論環保條款於投資協定之新定位

第十七屆國際經貿法學發展學術研討會

106/3/11

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「
法
次
之
性
保
應
及
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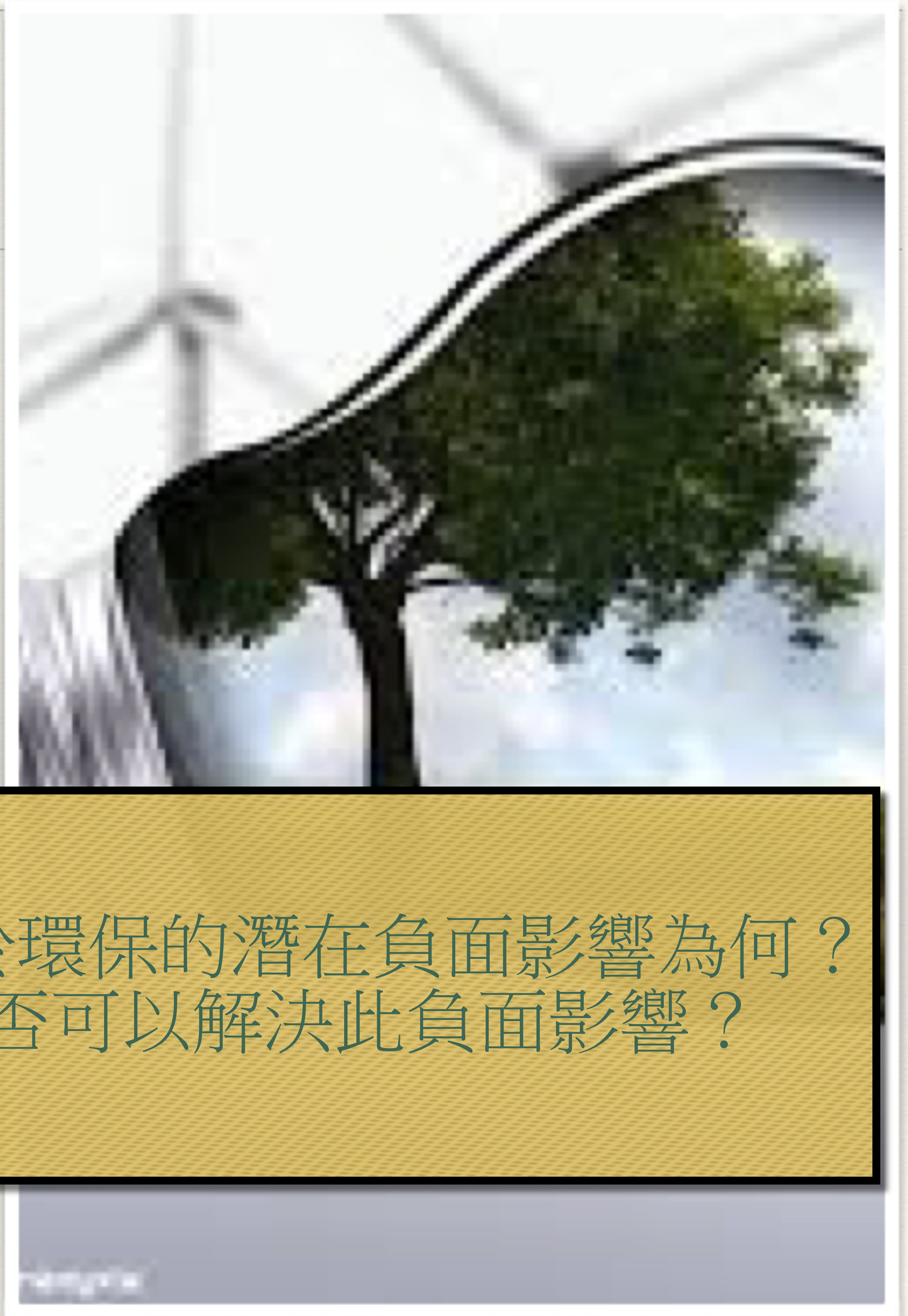
主要議題

環保議題
的整合在
範架構之

傳統的投資協議對於環保的潛在負面影響為何？
加入環保條款是否可以解決此負面影響？



大綱

- 地主國環保需求與國際投資保障義務之潛在衝突
- 環保條款之類型
- 環保條款效益評估
- 結論

地主國環保需求與國際投資保障義務之潛在衝突

<u>無法給予環保所需的差別待遇足夠的彈性空間</u>

- 「同類情形」判斷標準浮動 ：是否只考慮競爭關係
- 合理基礎是否廣受承認尚待觀察：政府公益需求是否承認
- 主觀意圖是否作為判斷標準仍屬未定：即便採取主觀意圖之見解，也無未處理多重目的的狀況。

