

# FOREIGN INVESTMENT AND THE ENVIRONMENT IN INTERNATIONAL LAW: AN AMBIGUOUS RELATIONSHIP

**JORGE E. VIÑUALES**

CENTRE FOR INTERNATIONAL ENVIRONMENTAL STUDIES  
Research Paper No. 02

forthcoming in: *British Yearbook of International Law*, Vol. 80, 2010

---

FOREIGN INVESTMENT AND THE ENVIRONMENT IN INTERNATIONAL LAW:  
AN AMBIGUOUS RELATIONSHIP

By JORGE E. VIÑUALES\*

---

**I. INTRODUCTION**

**II. CONCEPTUALISING INTERACTIONS**

- A. *Foreign Investment and the Environment*
- B. *Mutual Supportiveness*
- C. *Potential Conflicts*

**III. INVESTMENT PROCEEDINGS**

- A. *Jurisdictional Matters*
  - 1. *Environmental claims*
    - (i) Environmental claims as investment claims
    - (ii) Environmental claims as independent heads of claim
  - 2. *Investments in accordance with (environmental) law*
    - (i) Environmental rights as investments
    - (ii) Investments contrary to environmental law
- B. *Applicable Law*
  - 1. *Choice of law and other indications*
    - (i) Choice of law clause in an investment agreement
    - (ii) Choice of law provision in an investment treaty
    - (iii) References to the validity of an investment
    - (iv) Default rules
  - 2. *Relevance*
    - (i) Boundaries of the dispute
    - (ii) The pleas of the parties
    - (iii) Specific uses of environmental norms
- C. *Procedural Matters*
  - 1. *Role of non-disputing parties*
    - (i) Raising environmental issues
    - (ii) Reasons for third-party intervention
    - (iii) Applicable framework
  - 2. *Evidentiary issues*
    - (i) Downplaying the role of science
    - (ii) Scientific assistance

---

\* PhD (Institut d'Études Politiques de Paris), LLM (Harvard), DEA (HEI). Jorge E. Viñuales is the Pictet Chair in International Environmental Law and an Assistant Professor of International Law at the Graduate Institute of International and Development Studies, in Geneva. He is also Counsel with the law firm Lévy Kaufmann-Kohler, in Geneva, where he specialises in international investment law, as well as the Executive Director of the Latin-American Society of International Law. The opinions expressed in this study are personal and do not reflect those of any of the organizations with which the author is affiliated. The study takes into account developments until 6 August 2010. The author is grateful to Professor James Crawford for his comments on an earlier draft of this article. Any mistakes that the text may contain are the author's exclusive responsibility.

(iii) Adjustments to evidentiary standards

#### IV. INVESTMENT CLAIMS

A. *Normative conflicts v. legitimacy conflicts*

B. *Normative conflicts*

1. *Specific conflict rules*

2. *General conflict rules*

(i) Sequential application

(ii) Lex superior

(iii) Lex specialis

(iv) Lex posterior

(v) Systemic integration

C. *Legitimacy conflicts*

1. *Specific conflict rules*

2. *General conflict rules*

(i) Relations between domestic and international law

(ii) Conflicts of (domestic) laws

(iii) State regulatory powers

- The police powers doctrine

- The margin of appreciation doctrine

- Emergency and necessity clauses

D. *Issues of compensation*

1. *The irrelevance thesis*

2. *The police powers thesis*

3. *Middle grounds*

#### V. FUTURE TRENDS

---

##### I. INTRODUCTION

The purpose of this study is to analyse the interactions between two thriving fields of current international law, namely international investment law and international environmental law. Since their modern inception back in the 1960s,<sup>1</sup> the historical development of these two bodies of law has been characterised by a remarkable transformation from loosely-defined arrays of standards and principles, often controversial and with limited legal impact, to sophisticated legal fields, of considerable importance from

---

<sup>1</sup> Although the protection of foreign investors in international law can be traced back to the nineteenth century, and perhaps even earlier, its development in the last decades (particularly since the 1990s) has been totally unprecedented. For a survey of the new dawn of international investment law, see P Juillard, 'L'évolution des sources du droit des investissements', (1994) 250 *Recueil des cours* 9. Regarding international environmental law, again, despite the existence of some international practice relating to the protection of particular species or the distribution of shared resources, the development of modern international environmental law started only in the 1960s and particularly from the 1970s onwards, after the United Nations Conference on the Human Environment, of June 1972. For a survey of the historical development of international environmental law see M A Fitzmaurice, 'International Protection of the Environment', (2001) 293 *Recueil des cours* 27.

both the policy and business perspectives. This transformation has also changed the relations between investment and environmental regulation.

For several decades, both international investment law and international environmental law evolved in relative autarchy, as specialised fields of international law.<sup>2</sup> Such relative autarchy explains why the interactions between the two fields remained limited. Indeed, so long as the norms informing these fields remained vague, conflicts were less likely to materialise. Moreover, the possibility of such conflicts was largely overshadowed by the apparent solution that the concept of ‘sustainable development’ offered to the trade-off between protecting the environment and promoting growth and development.<sup>3</sup> Yet, the ‘environment-development equation’ proved to be a resilient beast, lurking in the shadows of most major environmental negotiations.<sup>4</sup> And even in those cases where conflicts between the two terms of the equation were singled out, the attention tended to focus mostly on trade restrictions based on environmental considerations.<sup>5</sup>

However, with the increasing reach and sophistication of both international investment law and international environmental law, the possibility that foreign investment protection may encroach on environmental protection and vice versa has started to receive more attention from legal commentators. The unifying concept of sustainable development is indeed no longer perceived as a sufficient tool to manage the possibility of conflicts between these two bodies of law. As one commentator has noted, sustainable development is a multilevel concept, with different meanings at different levels.<sup>6</sup> At a superficial level, sustainable development can be defined, along the lines of the well known Brundtland Report, as development that meets the needs of the present without compromising the needs of future generations.<sup>7</sup> Such a broad definition is admittedly helpful in gathering consensus from different constituencies in an international negotiation. But it provides little or no guidance on how the two terms of the environment-development equation should be reconciled in case of conflict.<sup>8</sup> It is only when one’s attention moves onto a deeper level, in

---

<sup>2</sup> Both international investment law and international environmental law have often been regarded as ‘special regimes’ in the meaning of paragraphs 11 and 12 (third paragraph) of the Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law, *Yearbook of the International Law Commission, 2006*, vol. II, Part Two (Conclusions-Fragmentation). On the scope and limits of this concept see, particularly, paragraphs 8 and 123-194 of the Analytical Study prepared by this Group, Document A/CN.4/L.682 and Corr.1. (Report-Fragmentation).

<sup>3</sup> On this concept see D Barstow Magraw, L D Hawke, ‘Sustainable Development’ in D. Bodansky, J Brunnée, E Hey (eds), *The Oxford Handbook of International Environmental Law* (Oxford University Press, Oxford, 2007) 613-638.

<sup>4</sup> The modest results achieved in the fifteenth Conference of the Parties to the United Nations Framework Convention on Climate Change (UNFCCC), in December 2009, can be largely explained by the trade-off between environmental protection and development. Developing countries, especially emerging economies, are extremely reluctant to compromise their development effort by undertaking genuine emission commitments. Industrialized countries refuse in turn to adopt or expand, as the case may be, their emissions commitments unless emerging countries are also subject to some significant restraint. See L Rajamani, ‘From Berlin to Bali and Beyond: Killing Kyoto Softly?’ (2008) 57 *International & Comparative Law Quarterly* 909.

<sup>5</sup> For an updated overview see P Birnie, A Boyle, C Redgwell, *International Law and the Environment* (Oxford University Press, Oxford, 2009) 766 et seq.

<sup>6</sup> See A Dobson, *Fairness and Futurity: Essays on Environmental Sustainability and Social Justice* (Oxford University Press, Oxford, 1999) 23-30.

