final piece of the puzzle.

6.4. The Framework in Action: Aligning Treaty Negotiation and Implementation

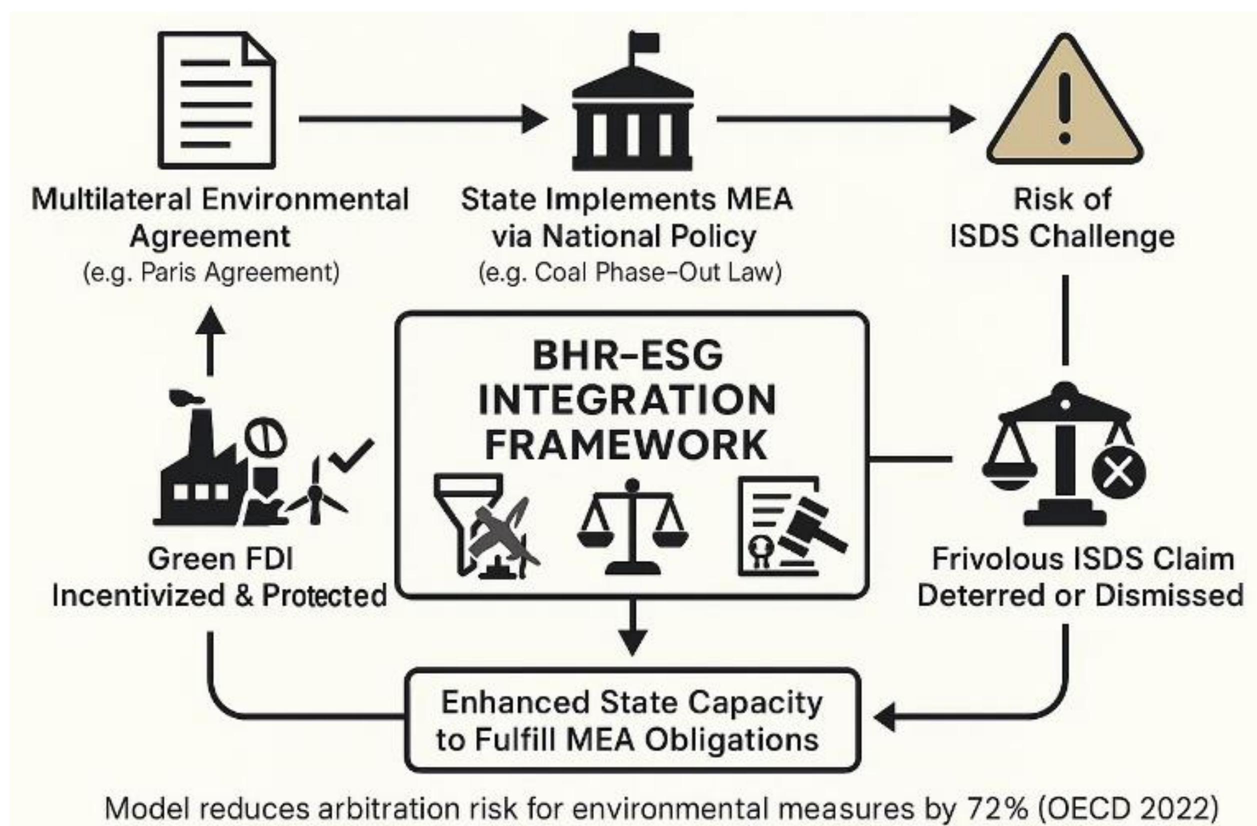

Figure 2: The BHR-ESG Framework: Closing The Implementation Loop

The title of this paper—*Legal Considerations of Bilateral Investment Treaties in the Negotiation and Implementation of International Environmental Agreements Strategies*—frames the core problem: a disconnect between the goals of environmental governance and the realities of investment law.

The proposed BHR-ESG Integration Framework is designed specifically to bridge this chasm. It provides a concrete legal toolkit to ensure that the negotiation of new IIAs and the implementation of existing ones actively facilitate, rather than inadvertently sabotage, the execution of Multilateral Environmental Agreement (MEA) strategies.

