The relationship between investment protection and environmental concerns is one of the long-standing issues in international investment law. Saverio Di Benedetto’s book, International Investment Law and the Environment, provides a welcome contribution to the debate on the issue by addressing the problem from an informed theoretical standpoint. The author shows how attention to environmental protection has begun penetrating into international investment agreements and investment arbitral case law, leading to the likely development of treaties and case law towards integration rather than isolation. The main argument of the book is based on the author’s identification of “internal”, “external”, and “exceptional” methods of interpreting investment rules, when questions of environmental and human health are at stake. The “internal” and “external” methods are sturdily knotted, as they both rest on the principles embraced by arbitral tribunals in construing such rules. The “exceptional” method, instead, operates a priori, when the legal instruments regulating investment and environmental protection are negotiated and drafted, bringing more certainty, but less flexibility, in dealing with the ever-developing international law on foreign investment.


Dr Paolo Vargiu, JD (Cagliari), LLM (Nottingham), PhD (Nottingham), PGCHE (Leicester), FHEA, Lecturer, University of Leicester (UK). The author can be contacted at paolo.vargiu@le.ac.uk.
The problems surrounding the relationship between foreign investment and environmental protection have been raised by academics and practitioners of international investment law. The core of the problem lies in the fact that protecting the rights of investors and environmental protection are often clashing objectives. Trying to harmonise these two fields of international law may present significant challenges to many scholars, especially considering the enormously conflicting interests at stake any time an investor carries out economic activities abroad. Saverio Di Benedetto recognises such difficulties and addresses the problem from quite a realistic perspective. His book is aimed at integrating environmental concerns “into the strict logic of international investment rules.” To do so, Di Benedetto analyses how the relationship between investment protection and environmental concerns has evolved so far, by looking at arguments and solutions in international investment agreements and case law. He tries to categorise such arguments and solutions on the basis of the legal approach behind them, and eventually suggests three possible outcomes for the route towards the integration of environmental concerns into international investment law.


Saverio Di Benedetto’s *International Investment Law and the Environment* is divided into two main parts, part I being devoted to the analysis of the problem of the intersection of investment protection and environmental concerns in treaties and case law, and part II addressing the issue of integration between the two fields at stake. More in detail, part I can be considered as the foundational section of the book, which establishes the main aspects of international investment law and its relationship with non-commercial values. At the same time, it underlies the pathway towards the critical analysis that follows later in the book. Chapters 1 and 2 are largely descriptive, giving readers the necessary background information regarding international law on foreign investment and environmental protection; they also highlight the core issues in each field and explain the relationship between them. Chapter 3 analyses the theoretical aspects of international investment law, addressing the question of whether international investment law is to be considered ‘as a unit or a set of fragmented elements.’ However, this issue, as correctly pointed out by the author, is not merely a theoretical one, but rather one with significant consequences in terms of the integration of other concerns and values in investment treaties and arbitral cases, such as environmental protection. Chapter 4 builds on the previous chapter to analyse the role of applicable law in the integration of non-commercial values in investment arbitral disputes.

In part II, chapter 5, intriguingly named “Internal Arguments: From Ordinary Meanings to Derogatory Logic”, is the first one in the book to address the behaviour of arbitral tribunals when facing potential conflicts between investors’ rights and environmental protection. The chapter in question focuses on “internal arguments” developed by arbitral tribunals that refer to the ordinary interpretative canons of international investment law. Chapter 6, on the other hand, analyses systemic approaches taken by investment tribunals and treaty makers in order to integrate, to a certain extent, concerns other than investors’ rights into the settlement of investment disputes. Chapter 7 addresses “exceptional models”—namely, the “specific ways of taking non-commercial issues into account when applying investment rules.” Finally, chapter 8 builds upon the previous parts of the book to outline three possible scenarios where international investment law and environmental protection might interact in the future.