<sup>7</sup> *Report of the World Commission on Environment and Development, ‘Our Common Future’*, UNGA Res A/42/427, Annex, Chapter II, 54 (para 1).

<sup>8</sup> See *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, [1997] ICJ Rep 7 (‘Gabčíkovo-Nagymaros’), paras 140-141 (referring to the need for the parties to find an ‘agreed solution’); *Iron Rhine (‘IJzeren Rijn’) Railway Arbitration (Belgium/Netherlands)*, RIAA vol. XXVII, 25 (‘Iron Rhine Arbitration’), paras 59-60 (noting that ‘[t]he mere invocation of such matters [the principle of sustainable development] does not, of course, provide the

search of a more rigorous definition of sustainable development, that the extent to which the contents of this concept are unsettled can be fully appreciated.

The emerging legal literature on the interactions between investment and environmental regulation seeks to capture different dimensions of this interface, focusing on issues such as the environmental responsibility of multinational corporations,<sup>9</sup> the scope of investment protection clauses,<sup>10</sup> the role of non-disputing parties,<sup>11</sup> the operation of emergency or necessity clauses,<sup>12</sup> or the treatment given in foreign investment disputes to some particular environmental question.<sup>13</sup> Despite the importance of this research, the overall picture that emerges from these contributions remains difficult to appraise, mostly as a result of the specific nature of the issues and perspectives selected.

In this context, the purpose of the present study is to build on this emerging literature in order to present a broader assessment of the current state of international law on this topic. In the first section, the study provides a conceptual framework to facilitate the analysis of both mutually supportive and conflicting interactions between foreign investment and environmental protection and their international legal regimes (II). This is followed by an analysis of the most significant questions posed by such interactions in the light of the relevant investment-related decisions from international courts and tribunals. The analysis is

---

answers in this arbitration to what may or may not be done, where, by whom and at whose costs’); *Case concerning Pulp Mills in the River Uruguay (Argentina v. Uruguay)*, Judgment of 20 April 2010, General List No 135 (‘Pulp Mills case’), paras 75-77 (referring to the duty of co-operation) and 177 (stating that sustainable development requires a balance between the use of the waters and the protection of rivers).

<sup>9</sup> See P Muchlinsky, *Multinational Enterprises and the Law* (Oxford University Press, Oxford, 2007), chapter 14; E Morgera, *Corporate Accountability in International Environmental Law* (Oxford University Press, Oxford, 2009); B J Richardson, ‘Climate Finance and its Governance: Moving to a Low Carbon Economy through Socially Responsible Financing?’ (2009) 58 *International & Comparative Law Quarterly* 597; B J Richardson, ‘Financing Sustainability: The New Transnational Governance of Socially Responsible Investment’ (2006) 17 *Yearbook International Environmental Law* 73; D M Ong, ‘The Contribution of State-Multinational Corporation “Transnational” Investment Agreements to International Environmental Law’ (2006) 17 *Yearbook International Environmental Law* 168.

<sup>10</sup> See O K Fauchald, ‘International Investment Law and Environmental Protection’ (2006) 17 *Yearbook International Environmental Law* 3; S Robert-Cuendet, *Protection de l’environnement et investissement étranger: Les règles applicables à la dépossesion du fait de la réglementation environnementale*, thèse, Université de Paris I; J Waincymer, ‘Balancing Property Rights and Human Rights in Expropriation’ in P-M Dupuy, F Francioni, E U Petersmann (eds), *Human Rights in International Investment Law and Arbitration* (Oxford University Press, Oxford, 2009, hereafter referred to as ‘Dupuy et al’) 275; I Knoll-Tudor, ‘The Fair and Equitable Treatment Standard and Human Rights Norms’ in Dupuy et al, 310; F Ortino, ‘Non-Discriminatory Treatment in Investment Disputes’ in Dupuy et al, 344.

<sup>11</sup> See B Stern, ‘Civil Society’s Voice in the Settlement of International Economic Disputes’ (2007) 22 *ICSID Review* 280; F Grisel, J E Viñuales, L’*amicus curiae* dans l’arbitrage d’investissement’ (2007) 22 *ICSID Review* 380; E Triantafilou, ‘Amicus Submissions in Investor-State Arbitration after Suez v. Argentina’ (2008) 24 *Arbitration International* 571; S Menétrey, L’*amicus curiae*, *vers un principe de droit international procédural?*, PhD dissertation (Université Panthéon-Assas, Paris—Université Laval, Québec), December 2008.

<sup>12</sup> See D Dobos, ‘The Necessity of Precaution: The Future of Ecological Necessity and the Precautionary Principle’ (2002) 13 *Fordham Environmental Law Journal* 375; J Neuman, E Turk, ‘Necessity Revisited: Proportionality in World Trade Organization Law after Korea-Beef, EC-Asbestos and EC-Sardines’ (2003) 37 *Journal of World Trade* 199; P-M Dupuy, ‘L’invocation de l’état de nécessité écologique. Les enseignements tirés d’une étude de cas’ in Société française pour le droit international, *La nécessité en droit international* (Pedone, Paris, 2007) 223; J E Viñuales, ‘Las Cuestiones Medioambientales y el Concepto de Estado de Necesidad’ (2009) 119 *Universitas. Revista de derecho* 223.

<sup>13</sup> See P Thielbörger, ‘The Human Right to Water versus Investor Rights: Double Dilemma or Pseudo Conflict?’ in Dupuy et al, above n 10, 487; J E Viñuales, ‘Access to Water in Foreign Investment Disputes’ (2009) 21 *Georgetown International Environmental Law Review* 733; R Pavoni, ‘Environmental Rights, Sustainable Development, and Investor-State Case Law: A Critical Appraisal’ in Dupuy et al, above n 10, 525; L Liberti, ‘The Relevance of Non-Investment Treaty Obligations in Assessing Compensation’ in Dupuy et al, above n 10, 557.

structured into two sections dealing with issues arising, respectively, in the conduct of arbitration proceedings (jurisdiction, applicable law, procedural issues) (III) and in the assessment of the merits of investment claims (normative and legitimacy conflicts, compensation) (IV). The last section is devoted to some reflections on the future interactions between international investment law and international environmental law (V).

## II. CONCEPTUALISING INTERACTIONS

In order to frame the discussion of the relations between international investment law and international environmental law, it is useful to look first at how the two underlying realities regulated by these bodies of law interact in practice (A). Our aim is not to characterise foreign investment or environmental degradation as socio-economic phenomena in general, but only to provide the foundations for an analysis of how international law deals with their interactions, either as mutually supportive (B) or as potentially conflicting realities (C).

### A. *Foreign Investment and the Environment*

Foreign investment in developing countries<sup>14</sup> can constitute both a vector of sustainable development, most notably through financial and technology transfers, and a threat to the environment, when its production processes and methods are risky or harmful. In practice, both dimensions are often combined.

One interesting illustration of this latter point is offered by the so-called race-to-the-bottom argument. The basic idea is that States wishing to attract foreign investment to further their development will have an incentive to lower their environmental protection standards.<sup>15</sup> In such a situation, other States may be led to do the same in order to avoid a competitive disadvantage, with a resulting overall decline of environmental protection. This would be a problem for both developed and developing countries, although for different reasons. Whereas the former fear the delocalisation of firms driven by the adoption of relatively less costly environmental regulations abroad, the latter have expressed concern over the environmental damage that may result from the activities of foreign investors located in their territory. A prominent example of such risks is given by the Bhopal tragedy, on 3 December 1984, when the accidental release of approximately 42 tonnes of toxic methyl isocyanate (MIC) gas from a Union Carbide pesticide plant located in the Indian city of Bhopal killed and injured several thousand people. The link between the accident and poor (or poorly enforced) regulation is difficult to establish, as were the exact circumstances that led to the release of the gas. The Bhopal tragedy has nevertheless become a common reference in discussions of the risks associated with the transfer of dangerous activities to developing countries.<sup>16</sup>

---

<sup>14</sup> In 2009, for the first time ever, emerging markets received more inflows of foreign direct investment than developed countries. See L Kekic, 'The Global Economic Crisis and FDI Flows to Emerging Markets' (October 2009) *Columbia FDI Perspectives* no 15.