地主國環保需求與國際投資保障義務之潛在衝突

<u>環境法下的私人財產權之概念較為限縮，而與徵收以及間接的概念未必相容</u>

- 補償金額超過地主國之預期
- 地主國無義務積極防免私人間財產權之衝突
- 間接徵收標準不明確導致寒蟬效應
- 污染者付費原則未必能落實

地主國環保需求與國際投資保障義務之潛在衝突

<u>環保政策之不確定性以及多層次管理所導致之不一致性，可能會有礙於投資人之正當合理期待</u>

- 正當合理期待要求難以全面呼應投資政策變動的需求
- 正當合理期待未必能配合環保之多層級治理需求：投資主管機關與環保主管機關給予不同的訊息

環保條款類型

- 前言宣示
- US Model BIT pmbl. ¶ 6: "Desiring to achieve these objectives in a manner consistent with the protection of health, safety, **<u>and the environment</u>**, and the promotion of internationally recognized labor rights."
- 政府規制權利之保留
- NFATA art. 1114.1: "Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is **<u>undertaken in a manner sensitive to environmental concerns</u>**."
- 同類情形之闡述
- TPP, art. 9.4, footnote 14: "For greater certainty, whether treatment is accorded in "like circumstances" under Article 9.4 (National Treatment) or Article 9.5 (Most-Favoured-Nation Treatment) **<u>depends on the totality of the circumstances</u>**, including whether the relevant treatment distinguishes between investors or investments on the basis of **<u>legitimate public welfare objectives</u>**

環保條款類型

- 實績要求之例外
- Canada Model BIT art. 7.2: "A measure that requires an investment to use a technology to meet generally applicable health, safety or **environmental requirements shall not be construed to be inconsistent with paragraph 1(f)**. For greater certainty, Articles 3 and 4 apply to the measure."
- 間接徵收之排除
- Canada Model BIT Annex B.13(1)(c): "**Except in rare circumstances**, such as when a measure or series of measures are so severe in the light of their purpose that they cannot be reasonably viewed as having been adopted and applied in good faith, non-discriminatory measures of a Party that are **designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment**, do not constitute indirect expropriation."

環保條款類型

- 無放寬標準條款
- NAFTA art. 1114.2: "The Parties recognize that it is **inappropriate to encourage investment by relaxing domestic health, safety or environmental measures**. Accordingly, a Party should not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such measures as an encouragement for the establishment, acquisition, expansion or retention in its territory of an investment of an investor. …."
- 專家報告審查
- US model BIT art. 32: Without prejudice to the appointment of other kinds of experts where authorized by the applicable arbitration rules, a tribunal, at the request of a disputing party or, unless the disputing parties disapprove, on its own initiative, **may appoint one or more experts to report to it in writing on any factual issue concerning environmental**, health, safety, or other scientific matters raised by a disputing party in a proceeding, subject to such terms and conditions as the disputing parties may agree.

環保條款類型

- 特定環保要求條款
- 「環境與社會影響評估（Environmental and Social Impact Assessment）」條款，以及「環境管控與改善（Environmental Management and Improvement）」條款
- 得受援引之環保條款
- 貿易與投資協議中的環保專章：TPP Ch. 20 (Environment); CETA Ch. 22 (Trade and Sustainable Development)

環保條款效益評估

<u>由潛在衝突的原因推導</u>

- 投資保障條文過於抽象，必須委由仲裁庭加以解釋，導致標準不一
- 環保僅是作為抗辯違反保障投資人義務的例外，而非兩個同等重要之義務
- 仲裁庭較偏重地主國是否出現行為不一致，以及是否給予投資人正當合理期待，而非投資人是否有義務理解地主國法律的需求

環保效益評估

降低義務內容之不確定	
前言宣示	X
政府規制權之保留	—
同類情形之闡述	V
實績要求之例外	V
間接徵收之排除	V
無放寬標準條款	—
專家報告審查	X
特定環保要求條款	—
得受援引之環保條款	—

環保效益評估

強化環保義務於投資協定的地位	
前言宣示	V
政府規制權之保留	V
同類情形之闡述	—
實績要求之例外	V
間接徵收之排除	V
無放寬標準條款	V
專家報告審查	—
特定環保要求條款	V
得受援引之環保條款	V

環保效益評估

增加投資人遵守環保規範之義務	
前言宣示	—
政府規制權之保留	—
同類情形之闡述	—
實績要求之例外	V
間接徵收之排除	—
無放寬標準條款	—
專家報告審查	—
特定環保要求條款	V
得受援引之環保條款	—

結論

投資協議「綠化」程度尚待加強

- 投資保護內容確定性稍加提昇
- 環保實績要求仍列為例外
- 環保要求尚未成為法律義務

謝謝聆聽