Notwithstanding its possibly misleading title, Saverio Di Benedetto’s *International Investment Law and the Environment* is first and foremost a book on international investment law, as the author correctly points out in his preface. This is in line with the approach adopted in most of the literature in the field; for instance, Shyami Puvimanasinghe in *Foreign Investment, Human Rights, and the Environment* and, to a slightly lesser extent, Jorge E. Viñuales in his *Foreign Investment and the Environment in International Law* tackle the issue in recent contributions from a very similar perspective. However, Puvimanasinghe’s book deals mainly
with the problem of the lack of integration between public international law and regional and domestic legal systems, using South Asia as a case study on the North-South power dynamics. Viñuales, for his part, focuses mainly on the relationship between investment and environmental protection from a policy and a practical perspective, considering the problems of such a relationship through an analysis of a wide range of case law. While Di Benedetto’s book is similar to these two titles, as it attempts to address the issue of integration of non-commercial values into international investment law, *International Investment Law and the Environment* stands out based on the strong theoretical foundation that permeates the whole analysis and the recommendations of the author at the end. As this review will demonstrate, Di Benedetto’s analysis moves from a theoretical to a practical perspective, in a strongly academic fashion—he tries to identify specific theoretical points in investment arbitral awards and treaties to predict possible developments of the practice. Viñuales’ book is based on the opposite approach, analysing State practice and the case law of fora such as the International Centre for Settlement of Investment Disputes, ad hoc arbitral tribunals under the United Nations Commission on International Trade Law Arbitration Rules, the International Court of Justice, the World Trade Organization (WTO) Appellate Body, the International Tribunal for the Law of the Sea, and even human rights bodies to extract more general and theoretical lessons.

In light of this comparison, it is worth underscoring that Di Benedetto’s approach is more appropriate with regard to how problems concerning investment and the environment have emerged at the international law level, be it arbitral jurisprudence or bilateral and multilateral investment agreements. Di Benedetto offers evidence and examples that demonstrate how considerations of environmental protection have started to penetrate into international investment agreements and investment arbitral case law. At the same time, the author correctly recognizes that there is no evidence that the attention to environmental concerns is now steadily established in investment law. The author is successful, however, in showing how the two fields of international law in question are now intertwined, and demonstrating that the development of treaties and case law is progressively moving towards integration rather than isolation. By addressing this point, Di Benedetto’s work also fills a long-standing gap in the literature, as his book tackles the issues of investment and environment from the perspective of integration. While one may possibly disagree with the author’s views on such integration—especially if one adheres to the view that the jurisdiction of investment tribunals should be strictly limited to questions arising from the relationship between the investor and the host

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9 See especially Puvimanasinghe, *supra* note 6, ch 2 at 33-57, ch 4 at 97-162, ch 8 at 243-260.

state\(^{11}\)—the analysis contained in *International Investment Law and the Environment* must not be dismissed in any study of the problem of environmental concerns in investment law. One may argue that Di Benedetto’s analysis is largely unbalanced in favour of case law rather than treaties and domestic investment laws. However, this is due to the fact that arbitral tribunals have actually played a key role in introducing environmental protection values in investment disputes. Tribunals have somehow anticipated the treaty tradition that has now incorporated environmental concerns among the norms on investment protection and promotion.\(^{12}\) In other words, the aforementioned unbalanced analysis is rather the fault of the system of investment law, and not a flaw in Di Benedetto’s study.

Notwithstanding the similarity of approaches taken by most of the contributions in the field, *International Investment Law and the Environment* is a compelling book that addresses the problem of investment and environment from an original perspective. The main shortcoming of the existing literature is, in my opinion, the failure to keep up with the practice and shift the focus from the relevance of non-investment concerns to questions of integration. More specifically, the literature in the field seems to be mostly concerned with the importance of considering non-commercial values in investment arbitral proceedings—deemed to be the doorway for such values to enter into the house of investment law—rather than with method and incorporation.\(^{13}\) It is true that the incorporation of non-commercial values in the sphere of investment law is still at an embryonic stage, hence the focus of scholarship on the need to address this deficiency.\(^{14}\) However, merely raising issues related to such non-commercial values is no longer sufficient, especially in light of the US Model BITs—and other Model BITs


that followed, such as the Colombian and Canadian ones—and the tradition of integration between commercial and non-commercial values started with the WTO Agreements.