<sup>15</sup> This argument has received particular attention in the context of environmental regulatory competition within the United States. See among others R L Revesz, 'Rehabilitating Interstate Competition: Rethinking the Race-to-the-Bottom Rationale for Federal Environmental Regulation' (1992) 67 *New York University Law Review* 1210; K H Engel, 'State Environmental Standard-Setting: Is There a Race and Is It to the Bottom' (1996-1997) 48 *Hastings Law Journal* 271.

<sup>16</sup> See S Jasanoff (ed), *Learning from Disaster: Risk Management after Bhopal* (University of Pennsylvania Press, Philadelphia PA, 1994).

The perception of the desirability of foreign investment may also change throughout the life of an investment. Numerous illustrations of this phenomenon can be provided. For instance, if one looks at cases of water and sewerage concessions, the initial perception of foreign investors is often positive, as a necessary contribution to the modernisation of the water distribution infrastructure. However, after some time, this initially positive perception may evolve towards a negative one, for a variety of justified or unjustified reasons, ranging from the imposition of high or simply unpopular tariffs to the occurrence of a crisis or to a sudden change in the government of the host country, to name but a few. Such changes have given rise to foreign investment disputes in a number of cases.<sup>17</sup> Another example of perception shifts concerns waste disposal/treatment facilities or related services operated by foreign investors. A number of developing countries or of their political subdivisions have outsourced such activities to foreign investors, often because investors can more easily mobilise the necessary capital and technology to set up such facilities or provide such services. But, again, throughout the life of the investment, the perception may change from a positive to a negative one and give rise to an investment dispute.<sup>18</sup>

As the foregoing examples suggest, the relations between foreign investment and environmental protection are complex and raise a number of difficult issues. It is, for instance, unclear what would happen with investments in environmentally-sensitive sectors, such as energy production, water distribution, waste treatment or chemical safety, if the host State's environmental regulations were to become more stringent during the life of the investment. In other cases international investment law could be used to protect the environment, for instance, by requiring a State to respect its own environmental laws upon which an investment is based.<sup>19</sup> Overall, what these examples show is that the relation between international investment law and international environmental law has two dimensions, one in which the two terms appear as mutually supportive and another in which they seem to conflict with each other. The emerging international regulation reflects the dual nature of this relation.

### B. Mutual Supportiveness

The mutually supportive dimension of foreign investment and environmental protection is at the heart of the concept of sustainable development. When considered from this perspective,

---

<sup>17</sup> See, for instance *Aguas del Tunari S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Objections to Jurisdiction of 21 October 2005 ('*Aguas del Tunari*') (later settled); *Biwater Gauff (Tanz.) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award of 24 July 2008 ('*Biwater v. Tanzania*'); *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award of 20 August 2007 ('*Vivendi II*').

<sup>18</sup> See, for instance, *Metalclad Corp. v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award of 25 August 2000 ('*Metalclad v. Mexico*'); *Técnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award of 29 May 2003 ('*Tecmed v. Mexico*'); *Abengoa, S.A. y COFIDES, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/09/2 ('*Abengoa v. Mexico*') (pending).

<sup>19</sup> See, for instance, the case brought by a Canadian investor against Barbados for failure to enforce its own environmental law (adopted in accordance with international environmental law) in connection with the protection of a natural ecosystem. The investor, who acquired 34.25 acres of natural wetlands and subsequently developed it into an ecotourism facility, claims that, through its acts and omissions, Barbados has *inter alia* failed (a) to prevent the repeated discharge of raw sewage into wetlands, (b) to investigate or prosecute sources of runoff of grease, oil, pesticides, and herbicides from neighbouring areas, and poachers that have threatened the wildlife within the ecosystem. The text of the notice of arbitration is available at <<http://graemehall.com/legal/papers/BIT-Complaint.pdf>> (last accessed on 16 February 2010). Irrespective of whether this claim prospers, its interest lies in the way it has been formulated, which illustrates a novel form of complementariness between international investment law and international environmental law.

however, sustainable development appears mainly as a policy goal, the operational contours of which are circumscribed in political declarations, recommendations and soft-law instruments.<sup>20</sup> Although such policy considerations are not the object of this study, it may be useful to provide a brief survey of the overall framework for environmental investment.

The main addressees of the international policy instruments dealing with sustainable development are States. Instruments such as Agenda 21, adopted in the 1992 Earth Summit,<sup>21</sup> or the Plan of Implementation adopted in the 2002 World Summit on Sustainable Development,<sup>22</sup> provide policy guidance to foster sustainable development. However, these instruments also provide some guidance to private and non-state actors.<sup>23</sup> In addition to these two instruments, numerous other ‘guidelines’, ‘recommendations’, ‘principles’ and ‘codes’ have been developed by either international organizations, non-governmental organizations or industry groups to regulate the environmental dimensions of foreign investment.<sup>24</sup> Generally speaking, one may distinguish two types of instruments,<sup>25</sup> those focusing directly on the activities of multinational corporations, and those affecting such activities indirectly, by targeting the main sources of project finance.

The most prominent illustrations of the first category are perhaps the OECD Guidelines for Multinational Enterprises<sup>26</sup> and the UN Global Compact.<sup>27</sup> Both instruments operate as normative frameworks that seek to influence the behaviour of multinational corporations in a number of areas, including environmental protection. The OECD Guidelines, adopted in 1976 and subsequently revised, contain eight recommendations focusing on environmental matters. Interestingly, States adhering to the guidelines agree to establish ‘national contact points’ (NCPs), the function of which is *inter alia* to receive complaints relating to the implementation of the guidelines by multinational corporations. Many complaints were brought before NCPs in connection with the exploitation of natural resources in the Democratic Republic of Congo,<sup>28</sup> which in turn triggered the establishment, in 2000, of a ‘Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of

---

<sup>20</sup> For an overview of the main political documents characterizing sustainable development see N Schrijver, ‘The Evolution of Sustainable Development in International Law: Inception, Meaning and Status’, (2008) 329 *Recueil des cours* chapters 1-3.

<sup>21</sup> See Report of the United Nations Conference on Environment and Development, A/CONF.151/26/Rev.1 (Vol. I), Resolution 1, Annex 2: Agenda 21 (‘Agenda 21’).

<sup>22</sup> See Report of the World Summit on Sustainable Development, A/CONF.199/20, Part I, item 2: Plan of Implementation of the World Summit on Sustainable Development (‘Plan of Implementation’).

<sup>23</sup> See, for instance, chapter 30 of Agenda 21, which contains a statement of the role of business and industry in pursuing sustainable development. This chapter focuses on promoting cleaner production and responsible entrepreneurship. As to the Plan of Implementation, it develops the idea of multi-stakeholder partnerships as a tool to pursue sustainable development. See, for instance, paragraphs 7(j), 9(g), 20(t), 25(g), 43(a) or 49.

<sup>24</sup> See Morgera, above n 9.

<sup>25</sup> See Richardson, above n 9 (Financing Sustainability), 74.

<sup>26</sup> See Organisation for Economic Co-operation and Development (OECD), Guidelines for Multinational Enterprises, 2000 (‘OECD Guidelines’); E Morgera, ‘An Environmental Outlook on the OECD Guidelines for Multinational Enterprises: Comparative Advantage, Legitimacy, and Outstanding Questions in the Lead Up to the 2006 Review’ (2006) 18 *Georgetown International Environmental Law Review* 751; S Tully, ‘The 2000 Review of the OECD Guidelines for Multinational Enterprises’ (2001) 50 *International & Comparative Law Quarterly* 394.