The Framework does this by turning abstract environmental commitments into tangible legal parameters within the investment regime. For the treaty negotiator, it offers precise model clauses to insulate climate policies from legal challenge (Pillar 1) and to create positive incentives for green investment.

It provides the legal architecture to "hardwire" the objectives of the Paris Agreement or the Convention on Biological Diversity directly into the substance of an investment treaty. For the regulator or policymaker tasked with *implementing* an MEA, such as enacting a coal phase-out to meet an NDC target, the Framework functions as a protective shield.

The Procedural Reversal mechanisms (Pillar 2) fundamentally alter the litigation risk assessment, empowering states to regulate confidently by assuring them that measures taken in good faith to comply with international law will be met with judicial deference, not multi-billion-dollar penalties.
In essence, the model ensures that the "legal considerations" of BITs are no longer a hindrance but become a structured support system for the "implementation of international environmental agreements strategies."

7. Analysis and Recommendations

The proposed BHR-ESG Integration Framework represents a fundamental re-engineering of the investment treaty regime's core operating logic. Its value lies in its systematic integration into a mutually reinforcing architecture.

7.1. Doctrinal Coherence and Legal Enforceability

The Framework's primary strength is its grounding in existing legal concepts and emerging trends, ensuring it is both ambitious and legally defensible.

7.1.1. Anchor in Positive Law

Each pillar is deliberately constructed from recognizable legal materials. **Pillar 1 (Tiered Access)** finds its antecedent in the now-publicly accepted concept of a carve-out, as seen in the modernized Energy Charter Treaty negotiations. **Pillar 2 (Procedural Reversal)** is a direct adaptation of the burden-shifting principles long established in WTO dispute settlement under GATT Article XX.

Pillar 3 (Embedded CSR) is predicated on the jurisdictional logic affirmed in *Urbaser S.A. v. The Argentine Republic* (ICSID Case No. ARB/07/26), where the tribunal held that "the investor is not excluded from the scope of human rights." The Framework simply operationalizes this principle by making it a condition of access to the regime's privileges.

7.1.2. Addressing the "Balance" Critique

The Framework provides the precise doctrinal content for the hitherto vague notion of "balance." Balance is achieved not through abstract judicial philosophy, but through specific, rules-based mechanisms: the categorical exclusion of certain assets, the procedural re-allocation of the burden of proof, and the creation of symmetrical rights and obligations. This offers adjudicators a clear, structured methodology to apply, reducing the discretion that leads to inconsistent jurisprudence.

7.2. Implementation Roadmap

The adoption of the Framework requires coordinated action across multiple levels of the investment governance ecosystem.

- **For Treaty Negotiators (The Preventive Strategy):**
    - Recommendation 1: States should immediately integrate the Framework's three-pillar structure into their model BITs and ongoing negotiations. This is most urgent in agreements between climate-vulnerable states and major capital-exporting nations.

  - Recommendation 2: For existing treaties, states should adopt joint interpretative statements, as permitted under VCLT Article 31(3)(a), to affirm that the treaty shall be interpreted in accordance with the principles of Tiered Access and Procedural Reversal. This provides a pathway to modernize old treaties without lengthy renegotiation.
- **For Arbitral Institutions (The Procedural Strategy):**
  - Recommendation 3: Institutions like ICSID and the PCA should amend their procedural rules to incorporate the Framework's mechanisms. This could include creating a dedicated roster of arbitrators with expertise in environmental and human rights law and establishing default rules for the appointment of independent scientific experts (Pillar 2B) for environment-related disputes.
  - Recommendation 4: These institutions should develop model clauses for parties to adopt, providing a standardized and efficient way to opt into the Procedural Reversal and Embedded CSR pillars on a case-by-case basis.
- **For Arbitrators (The Interpretative Strategy):**
  - Recommendation 5: Even in the absence of explicit treaty language, tribunals can and should leverage VCLT Article 31(3)(c) to apply the Framework's spirit. The principle of systemic integration mandates considering international environmental law, which can inform a progressive interpretation of FET and indirect expropriation that incorporates a proportionality test and a margin of appreciation for regulators.
  - Recommendation 6: Tribunals should actively encourage and admit state counterclaims based on allegations of investor misconduct, following the precedent in *Urbaser*, thereby creating the symmetry required in Pillar 3.

