

Environmental Interests In Investment Arbitration: Balancing Profit and Planet



Investment arbitration has long been a contentious topic, with its reputation often mired in controversy. However, in recent years, a new dimension has emerged in this field – environmental interests. As the world grapples with the pressing issues of climate change and sustainability, investors, governments, and

environmentalists find themselves entangled in a complex web of legal and ethical debates. This article explores the role of environmental interests in investment arbitration and examines how the balance between profit and planet can be achieved.

An Overview of Investment Arbitration

Investment arbitration refers to the resolution of disputes between investors and states. These disputes arise when a state takes measures that affect the investments made by foreign investors within its territory. Typically, these disputes are settled through the arbitration process, wherein an independent tribunal hears the arguments presented by both parties and delivers a binding decision.

Historically, investment arbitration primarily focused on issues related to expropriation, discrimination, and fair and equitable treatment. However, as environmental concerns intensify, the environmental impact of investment decisions and regulatory measures has become a central issue in arbitration cases.



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The Rise of Environmental Interests

With the global recognition of climate change as a pressing issue, governments increasingly adopt environmental regulations to mitigate adverse environmental effects. These regulations can have significant implications for foreign investors, as they may impact the profitability or feasibility of investments.

Investors and corporations argue that environmental regulations can go too far, imposing unreasonable burdens on their operations, and diminishing the expected return on investment. On the other hand, environmentalists argue that without strict regulations, development will come at the expense of the planet's wellbeing, exacerbating global challenges.

This clash between profit and planet is at the heart of the emerging field of environmental interests in investment arbitration.

The Impact of Environmental Interests on Investment Arbitration Cases

Environmental interests have had a clear influence on recent investment arbitration cases. Disputes have arisen when states enact policies designed to protect the environment, but these policies clash with the investors' expectations of profit. For example, a state's decision to tighten emission control standards can significantly affect the profitability of a foreign investor's manufacturing operations.

In such cases, investors have sought compensation for loss of profits under investment treaties. These treaties protect foreign investors by guaranteeing certain rights, including protection against expropriation without compensation and fair and equitable treatment. The question then arises: Should environmental

concerns take precedence over investors' rights, or should investors be compensated for the impact of environmental regulations?

Finding the Balance: Sustainable Development and Investment Arbitration

As the tensions between investment and environmental interests grow, international institutions and tribunals have begun to grapple with the challenge of finding a balance between profit and planet. One approach that is gaining traction is the integration of sustainable development principles into investment arbitration proceedings.

The concept of sustainable development emphasizes the need for economic growth that is environmentally responsible and socially inclusive. By incorporating this principle into investment arbitration, tribunals can evaluate the environmental impact of investment decisions while still protecting investors' rights.

Additionally, guidelines and frameworks have been developed to assist arbitral tribunals in assessing the environmental implications of investment disputes. These guidelines can help tribunals consider the potential environmental harm caused by investment activities and promote the implementation of environmentally friendly practices.

As the world faces the urgent need to address climate change and promote sustainable development, investment arbitration must adapt to accommodate these environmental interests. The delicate balance between profit and planet requires careful consideration and innovative approaches. By incorporating sustainable development principles into investment arbitration and utilizing guidelines to evaluate environmental impacts, a harmonious resolution can be achieved. Ultimately, the goal should be to foster economic growth while protecting the environment for future generations.



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Environmental Interests in Investment Arbitration

Challenges and Directions

Flavia Marisi

Economic growth, social inclusion, and environmental protection stand at the core of sustainable development, which aims to deliver long-term growth for current and future generations. Foreign Direct Investment (FDI) can play a key role in sustainable development. Host states' benefits descending from FDI inflows include tax revenues, technology transfer, specialised training of local human resources, network with satellite activities, better availability of quality products and customer-centric services. These downstream effects jointly stimulate economic growth and social inclusion. This thoroughly researched book explores the relationship between environmental protection – the third component of sustainable development – and FDI.

In practice, the intersection between environmental protection and foreign investment not only has generated remarkable success stories such as cross-sectoral green investment but has also in some instances led to severe cases of environmental degradation. Certain foreign investments resulted in open-pit mines leaking harmful substances into the soil, excessive deforestation, improper treatment of water, pollution of groundwater and contamination of mud pits following oil exploitation, leaving the host state with significant environmental damage. Some other cases have witnessed the host state withdrawing or infringing its own environmental policies, which could, in principle, lead to a decrease in the value of the foreign investment as a result of natural resources deterioration.

In recent years, an increasing number of investment arbitration cases have seen a clash between the states' commitments towards their citizens, which include the duty to protect the environment, their health and well-being, and the commitment towards foreign investors to protect their investments. In this book, the author focuses on investor-state cases in which environmental protection measures have been contested and discusses substantive mechanisms in treaty drafting, rules of Customary International Law, and interpretation doctrines, which are aimed at taking environmental concerns into consideration.

The topics covered include the following:

- statistical analysis of investor-state cases where environmental protection measures have been contested;
- the role of environmental principles in investor-state arbitration;
- treaty mechanisms addressing environmental concerns;

- legal tools available under Customary International Law to address environmental interests;
- the application of the doctrines of proportionality, police powers, and margin of appreciation; and
- environmental counterclaims as an instrument to claim compensation for environmental damage.

The author provides a detailed framework on the normative architecture, offers an extensive analysis of the relevant case law, and proposes concrete solutions to the identified clashes, aimed at refining the balance between environmental and investment protection.

With its in-depth analysis and careful documentation, this book aptly captures the inherent fragmentation of international law and undoubtedly represents an invaluable resource for both international law practitioners and scholars. The solution-oriented approach adopted in the book will be welcomed by legal counsel, law firms, investment treaty negotiators, and decision makers at the different stages of investment lawmaking and practice, as well as by international institutions and academics.



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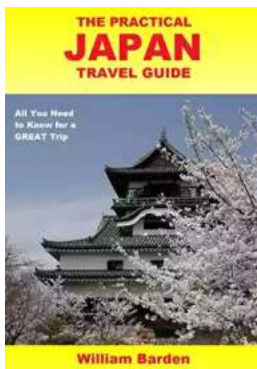
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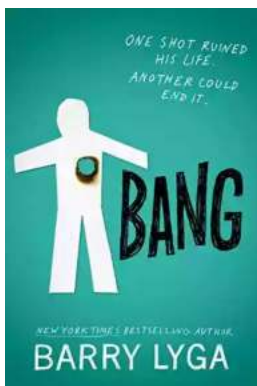
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