<sup>27</sup> See UN Global Compact, at <<http://www.globalcompact.org>> (last accessed on 25 April 2010). On the operation of the Global Compact see UN Global Compact Office, *United Nations Guide to the Global Compact: A Practical Understanding of the Vision and the Nine Principles*; B King, ‘The UN Global Compact: Responsibility for Human Rights, Labour Relations, and the Environment in Developing Nations’ (2001) 34 *Cornell International Law Journal* 481.

<sup>28</sup> See Fauchald, above n 10, 43 et seq.



Wealth of the Democratic Republic of the Congo' by the United Nations Security Council.<sup>29</sup> The Panel issued its first 'final' report in 2002, finding that 85 named enterprises were in violation of the guidelines.<sup>30</sup> Eventually, however, the follow-up of these cases was mostly<sup>31</sup> left to the NCPs of the relevant home countries, and very few cases were actually continued, allegedly for lack of sufficiently detailed information.<sup>32</sup> As to the Global Compact, it is a UN-led initiative, launched in July 2000, addressing four areas potentially affected by the activities of businesses, namely human rights, labour standards, environment (principles 7 to 9) and corruption. The Global Compact is structured as a public-private-partnership and operates essentially as a policy network with more than 7700 participants worldwide, including some 5300 businesses. It was established as a tool to channel the activities of the private sector towards the accomplishment of the Millennium Development Goals (MDGs) adopted by the United Nations General Assembly in 2000.<sup>33</sup>

The second category encompasses a number of principles and policy instruments aimed at regulating the activities of financial intermediaries, including the World Bank's International Finance Corporation (IFC) and private financial institutions (commercial banks, investment banks, insurance companies and pension funds).<sup>34</sup> Among the numerous instruments falling under this category, one may mention the IFC's Performance Standards on Social and Environmental Sustainability,<sup>35</sup> the Equator Principles,<sup>36</sup> the UNEPFI-led Statement by Financial Institutions on the Environment and Sustainable Development,<sup>37</sup> the UN Principles of Responsible Investment,<sup>38</sup> and many others. Despite some variation from one instrument to another, they all operate by setting social and environmental standards for project financing by public, institutional or private financiers. Thus, access to funding by promoters of infrastructure or other projects with significant implications for the environment is subject to the respect of a number of environmental standards.

In addition to the policy initiatives mentioned so far, there are many other forms of fostering mutual supportiveness between foreign investment and environmental protection. Two major examples are the project-based flexibility mechanisms established, respectively,

---

<sup>29</sup> See UN Doc S/PRST/2000/20.

<sup>30</sup> See Final Report (1) of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo, S/2002/1146 (2002), paras 170-8 and Annex III, referred to by Fauchald, above n 10, 43.

<sup>31</sup> The UN Security Council followed up on those cases where the illegal resource exploitation was closely linked to illegal import of arms into the Congo. See UN Doc S/RES/1533 (2004) establishing a Committee to examine such cases. This committee took a number of measures, but none of the multinational enterprises subject to the OECD Guidelines seems to have been targeted. See *ibid*, 44 n 180.

<sup>32</sup> Fauchald, above n 10, 44-45.

<sup>33</sup> See United Nations Millennium Declaration, UN Doc A/RES/55/2 Millennium (18 September 2000).

<sup>34</sup> See generally Richardson, above n 9 (Financing Sustainability).

<sup>35</sup> See International Finance Corporation (IFC), *Performance Standards on Social and Environmental Sustainability*, adopted on 21 February 2006, available at <<http://www.ifc.org/sustainability>> (last accessed on 25 April 2010). On the operation of the Standards see E Morger, 'Significant Trends in Corporate Environmental Accountability: The New Performance Standards of the International Financial Corporation' (2007) 18 *Colorado Journal of International Law and Policy* 151.

<sup>36</sup> See Equator Principles, available at <<http://www.equator-principles.com>> (last accessed on 25 April 2010). On the operation of these principles see B J Richardson, 'The Equator Principles: The Voluntary Approach to Environmentally Sustainable Finance' (2005) 14 *European Environmental Law Review* 280.

<sup>37</sup> See UNEP Finance Initiative, *Statement by Financial Institutions on the Environment and Sustainable Development*, available at <<http://www.unepfi.org/signatories/statements/fi/index.html>> (last accessed on 23 April 2010).

<sup>38</sup> See United Nations Principles of Responsible Investment, available at <[www.unpri.org/principles](http://www.unpri.org/principles)> (last accessed on 25 April 2010).

in Articles 6 (joint-implementation mechanism) and 12 (clean development mechanism) of the Kyoto Protocol.<sup>39</sup> States having undertaken quantified emission reduction commitments under Article 3.1 and Annex B of the Kyoto Protocol can earn emission credits by conducting certain projects that reduce emissions in other countries. By providing such possibility, these mechanisms induce 'green' investment in transitional and/or developing countries, thereby constituting an additional vector of sustainable development.

The instruments surveyed in the foregoing paragraphs provide apposite illustrations of the potential convergence between foreign investment and environmental protection. While such instruments suggest that foreign investment and environmental protection are not antagonistic terms, one must not underestimate the potential for conflicts to arise between the two. The remainder of this article focuses on such conflicts from the perspective of international law.

### *C. Potential Conflicts*

The potentially conflicting dimension of the relations between investment and environmental protection calls for a variety of legal techniques through which conflicts can be managed.

To analyse these techniques, it is useful to introduce a distinction between two fundamental types of conflicts arising from the interactions between foreign investment and environmental regulation. On the one hand, conflicts may arise between one international obligation stemming from international investment law and another international obligation stemming from international environmental law. Such scenario shall be referred to as a 'normative conflict'. On the other hand, conflicts may arise between norms or measures stemming from different legal systems. Although many scenarios are possible, in the context of foreign investment disputes the most common one is that of a measure/regulation adopted by the host State for environmental reasons adversely affecting the interests of a foreign investor, who claims that the measure/regulation is in breach of an international investment obligation of the host State. This type of conflict shall be referred to as a 'legitimacy conflict' between investment protection and environmental considerations.

An environmental measure/regulation adopted by a State may also be based on a norm (be it an obligation or other type of norm) of international environmental law. However, such a hypothesis will be treated as a normative conflict only when the argument is clearly formulated as a conflict between two or more international obligations. The distinction between normative and legitimacy conflicts is, as discussed in section IV below, both analytically useful and legally relevant, because the rules applicable to the resolution of each of these types of conflict are different.

Before undertaking the analysis of these rules, it is necessary to discuss a number of issues that may arise in the course of an investment proceeding as a result of the environmental ramifications of a dispute.

---

<sup>39</sup> See Kyoto Protocol to the United Nations Framework Convention on Climate Change, Kyoto, 11 December 1997, 2303 UNTS 148 (entered into force on 16 February 2005), arts 6 and 12. See also M Wara, 'Measuring the Clean Development Mechanism's Performance and Potential' (2008) 55 *UCLA Law Review* 1759; J E Viñuales, 'El régimen jurídico internacional relativo al cambio climático: Perspectivas y prospectivas' in Organization of American States (OAS)/Inter-American Juridical Committee, *Annual Course on International Law. Universalism and Regionalism at the Beginning of the 21st Century* (2010) 36, section III.

### III. INVESTMENT PROCEEDINGS

This section is devoted to a number of issues that arbitral tribunals must determine in the conduct of investment proceedings before they move onto (or as they proceed to) the assessment of the merits of the claims. The selection of these issues is based on the practice of investment tribunals as well as on the emerging literature referred to in the introduction. They can be organised under three main rubrics, namely jurisdictional matters (A), matters pertaining to the applicable law (B), and procedural matters (C).

#### A. *Jurisdictional Matters*

There are two main hypotheses under which environmental considerations may have an impact on jurisdictional matters, namely (1) in connection with the claims that may be heard by an investment tribunal, and (2) in connection with the scope of protected investments under a given investment treaty.

##### 1. *Environmental claims*

###### (i) *Environmental claims as investment claims*

An investment protection standard may be breached as a result of conduct of the host State in violation of an environmental norm, either domestic or international. This could be the case where the investment heavily depends upon the host State's implementation of environmental law.

