

## 論環保條款於投資協定之新定位

薛景文\*

### 摘要

「聯合國貿易和發展會議 (United Nations Conference on Trade and Development, UNCTAD)」於 2008 年的報告中指出，新一代「雙邊投資協定 (Bilateral Investment Treaties, BITs)」或「國際投資協定 (International Investment Agreements, IIAs)」中將勞工、環保等考量納入投資協定內，而不再將投資與環保需求截然兩分，減輕國際法規「破碎化 (fragmentation)」的問題，而晚近的區域貿易協定更同時納入環保專章以及投資專章。觀察目前第四代 BITs 或協定 IIAs，地主國因環境保護措施，多有直接於協定 IIAs 下，訂定特定之環保條款，以符合個別會員國之環保需求。此模式似乎意在直接改變國際投資法傳統之規範方式，從投資人保障之單元視角，改成投資人保障與永續發展之二元並重。觀察其中環保規範之態樣，大致可區分為前言宣示、政府規制權利之保留、實績要求之例外、間接徵收之例外、標準之維持、專家報告審查、特定環保要求條款、以及得受援引之環保條款等七種規範型式。然而，要達成二元並重似非以變更單一條文即可完成，故本文將一一檢視投資協定所採用的幾個方法，是否真的有助於環境保護，而何種規範模式較具有實益，實際運作上之困難為何，又在制度設計上應考量的重點為何，最後以「跨太平洋夥伴協定 (Trans-Pacific Partnership, TPP)」環保專章以及投資專章的互動為例，加以評析。

### Abstract

According to a report released by United Nations Conference on Trade and Development (UNCTAD) in 2008, latest generation of Bilateral Investment Treaties (BITs) and International Investment Agreements (IIA) have begun to take labour or environmental issues into account, and recent Free Trade Agreements (FTAs) even include environmental chapter in addition to investment one. This phenomenon seems to shape international investment law from a mono-perspective covering only investor protection to dual purposes that incorporate both investor and environmental concern. Closely examine those environmental provisions in BITs, IIAs, or FTAs, they can be roughly classified into eight categories by essence, including the preamble, right to regulate, the exception to performance requirement provision, the exception to

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\* 國立政治大學國際經營與貿易學系助理教授，德國科隆大學法學博士。

indirect expropriation provision, maintenance of standards, expert report, specific environmental requirements, and environmental provisions in FTAs. A single provision, however, can hardly attain the dual goals; therefore, this article analyzes the effectiveness of eight categories of environmental provisions mentioned above and provides suggestion on designing valid and practical environmental provisions in the field of international investment law.

