Preface

This book addresses an issue of increasing importance in public international law: the controversial relationship between international investment law (IIL) and environmental protection. The sharp and sudden growth of foreign investments in the last two decades has contributed to pollution and environmental degradation, mainly in developing countries. This is an issue of great significance and has been amplified, at the international legal level, by the rapid increase in the number of bilateral and regional treaties that set out rules to protect foreign investments. These international investment agreements (IIAs) give foreign investors specific rights by limiting the sovereignty of the host country to make regulations for public, and indeed, environmental, purposes. Recent arbitral practice testifies to the controversial relationship between these two spheres of interest.

The inquiry underlying this book can be briefly summarized as follows: is it possible to reconcile foreign investor rights and environmental protection? Or more precisely: how and to what extent can environmental concerns be integrated into the strict logic of international investment rules? International practice raises more specific queries: is a state obliged to pay compensation for the indirect expropriation of foreign investments due to environmental regulations? Is it possible for a country to withdraw a foreign investor’s permit to carry out a dangerous activity without infringing international standards of fair and equitable treatment?

These questions, although quite simple in themselves, open the door to complex and multiform answers and solutions. Scholars studying the relevance of environmental and human health concerns in the context of IIL usually prefer either to address specific issues (e.g. regulatory expropriations, freezing clauses, etc.) or to limit their scrutiny to specific

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1 Thanks to Prof. Andrea Kay Bjorklund, Laurence Boisson de Chazournes, Maria Chiara Malaguti, Massimo Monteduro and Dr. Roberta Marra for their precious comments and advices, appreciations to Chona Mendoza and Karen Luedtke for their careful work in proofreading this book, and thanks to Lucia for having constantly supported my work.
legal contexts (e.g. the North American Free Trade Agreement). Some scholars have focused on the matter more comprehensively by identifying points of friction between investment rules and environmental protection and by detecting or proposing various solutions. On the whole, the doctrinal approaches appear fragmentary, mirroring in essence the multi-form nature of IIL (its multiple and autonomous sources create a kind of legal patchwork, which is only partially ‘unified’ by the practice of arbitral tribunals) and all of these debates may be situated in the broader context of discourses on the fragmentation of international law.

With this in mind, this book is not engaged in a search for the chimera of a single legal formula which radically resolves the antagonism between foreign investments and environmental concerns. Instead, it gathers and scrutinizes the legal arguments and solutions in arbitral case law and investment treaties around this inquiry. By extrapolating and ordering the insights from this vast and heterogeneous mass of available practice, the book outlines a possible method for reconciling investor rights and environmental concerns, which is centred around the model of legal exception and highlights the role of legal principles. More broadly, this attempt to analyse and order available arguments for integration and to sketch out an interpretative method has the purpose of not leaving this delicate matter to the mere discretion of arbitrators, according to a simple case-by-case approach. Accordingly, it addresses the interests of both foreign investors (in terms of greater certainty of law and planning strategies) and environmental stakeholders (as their concerns are more likely to be considered).

As such, this book essentially examines investment regimes and it is first and foremost a study of international investment law. Although other fields of international legal practice, such as certain human rights instruments, are also concerned with the foreign investments and environmental protection, the peculiarities of IIL, as a *sui generis* system of law with a marked influence on state sovereignty, suggest limiting the subject matter to experiences within this sector of international law. At the same time, comparisons with other fields of international law, in particular WTO law, provide crucial insights and are broadly employed to address the subject at hand. Moreover, this inquiry into the integration of environmental issues into the context of IIL may provide a paradigmatic model for the broader theme of integrating non-economic matters into the tissue of rules that protect foreign investments.

With this background in mind, this book is framed in the following terms.

Chapter 1 summarizes the concrete social and legal reasons that trigger antagonisms between foreign investor rights and environmental interests.
Chapter 2 gives basic insights into international investment rules and their conflicting relationship with environmental protection with an introductory character, and explains the reasons for the ground of inquiry. Chapter 3 highlights the theoretical aspects of IIL: it undertakes an analysis of IIL criticism and self-contained approaches, as well as the comprehensive and comparative public law conceptions of IIL. It discusses whether and to what extent the issue of integrating environmental concerns when applying investment rules is influenced by one or another of these theoretical viewpoints. In this way, the foundations for a critical scrutiny of legal arguments and solutions presented in Chapters 5 to 7 are delineated. Chapter 4 further sets the scene by distinguishing issues of applicable law and legal interpretations referring to IIL. It clarifies more specifically why this book deals mainly with hermeneutical questions.

Chapters 5 to 7 constitute the core of the book, with a critical analysis of case-law arguments and treaty solutions that address the integration of environmental and human health concerns into IIL. These investment materials are ordered into three integrative approaches, moving from internal arguments to systemic interpretative methods and, finally, to exception-based models. Chapter 5 brings together the arguments which address ‘integrative issues’ from an ‘internal’ perspective, that is, by interpreting notions and concepts that are typical of IIL, in line with hermeneutical canons oriented towards investor protection (which involve not only literal, but also teleological interpretation). Significantly, most arguments of this kind tend to take environmental values into account by following a common interpretative pattern. Chapter 6 scrutinizes systemic approaches, and highlights the importance of these methods of interpretation when dealing with ‘environmental cases’, according to Art. 31.3(c) of the Vienna Convention. Chapter 7 emphasizes the role that legal exceptions could play in reconciling environmental protection and foreign investor rights. It analyses different forms of exception that may facilitate the integration of environmental concerns into IIL, starting with state of necessity before moving on to the modalities and limits of investment treaty provisions of exceptional clauses modelled on GATT Art. XX. These innovative treaty clauses are then used as a background to assess the arguments scrutinized in the preceding chapters, which equally involve the legal paradigm of exception. Finally, Chapter 8 outlines possible scenarios for the evolution of the integrative question, according to the model of legal exception. It discusses the foundations that underlie the process of creating and consolidating environmental exceptions in IIL and the relationship between rules and exceptions with respect to theories affirming the indeterminacy of international law.