An example is provided by the notice of arbitration filed by a Canadian national, Peter A. Allard, against Barbados,<sup>40</sup> for failure to enforce<sup>41</sup> applicable international and domestic environmental law in connection with the protection of a natural wetlands ecosystem. According to the investor, the profitability of its investment (an ecotourism facility) was reduced as a result *inter alia* of 'Barbados' actions and omissions' which 'have severely damaged the natural ecosystem that [the investor's facility] relies upon to attract visitors'.<sup>42</sup> These and other actions and omissions would allegedly amount to a breach of the fair and equitable treatment, full protection and security, and expropriation clauses of the Canada-Barbados BIT.<sup>43</sup>

Other potential illustrations are the two *Unглаbe v. Costa Rica* cases brought before ICSID.<sup>44</sup> According to the information publicly available, the investors claimed mistreatment by the State of parcels of land contained in a 33 hectare oceanfront resort community development in Costa Rica. Reportedly, the claims arose from certain measures taken by Costa Rica in order to create a preserve for endangered leatherback turtles. The

---

<sup>40</sup> See *Peter A. Allard v. Government of Barbados*, Notice of Dispute ('*Allard v. Barbados*'), above n 19.

<sup>41</sup> A more difficult hypothesis would be a claim based on the absence of enactment of a domestic law or measure as required by treaty. Such a hypothesis could arise in the context of investments made in reasonable anticipation of an action required from the host State by a norm of international environmental law, and that has not been taken. Depending on the facts, issues relating to the self-executing character of the international norm at stake or of analogical reasoning with the implementation European Community directives could arise.

<sup>42</sup> See *Allard v Barbados*, above n 19, para 16.

<sup>43</sup> *Ibid*, paras 14-21, referring to the Agreement between the Government of Canada and the Government of Barbados for the Promotion and Reciprocal Protection of Investments (Canada-Barbados BIT), Articles II(2), and VIII(1).

<sup>44</sup> See *Reinhard Hans Unглаbe v. Republic of Costa Rica*, ICSID Case No. ARB/09/20 (pending); *Marion Unглаbe v. Republic of Costa Rica*, ICSID Case No. ARB/08/1 (pending).

investors disagree with Costa Rica regarding the appropriate means for safeguarding turtle breeding sites.<sup>45</sup>

Still another example would be a situation where the uneven enforcement of environmental standards to different foreign and/or domestic investors would fall foul of the most-favoured-nation and/or national treatment clauses contained in an investment treaty. For instance, one could think of a case where mandatory emissions targets for companies in the electricity generation are unevenly enforced. In this hypothesis, the affected investor could bring a claim for breach of investment protection standards arguing that the host State is not enforcing its environmental laws upon the investor's competitors. This is of course not to say that such claim would be justified, a question that will depend upon the circumstances of each case.

For the purpose of establishing jurisdiction, this type of claims does not present any significant specificity and must therefore be treated as a regular investment claim. A number of issues may arise, however, with respect to applicable law, as it will be discussed later.

(ii) *Environmental claims as independent heads of claim*

The situation is different when an environmental claim is brought as an independent head of claim, i.e. when the investor claims that the conduct of the host State is in breach of an environmental norm, irrespective of any breach of an investment protection standard.

In *Biloune v. Ghana*,<sup>46</sup> the claimant had asked an investment tribunal organised under the UNCITRAL Arbitration Rules to examine a claim for violation of international human rights law by the host State. The tribunal considered that it did not have jurisdiction to examine such issues as an independent head of claim but only within the context of specific investment claims:

This Tribunal's competence is limited to commercial disputes arising under a contract entered into in the context of Ghana's Investment Code. As noted, the Government agreed to arbitrate only disputes 'in respect of' the foreign investment. Thus, other matters—however compelling the claim or wrongful the alleged act—are outside this Tribunal's jurisdiction. Under the facts of this case it must be concluded that, while the acts alleged to violate the international human rights of Mr Biloune may be relevant in considering the investment dispute under arbitration, this Tribunal lacks jurisdiction to address, as an independent cause of action, a claim of violation of human rights.<sup>47</sup>

The decision of the tribunal suggests that, as a rule, an investment tribunal would not have jurisdiction over a claim brought solely for breach of an environmental norm, irrespective of any breach of an investment protection standard.

This conclusion seems consistent with the approach followed by some treaties according to which the availability of arbitration is limited to certain causes of action. For instance, Article 1116(1) of the North-American Free Trade Agreement (NAFTA)<sup>48</sup> provides that '[a]n investor of a Party may submit to arbitration under this Section a claim

---

<sup>45</sup> See 'Another Investor in Costa-Rican Resort Development filed BIT Claim', *Investment Arbitration Reporter*, 13 November 2009, available at <[http://www.iareporter.com/articles/20091124\\_21](http://www.iareporter.com/articles/20091124_21)> (last accessed on 26 February 2010).

<sup>46</sup> See *Antoine Biloune v. Ghana Investment Centre*, UNCITRAL, Award on Jurisdiction and Liability of 27 October 1989, 95 ILR 183 ('*Biloune v. Ghana*').

<sup>47</sup> *Ibid.*, paras 202-203.

<sup>48</sup> See *North American Free Trade Agreement*, US-Canada-Mexico, 17 December 1992, 32 ILM 296 (entered into force on 1 January 1994) ('NAFTA').

that another Party *has breached an obligation under ... Section A.*<sup>49</sup> Section A of Chapter 11 of NAFTA provides for the usual investment protection standards. Similarly, Article 26(1)-(2) of the Energy Charter Treaty (ECT)<sup>50</sup> limits the availability of arbitration to '[d]isputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former, which concern an *alleged breach of an obligation of the former under Part III.*'<sup>51</sup> Part III of the ECT provides for the usual investment protection standards.

The foregoing examples also suggest that the question whether an investment tribunal may assert jurisdiction over an environmental claim brought as an independent head of claim depends upon the scope of the arbitration clause and the substantive provisions contained in the applicable treaty. The conjunction of these two elements was discussed by the ICJ in the *Pulp Mills* case. Argentina argued that the jurisdictional clause contained in Article 60 of the 1975 Statute of the River Uruguay, read in the light of Articles 1 and 41 of said statute, which Argentina characterized as 'referral clauses', gave the Court jurisdiction over breaches of obligations arising from multilateral environmental treaties and general international law. The Court rejected this argument on the grounds that Articles 1 and 41 of said statute could not operate as referral clauses.<sup>52</sup> However, the reasoning of the Court suggests *a contrario* that, under a relatively broad jurisdictional treaty clause, an investor could bring an independent environmental claim if the treaty in question contains a referral clause. As it will be discussed in section IV of this study, bilateral investment treaties ('BITs') and free trade agreements ('FTAs') may incorporate environmental protection standards either in their text or in parallel agreements. However, if an investor were to bring a claim under such circumstances, the claim would operate as an investment claim, much in the same way as a claim for breach of a fair and equitable treatment clause imported from another treaty through a most-favoured-nation clause in the applicable treaty is technically based on this latter clause.

## 2. *Investments in accordance with (environmental) law*

The influence of environmental considerations in determining the existence of a protected investment can take at least two forms. First, the specific contours of what the claimant asserts as an investment may not be covered by an investment treaty (i). Second, an otherwise covered investment may be contrary to domestic environmental laws and therefore excluded from the protection of a treaty (ii).

### (i) *Environmental rights as investments*

The first scenario can be illustrated by reference to *Bayview v. Mexico*,<sup>53</sup> where the US based claimants argued that the diversion by Mexico of the waters of the Rio Grande River amounted to a breach of NAFTA Chapter 11. This argument supposed that water rights held by the US claimants in the US territory could constitute a protected investment under

---

<sup>49</sup> Emphasis added.