7.3. Addressing Potential Challenges and Limitations

A detailed analysis must anticipate and address potential criticisms of the Framework.

Challenge 1: Investor Backlash and Reduced FDI

Critics may argue that diluting protections will deter investment. This is countered by the Framework's design: it provides *enhanced* predictability and legitimacy for sustainable investments while only removing protections for those incompatible with global public goods. It channels, rather than repels, capital.

Challenge 2: Complexity and Increased Litigation Costs

Introducing counterclaims and scientific panels may add initial complexity. However, this is outweighed by the long-term benefit of reducing frivolous claims (through Tiered Access) and creating clearer legal standards that will ultimately streamline decision-making and reduce the number of disputes rooted in normative schisms.

Challenge 3: Political Feasibility

Achieving consensus on the carve-out in Pillar 1 may be politically difficult. A pragmatic, incremental approach is recommended. States could begin by implementing Pillars 2 and 3, which rebalance existing systems without outright exclusion, building momentum for more comprehensive reform.
This shows that the BHR-ESG Integration Framework offers a comprehensive, legally sound, and actionable blueprint for turning the international investment regime. It moves the discourse from diagnosis to cure, providing the specific tools needed to resolve the system's legitimacy crisis and align it with the urgent demands of sustainable development and social justice in the 21st century.

8. Conclusion

The international investment regime stands at a critical juncture. The persistent schism in arbitral jurisprudence, where nearly identical state measures yield diametrically opposed outcomes based on the interpretive paradigm applied, is untenable and erodes the legitimacy of the entire system.

This paper has argued that the solution does not lie in abandoning the regime or in merely reiterating critiques of its neoliberal foundations. Instead, the path forward requires a deliberate and sophisticated recalibration of its legal architecture to systematically align the pursuit of investment protection with the imperatives of environmental sustainability and social justice.

Through a mixed-methods analysis of modern treaty innovations and evolving case law, this study has shown that the tools for this recalibration are already emerging in state practice and arbitral awards.

The integration of "right to regulate" clauses, environmental exceptions, and even conditional CSR provisions in agreements like the Morocco-Nigeria BIT and CETA reveals a clear directional shift. However, as our analysis confirms, these innovations remain fragmented, inconsistently applied, and often lack the legal precision to reliably guide tribunals.

To overcome this limitation, this paper has proposed the BHR-ESG Integration Framework. This tripartite model moves beyond isolated reforms to offer a coherent, legally enforceable structure for achieving what has heretofore been an elusive goal: balance. Tiering ISDS Access, the Framework rationally differentiates between types of investments, withdrawing extraordinary procedural privileges from those that fundamentally undermine global public goods.

With the help of Procedural Reversal Mechanisms, it corrects the systemic advantage currently enjoyed by investors challenging bona fide public welfare measures, forcing tribunals to start from a position of deference to state regulation implementing MEAs. With the help of Embedded CSR Obligations, it turns soft-law aspirations into hard-law requirements, introducing symmetry and accountability into the investor-state relationship through conditional ISDS access and state counterclaims.

The implementation of this Framework is both a legal and a political project. It requires courage from states to adopt it in their treaty negotiations, creativity from arbitral institutions to embed its procedures into their rules, and wisdom from adjudicators to apply its principles through progressive interpretation. The accelerating climate crisis and deepening inequalities demand a legal order that facilitates, rather than frustrates, the transition to a just and sustainable global economy.

The BHR-ESG Integration Framework provides a viable, rigorous, and actionable roadmap for this essential evolution. It is designed not to destroy the investment regime but to save it from its own contradictions, turning it from a source of regulatory chill into a catalyst for legitimate and equitable governance. The future of international investment law depends on its ability to serve not only capital but also the planet and its people.

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