Di Benedetto, however, recognises this issue and devotes half of his book to addressing integration, rather than the mere consideration of environmental concerns in international investment law. Di Benedetto’s work critically addresses both arguments used by arbitral tribunals as well as treaty provisions to integrate environmental and human health issues into the sphere of investment law, dividing such arguments and provisions into the three categories that give titles to chapters 5 to 7 (“Internal Arguments”, “Systemic Approaches”, and “Exceptional Models”). Di Benedetto tries to rationalize, in his own words, “what is otherwise a chaotic quantity of legal materials” into schematic categories that represent one of the core contributions of his book to the debate on foreign investment and the environment. To do so, the book revolves around the author’s identification of “internal”, “external”, and “exceptional” methods of interpreting investment rules in disputes in which questions of environmental and human health are at stake. The “internal” and “external” methods are strongly intertwined, as they both depend on the canon embraced by arbitral tribunals in interpreting such rules. The “exceptional” method, instead, is one that operates a priori, when the legal instruments regulating investment and environmental protection are negotiated and drafted. While it brings more certainty to the table, it is also less flexible and perhaps less appropriate to deal with the ever-developing international law on foreign investment. On one hand, “internal” arguments, analysed in chapter 5, are based on a self-centred approach of arbitral tribunals. Such tribunals, considering investment law as a self-sufficient system, only deal with the ordinary meaning of the various applicable norms; thus external rules and principles are unable to enter the scene and affect the consideration of the facts of the case, and, in the end, the outcome of the dispute at hand. On the other hand, “external” arguments also consider rules and obligations outside of investment law, contextualising, where possible, the need for—and rules on—investment protection within the bigger picture of host states’ interests.

Di Benedetto rightly points out at various stages how the two categories of “internal” and “external” arguments are not mutually exclusive. Even the case law shows that arbitral tribunals move easily from “internal” to “external” arguments. Generally speaking, it is possible to observe a tendency for arbitral tribunals to try and solve disputes by only applying investment law rules (mostly from BITs and domestic investment laws) in their ordinary meaning. However, when this is not possible, arbitral tribunals have shown no fear in going beyond the boundaries of investment law whenever rules from outside this field are needed, particularly in the application and interpretation of rules on environmental protection. This modus operandi of arbitral tribunals comes from the gaps of investment law as a system. Such gaps are commonly filled by reference to general public international law and other specialised branches of international law. This argument is strictly related to the long-standing

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15 Di Benedetto, supra note 2 at 79.
16 Di Benedetto, supra note 2 at 86, 95, 134, 151.
17 Ibid at 80, 93, 103. See especially Compañía del Desarrollo de Santa Elena, S.A. v The Republic of Costa Rica (2000), ARB/96/1 at paras 54–74 (International Centre for Settlement of Investment Disputes); Metalclad Corporation v the United Mexican States (2000), ARB(AF)/97/1 paras 48ff (International Centre for Settlement of Investment Disputes).
The third category of arguments identified by Di Benedetto in his book, as stated beforehand, includes “exceptional” models, namely interpretative approaches that require a legal exception—for instance, specific norms included in investment agreements or norms of *jus cogens*—for the integration of environmental concerns into international investment law. The genesis of such exceptions is identified by the author in Article XX of *The General Agreement on Tariffs and Trade*, which allows WTO member states to adopt or enforce measures necessary to protect public morals, human, animal or plant life or health, or relating to the conservation of exhaustible natural resources. Exceptional models are now quite frequent in the investment law practice. For instance, article 14 of the 2012 US Model BIT excludes the application of the most favoured nation and national treatment standards to certain measures taken by the host state, while Annex B, point 4 of the same BIT outlines, to the exclusion of any other situations, which measures shall be considered indirect expropriations. Moreover, article 9 of the Canada Model BIT restricts the application of the most favoured nation and national treatment standards, as well as the minimum standard of treatment, excluding the application of such standards to the pre-existing situations listed in article 9 itself. Lastly, article 19 of the Canada-Benin BIT provides specific exceptions for the protection of intellectual property rights and the application of standards of treatment to the investment, while article 20 of the

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BIT contains general exceptions to protect “human, animal or plant life or health” and to conserve living or nonliving exhaustible natural resources.24

Notwithstanding the efforts of chapters 5 to 7, Saverio Di Benedetto himself points out that it is not genuinely possible, at this stage, to predict the methods through which environmental concerns will be integrated into international investment law. However, he foresees three possible scenarios: fragmentation, sovereignty, and general exception. These scenarios are very much linked to the three interpretative methods identified by Di Benedetto, fragmentation being the outcome of the “internal” method, sovereignty being at the core of the “external” method, and the general exception scenario being the logical result of the “exceptional” method of interpretation. Each will be discussed in turn. Whilst the fragmentation of state and arbitral practice has so far dominated the scene in investment law, it appears—from an analysis of the academic literature as well the reading of the most recent case law—that a number of core principles (such as the fair and equitable treatment, the full protection and security, the most favoured nation treatment, and the national treatment standards)25 are now undisputedly part of the commonly accepted approach to international investment law, and more should be on the way. In spite of the relatively conservative character of international investment law, the tendency since the 1960s seems to illustrate a shift towards a system, however imperfect, that might overcome internal fragmentation. The imperfection lies mostly in the fact that a number of investment agreements provide slightly different formulas of such core norms; however, their nature as central, essential, and fundamental is universally accepted.26 The second scenario, which gives precedence to state sovereignty by justifying any state regulatory measure, as long as it is non-discriminatory and in pursuance of a public policy objective, also seems to be past its prime and confined to cases of indirect expropriation, mostly because of the undesirably vast amount of discretion left to arbitral tribunals. As one of the problems of international investment law concerns certainty and predictability,27 this scenario seems to be even more obsolete than the first.