<sup>50</sup> Energy Charter Treaty, 17 December 1994, 2080 UNTS 95 (entered into force on 16 April 1998) ('ECT').

<sup>51</sup> Emphasis added. Both the NAFTA and the ECT are mentioned C Reiner, C Schreuer, 'Human Rights and International Investment Arbitration' in Dupuy et al, above n 10, 83.

<sup>52</sup> See *Pulp Mills case*, above n 8, paras 48-63.

<sup>53</sup> See *Bayview Irrigation District v. United Mexican States*, ICSID Case No. ARB(AF)/05/1, Award of 19 June 2007 ('*Bayview v. Mexico*').

NAFTA. However, in a submission made before the tribunal on the basis of Article 1128 of NAFTA,<sup>54</sup> the United States government itself argued against this proposition.<sup>55</sup> Eventually, the tribunal concluded that such water rights were not protected under Article 1101 of NAFTA. The tribunal noted, in this regard, that:

[I]n order to be an ‘investor’ within the meaning of NAFTA Art. 1101(a), an enterprise must make an investment in another NAFTA State, and not in its own. Adopting the terminology of the *Methanex v. United States* Tribunal, it is necessary that the measures of which complaint is made should affect an investment that has a ‘legally significant connection’ with the State creating and applying those measures. The simple fact that an enterprise in a NAFTA State is affected by measures taken in another NAFTA State is not sufficient to establish the right of that enterprise to protection under NAFTA Chapter Eleven: it is the relationship, the legally significant connection, with the State taking those measures that establishes the right to protection, not the bare fact that the enterprise is affected by the measures.<sup>56</sup>

The reasoning of the tribunal on this point may be of relevance for potential cases brought as a result of long-arm environmental statutes, which strongly affect investments made in either Canada or Mexico, but whose main market is in the United States.

(ii) *Investments contrary to environmental law*

The second scenario has more often been argued in investment cases, although not in connection with violations of domestic environmental laws.<sup>57</sup> A number of investment treaties subject the definition of protected investments to their conformity with the laws of the host State.<sup>58</sup> As a result, domestic environmental laws may have an impact on whether an investment is protected.<sup>59</sup> Such characterization may, under some circumstances, be relevant for the determination of a tribunal’s jurisdiction.

Most tribunals have considered that such a reference to the host State’s laws concerns the validity of an investment and not the definition of the term investment itself. As noted by the tribunal in *Salini v. Morocco*, the provisions in BITs requiring the conformity of the investments with the host State’s laws refer ‘to the validity of the investment and not to its

---

<sup>54</sup> Article 1128 of NAFTA provides: ‘On written notice to the disputing parties, a Party may make submissions to a Tribunal on a question of interpretation of this Agreement.’

<sup>55</sup> The United States Article 1128 Submission states that ‘[a]ll three NAFTA Parties thus agree that the scope and coverage of NAFTA Chapter Eleven is restricted to investors of a NAFTA Party that are seeking to make, are making or have made investments in the territory of another NAFTA Party’, *Bayview v. Mexico*, Submission of the United States of America, 27 November 2006, para 14, <[http://www.naftaclaims.com/Disputes/Mexico/Texas/TexasClaimsMexico-USA\\_1128-Jurisdiction.pdf](http://www.naftaclaims.com/Disputes/Mexico/Texas/TexasClaimsMexico-USA_1128-Jurisdiction.pdf)> (last accessed on 17 February 2010).

<sup>56</sup> See *Bayview v. Mexico*, above n 53, para 101.

<sup>57</sup> The question has arisen most notably in connection with European Community law, particularly on State aid. For a discussion of the so-called ‘intra-EU BITs’ see H Wehland, ‘Intra-EU Investment Agreements and Arbitration: Is European Community Law an Obstacle?’ (2009) 58 *International & Comparative Law Quarterly* 297; M Burgstaller, ‘European Law and Investment Treaties’ (2009) 26 *Journal of International Arbitration* 181.

<sup>58</sup> For instance, the Egypt—Pakistan BIT (2000), provides in Article 1(1) that ‘[t]he term investment means every kind of assets ... invested by investors of a Contracting Party in the territory of the other Contracting Party in accordance with the laws and regulations of that Party.’ Another example is given by the Bahrain—Thailand BIT (2002), which provides, in Article 2 that ‘[t]he benefits of this Agreement shall apply to the investments by the investors of one Contracting Party in the territory of the other Contracting Party which is specifically approved in writing by the competent authority in accordance with the laws and regulations of the latter Contracting Party.’ Both examples are quoted from A Joubin-Bret, ‘Admission and Establishment in the Context of Investment Protection’ in A Reinisch (ed) *Standards of Investment Protection* (Oxford University Press, Oxford, 2008) 17.

<sup>59</sup> See *ibid*, 19.

definition. More specifically, [such provisions seek] to prevent the Bilateral Treaty from protecting investments that should not be protected because they would be illegal.<sup>60</sup> However, in at least two cases, the legality of an investment was considered as a jurisdictional obstacle.

In *Inceysa v. El Salvador*,<sup>61</sup> the respondent argued that it had not consented to the protection of investments procured by fraud, forgery or corruption.<sup>62</sup> The applicable BIT did not qualify the definition of investment in the provision defining this term but contained a reference to compliance with national laws in the provisions dealing with admission and protection. The tribunal concluded that, under the circumstances, it did not have jurisdiction over the claim brought by the investor, as the respondent had not consented to extend the protections of the treaty or those of its domestic code to an investment made in an openly illegal manner.<sup>63</sup>

A similar conclusion was reached in *Fraport v. Philippines*.<sup>64</sup> The respondent had argued, in essence, that ‘the protections afforded by the BIT at issue [did] not extend to investments made in violation of Philippine law’ and that such conclusion applied even once an investment had been admitted if the investment was ‘implemented in a manner that materially violates the host State’s laws that directly regulate the investment or the investment activities’.<sup>65</sup> The domestic laws at issue restricted foreign ownership and control of corporations engaging in certain activities. In its analysis, the tribunal distinguished between initial and subsequent illegality, considering that, whereas the latter could only operate as a substantive defence, the former could potentially limit jurisdiction.<sup>66</sup> This was so irrespective of whether the investment had been accompanied by some explicit agreement with or communication from the host State,<sup>67</sup> as even where the host State had issued an authorisation, a potential estoppel argument could be dismissed if the arrangements making

---

<sup>60</sup> *Salini Costruttori v. Morocco*, Decision on Jurisdiction, 23 July 2003, 42, para 46, reproduced in R Dolzer, C Schreuer, *Principles of International Investment Law* (Oxford University Press, Oxford, 2008) 113 and decisions cited therein.

<sup>61</sup> *Inceysa Vallisoletane, SL v. El Salvador*, ICSID No ARB/03/26, Award of 2 August 2006 (*Inceysa v. El Salvador*).

<sup>62</sup> *Ibid.*, para 45.

<sup>63</sup> *Ibid.*, paras 257, 264.

<sup>64</sup> *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/03/25, Award, 16 August 2007 (*Fraport v. Philippines*).

<sup>65</sup> *Ibid.*, paras 285-286, 344.

<sup>66</sup> The tribunal reasoned that ‘[a]lthough this contention [jurisdictional limits arising from subsequent illegality] is not relevant to the analysis of the problem which the Tribunal has before it, namely the *entry* of the investment and not the way it was subsequently conducted, the Tribunal would note that this part of the Respondent’s interpretation appears to be a forced construction of the pertinent provisions in the context of the entire Treaty. The language of both Articles 1 and 2 of the BIT emphasizes the *initiation* of the investment. Moreover the effective operation of the BIT regime would appear to require that jurisdictional compliance be limited to the initiation of the investment. If, at the time of the initiation of the investment, there has been compliance with the law of the host state, allegations by the host state of violations of its law in the course of the investment, as a justification for state action with respect to the investment, might be a defense to claimed *substantive* violations of the BIT, but could not deprive a tribunal acting under the authority of the BIT of its jurisdiction’, *ibid.*, para 345 (italics original).

<sup>67</sup> *Ibid.*, para 343.

an investment illegal were covert.<sup>68</sup> That was, as a matter of fact, the conclusion of the tribunal in this case.<sup>69</sup>

The significance of the *Inceysa* and *Fraport* decisions for the relations between foreign investment and environmental protection should not be underestimated. One could imagine, for instance, a case where a landfill or a chemical production plant has been established in a developing country in violation of local laws requiring the conduct of an environmental impact assessment, especially if the investor has resorted to corruption or other unacceptable means prohibited by international public policy or *ordre public international*.<sup>70</sup> Even if establishing such facts could be difficult in practice, treating this issue at the jurisdictional phase instead of waiting until the merits phase would increase the efficiency of investment arbitration proceedings, saving some of the scarce resources that developing countries can devote to such proceedings.

### B. Applicable Law

The question of the law applicable to investment disputes is different from, although related to, the question of the scope of jurisdiction.<sup>71</sup> Even in cases where an independent human rights or environmental claim has been deemed to be outside the scope of jurisdiction of the tribunal, human rights or environmental rules may remain relevant for the consideration of an investment claim.<sup>72</sup> The potential confusion between jurisdiction and applicable law stems *inter alia* from the diversity of the provisions from which the applicable law can be determined, and the fact that, in some treaties, the same provision deals with both jurisdiction and governing law.<sup>73</sup>

The legal framework potentially applicable to an investment consists of three main layers, namely contractual provisions (if the investment has been made through a contract with the host State or its instrumentalities), domestic law (of the host State or, potentially, of another State), and international law (treaty law or customary international law). Environmental considerations may be included in a clause of the investment contract (and/or of a related agreement, such as a credit facility agreement), in domestic regulations or in the applicable investment treaty. Environmental protection standards may also arise from an applicable environmental treaty or, exceptionally, from general international law.<sup>74</sup> The specific body of norms (contractual, domestic, international) which will be applicable for

---

<sup>68</sup> Ibid, paras 346-347. Such conclusion is exceptional. Where the actions of the host State's own authorities were themselves illegal, an objection to jurisdiction based on the non-conformity of the investment with laws of the host State would normally fail. See *Ioannis Kardassopoulos v. Georgia*, ICSID Case No. ARB/05/18, Decision on Jurisdiction, 6 July 2007, para 182.

<sup>69</sup> *Fraport v. Philippines*, above n 64, para 404, stating that '[c]ompliance with the host state's laws is an explicit and hardly unreasonable requirement in the Treaty and its accompanying Protocol. Fraport's ostensible purchase of shares in the Terminal 3 project, which concealed a different type of unlawful investment, is not an "investment" which is covered by the BIT. As the BIT is the basis of jurisdiction of this Tribunal, Fraport's claim must be rejected for lack of jurisdiction *ratione materiae*.'

<sup>70</sup> In *Inceysa v. El Salvador*, the tribunal considered that Inceysa's investment was contrary to international public policy and that asserting jurisdiction over such investment would also constitute a violation of international public policy. See above n 61, paras 245-252.

<sup>71</sup> See *Pulp Mills case*, above n 8, para 66.

<sup>72</sup> See *Biloune v. Ghana*, above n 46, paras 202-203.

<sup>73</sup> See, for instance, Article 26 of the Energy Charter Treaty, which defines both the scope of jurisdiction of (paragraphs 1 and 2) and the law applicable by (paragraph 6) arbitral tribunals constituted under paragraph 4.

<sup>74</sup> See *Legality of the Threat or Use of Nuclear Weapons*, [1996] ICJ Rep 226 ('*Legality of Nuclear Weapons*'), para 29 (affirming the prevention principle); *Pulp Mills case*, above n 8, para 204 (asserting a requirement of prior environmental impact assessment).



the determination of a given dispute as well as the precise articulation of such norms will depend upon (1) the law possibly chosen by the parties or indicated by other means (mainly a default clause), and (2) the relevance of potentially applicable norms in the light of the scope of the dispute. These two aspects must not be considered as a sequential test but merely as two questions that help organise the process of determining the applicable law.

### 1. *Choice of law and other indications*

Concerning the first issue, indications as to the applicable law may appear in different forms including (i) in a choice of law clause contained in an investment contract between a foreign investor and the host State, (ii) in a choice of law provision contained in an investment treaty between the host State and the investor's home State (choice that the investor accepts in availing itself of the treaty's arbitration clause), (iii) in an 'indirect' reference to the applicable law in the form of a provision in a treaty or in an investment code specifying that only investments made in accordance with the host State's laws are protected, or (iv) in a default clause contained in the rules governing the arbitration proceedings.

#### (i) *Choice of law clause in an investment agreement*

When there is a choice of law, the applicable law is quite often that of the host State, although it may also be that of the investor's home State, that of a third State or another body of law such as international law.<sup>75</sup>

The place occupied by environmental laws in this choice raises a number of questions. The most basic one is whether environmental laws are included in the scope of the choice. Whereas the answer will normally be affirmative when the parties have chosen the laws of the host State, the situation is less clear when the laws chosen are those of the investor's home State or of a third State, to the extent that environmental law could take the form of either private or public law and that there are limitations in the application of a foreign public law.<sup>76</sup>

Where the parties have chosen a foreign law to govern contractual matters, an argument could be made in favour of applying the environmental laws of the host State if and to the extent that they can be considered as *lois de police*.<sup>77</sup> The application of the environmental laws of the investor's home State or of a potentially affected third State is much more difficult to assess.<sup>78</sup> In practice, the overriding character of *lois de police* and their

---

<sup>75</sup> For examples see Dolzer, Schreuer, above n 60, 265 et seq; D Bishop, J Crawford, M Reisman, *Foreign Investment Disputes* (Kluwer International, The Hague, 2005) 255 et seq.

<sup>76</sup> See H Batiffol, P Lagarde, *Droit international privé*, vol. I (6th edn, LGDJ, Paris, 1974) paras 245-246; G Van Hecke, 'Droit public et conflit des lois', in *Travaux du Comité français de droit international privé* (1982-1984) 228.

<sup>77</sup> On the concept of *lois de police* see Ph Franceskakis, 'Quelques précisions sur les lois d'application immédiate et leurs rapports avec les règles de conflit de lois' (1966) 55 *Revue critique de droit international privé* 1; T Guedi, 'The Theory of the *Lois de Police*—A Functional Trend in Continental Private International Law—A Comparative Analysis with Modern American Theories' (1991) 39 *American Journal of Comparative Law* 661; T C Hartley, 'Mandatory Rules in International Contracts: The Common Law Approach', (1997) 266 *Recueil des cours* 337; A Bonomi, *Le norme imperativa nel diritto internazionale private* (Publications of the Swiss Institute of Comparative Law, Zurich, 1998).

<sup>78</sup> On the conceptual aspects of the extraterritorial application of such laws see B Stern, 'Une élucidation du concept d'application extraterritoriale du droit', (1986) 3 *Revue québécoise de droit international* 49-78.

application by arbitral tribunals seem to be in decline. As a result, the application of foreign (or even local) *lois de police* will often turn on the specificities of the case.<sup>79</sup>

(ii) *Choice of law provision in an investment treaty*

The inclusion of a choice of law provision in an investment treaty is frequent in practice. Indeed, multilateral and bilateral investment treaties often include provisions specifying the law applicable for the resolution of disputes. For instance, Article 1131(1) of NAFTA states: ‘A Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.’<sup>80</sup> Similarly, Article 26(6) of the Energy Charter Treaty states: ‘A tribunal established under paragraph (4) [arbitral tribunal] shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law.’<sup>81</sup> Turning to bilateral investment treaties, one may mention, among many others, the Canadian Model BIT 2004, which states in Article 40(1): ‘A Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.’ Similarly, the Chinese Model BIT 2003 states in Article 9(3) that ‘the arbitration award [of the investment tribunal] shall be based on the law of the Contracting Party to the dispute including its rules on the conflict of laws, the provisions of this Agreement as well as the universally accepted principles of international law.’<sup>82</sup> Still another example is provided by Article 30 of the United States Model BIT 2004, which is much more detailed than most other BITs:

1. Subject to paragraph 3, when a claim is submitted under Article 24(1)(a)(i)(A) or Article 24(1)(b)(i)(A) [claims for breach of an investment protection brought, respectively, by a foreign entity or by a local entity under foreign control], the tribunal shall decide the issues in dispute in accordance with this Treaty and applicable rules of international law.