The “general exceptions” scenario, in the words of the author, “would involve a normative model of general exceptions that would become the basic tool to take fundamental non-commercial interests, such as human health and the environment, into account in investment regimes.”28 As previously stated, the most recent international investment agreements seem

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28 See Di Benedetto, supra note 2 at 213.
to converge on listing, more or less exhaustively, the possibilities to derogate from the rules on investment protection. This entails a drastic reduction of the possibility for the tribunal to consider the majority of regulatory state measures as exceptional. A model based on legal exceptions could indeed provide more certainty and predictability to bilateral and multilateral investment regimes. Moreover, such a model would allow for the stable inclusion of environmental, labour, and human health values in the system of investment law. At the same time, this model would not significantly affect state sovereignty, except for a “soft” limitation for the preservation of specific, widely accepted values (as opposed to “hard” limitations in certain matters listed in treaties). Di Benedetto’s point on the feasibility of the “general exceptions” scenario is solidly grounded in existing scholarship. Academics have engaged with the topic, both from a theoretical and a practical perspective, addressing the applicability of exceptions as a legal method in different fields of international law. As Di Benedetto himself points out in chapter 7, WTO Agreements use this very method to take non-commercial issues into account; the scholarship has identified many other instances, mostly in the law of state responsibility, in which the method is successfully implemented. Thus, there are solid reasons to believe that such a method would also effectively allow consideration of environmental issues within the investment law discourse.

From a stylistic point of view, this book is definitely a compelling read. Even though one can anticipate that a number of scholars might disagree with Di Benedetto’s conclusions, the author’s writing style makes the reading an enjoyable experience, as it constantly reminds the reader of the core argument of the book. Moreover, every argument raised by Di Benedetto is substantively grounded in literature and case law. The scholarly research is of the highest quality, as is the consideration of writings in adjoining fields.

All things considered, the overall judgment on International Investment Law and the Environment cannot but be a definitely positive one, particularly from an academic point of view. Di Benedetto’s study of the topic at stake is to be commended, as it is exceptionally rigorous and extremely sophisticated from a theoretical standpoint.

In a way, though, the main strength of Saverio Di Benedetto’s book is also one of its primary weaknesses: the thorough, complex, and sophisticated level of the analysis expertly provided by Di Benedetto is not aimed at addressing the hands-on issues of environmental concerns in investment law and arbitration. The analysis is rather aimed at identifying and categorising the existing trends for the purpose of trying to predict the future developments of students of international law.


the integration process between foreign investment and the environment. If the approach taken by the author in this book somehow limits its potential audience, it is nevertheless essential reading for all scholars in the field, and quite possibly recommendable for postgraduate study of investment law, environmental law and legal theory—especially part II of the book, which would not only be of interest to international economic law theorists but rather appeal to a more general audience. As stated beforehand, the theoretical underpinning of this book makes it less appropriate for a practice-oriented perspective on the issue of environmental protection in international investment law—while Viñuales’ *Foreign Investment and the Environment in International Law* would be a valuable tool for practitioners especially by virtue of the approach it takes. In sum, *International Investment Law and the Environment* is a seminal, sophisticated, theoretical, scholarly oriented contribution to the study of international investment law, and a must-have for investment law scholars.
I. Investment Law in a Broader Perspective

**Prelude:**

International investment law has always been, and probably always will be, in flux. Why?

1. **Competing Ideologies**
2. **Changing Economies**
3. **Variance of Legal Norm Entrepreneurship**

**1. Foreign Investment.**

This book expands upon research into the protection of foreign investments, which is currently an intensively studied area of international law. At the same time, it also examines environmental protection, as well as general areas of debate in international law, including fragmentation, self-contained regimes, the role of interpretation and of principles, and theories of indeterminacy. Discover the world's research. 17+ million members.

This fact shows the asymmetrical positions of agriculture and the environment in international law. As a consequence, this chapter focuses less on the environment than it does on agriculture. Moving from international rules and instruments regarding agriculture, it tries to show the existing interaction with environmental law.