2. Subject to paragraph 3 and the other terms of this Section, when a claim is submitted under Article 24(1)(a)(i)(B) or (C), or Article 24(1)(b)(i)(B) or (C) [*idem* before except for the cause of action, which is, respectively, breach of an investment authorization or an investment agreement], the tribunal shall apply:

(a) the rules of law specified in the pertinent investment authorization or investment agreement, or as the disputing parties may otherwise agree; or

(b) if the rules of law have not been specified or otherwise agreed:

(i) the law of the respondent, including its laws on the conflict of laws; and

(ii) such rules of international law as may be applicable.

3. A joint decision of the Parties, each acting through its representative designated for purposes of this Article, declaring their interpretation of a provision of this Treaty shall be binding on a tribunal, and any decision or award issued by a tribunal must be consistent with that joint decision.<sup>83</sup>

In all these examples, some room is left for the potential application of environmental norms stemming from both domestic and international law. As noted by two commentators with respect to the potential application of human rights law, ‘human rights [and also by analogy

---

<sup>79</sup> See L Radicati di Brozolo, ‘Arbitrage commercial international et lois de police. Considérations sur les conflits de juridictions dans le commerce international’, (2005) 315 *Recueil des cours* 402.

<sup>80</sup> NAFTA, above n 48, art 1131(1),

<sup>81</sup> ECT, above n 50, Art 26(6).

<sup>82</sup> Chinese Model BIT 2003, reproduced in Dolzer, Schreuer, above n 60, 352 et seq.

<sup>83</sup> United States Model BIT 2004, reproduced in *ibid.*, 385 et seq.

environmental] provisions are applicable to the extent to which they are included in the parties' choice of law.'<sup>84</sup>

One potentially important issue arising from the scope of the choice-of-law clause in a BIT relates to the possibility for a State to bring a counterclaim against an investor for breach of the domestic environmental laws. The admissibility of such type of counterclaims will depend on a variety of factors, including the scope of the jurisdictional and the choice-of-law clauses as well as the facts of the case. Assuming *ratio arguendi* that neither the jurisdictional clause nor the facts preclude such possibility, an independent environmental counterclaim could be brought only if the applicable treaty directs the arbitral tribunal to apply domestic (environmental) law. This hypothesis would be similar to a case where a treaty with a broad jurisdiction clause directs the tribunal to apply the provisions of investment contracts. In both cases, the investor would be subject to substantive obligations (arising, respectively, from the host State's law or from a contract) capable of founding a State counterclaim. Such substantive obligations would not be present if the applicable law is limited to the provisions of the treaty and/or international law, as private investors have no obligations under either treaties or customary international law.<sup>85</sup> In practice, instead of bringing a counterclaim, States will more likely bring claims against investors before State courts. A State may nevertheless decide to bring a counterclaim within an investment proceeding to facilitate the set-off of the opposing claims or to benefit from the more sophisticated international regime for the recognition and enforcement of arbitral awards.<sup>86</sup>

### (iii) *References to the validity of an investment*

This hypothesis has already been discussed in some detail in connection with jurisdictional matters. In essence, the reference in an investment treaty to investments made 'in accordance with the laws' of the host State is, as a rule, considered through the lens of the 'validity' theory. Thus, where the operation of an investment is (or becomes) in breach of the host State's environmental laws, investment tribunals tend to recognise that the host State could avail itself of this circumstance in the form of a substantive defence.<sup>87</sup> The technical operation of such a defence is not entirely clear and could be spelled out in at least three manners, depending on the circumstances of the case.

Let us assume, for the purposes of the analysis, that, as a result of an investor's breach of the domestic environmental regulations, a State adopts a measure adversely affecting the interests of such investor. Let us also assume that this latter brings only treaty claims under a treaty providing that the dispute will be decided solely on the basis of its provisions and other relevant rules of international law. In this first situation, the non-conformity of the investment with local environmental regulations would be a mere fact relevant to assess whether the adverse measures were justified or not, which is in turn important for determining whether an investment protection clause in the treaty has been breached or not.

---

<sup>84</sup> See Reiner, Schreuer, above n 51, 84.

<sup>85</sup> On claims and counterclaims by host States see J Crawford, 'Treaty and Contract in Investment Arbitration' (2008) 24 *Arbitration International* 351; H E Veenstra-Kjos, 'Counter-claims by Host States in Investment Dispute Arbitration "without Privity"' in P Kahn, T Waelde (eds), *New Aspects of International Investment Law* (Martinus Nijhoff Publishers, Leiden, 2007) chapter 14; G Laborde, 'The Case for Host State Claims in Investment Arbitration' (2010) 1 *Journal of International Dispute Settlement* 97.

<sup>86</sup> See Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10 June 1958, 330 UNTS 38 ('New York Convention') (entered into force on 7 June 1959).

<sup>87</sup> See above section III.A(1)(ii).

A second situation would arise where the treaty does not contain a provision excluding the applicability of domestic law<sup>88</sup> or where the choice of law provision expressly mentions the applicability of the host State's domestic laws. In such a hypothesis, the domestic environmental laws could be applied as law instead of as facts. In *Maffezini v. Spain*,<sup>89</sup> the choice of law clause in the Argentina - Spain BIT expressly mentioned the applicability of the 'the law of the Contracting Party in whose territory the investment was made'.<sup>90</sup> Maffezini argued that the Spanish authorities had forced him to proceed with the construction of a chemical plant even before the implications of the environmental impact assessment (EIA) conducted as part of the process were known, and that they had then asked for additional information in this connection. Spain replied that Maffezini was well aware of the standards for the conduct of an EIA under Spanish and European law and had nevertheless decided to start the construction works before the conclusion of the EIA. After reviewing the arguments of the parties, the tribunal concluded that the Spanish authorities had strictly abided by the applicable domestic and European environmental laws on this point.<sup>91</sup>

The third situation would arise where the violation of the domestic laws by the investor is so glaring that it brings into operation the rules on international public policy or *ordre public international*.<sup>92</sup> Of course, it is unclear whether certain environmental norms are or could be part of international public policy. However, this is by no means impossible, in light of the increasing environmental conscience in the population of many countries as well as of the morally unacceptable effects that a violation of certain environmental norms, such the prohibition of indiscriminate disposal of radioactive or other highly toxic waste, could have on the local population.

#### (iv) *Default rules*

The arbitration rules most frequently used in investment proceedings, namely the ICSID<sup>93</sup> and UNCITRAL<sup>94</sup> Arbitration Rules, as well as other rules increasingly in use, such as those of the LCIA,<sup>95</sup> the ICC,<sup>96</sup> the PCA<sup>97</sup> or the Stockholm Chamber of Commerce,<sup>98</sup> contain

---

<sup>88</sup> Although this is not a choice of law *stricto sensu*, the initiation of arbitration proceedings by an investor based on the arbitration clause in a treaty containing such a reference to the validity of investments can arguably amount to consent by the investor to the application of the relevant domestic laws.

<sup>89</sup> See *Emilio Agustín Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Award of 13 November 2000 ('*Maffezini v. Spain—Award*').

<sup>90</sup> See *Emilio Agustín Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision on Jurisdiction of 25 January 2000 ('*Maffezini v. Spain—Jurisdiction*'), para 19.

<sup>91</sup> The tribunal reasoned that '[t]he Kingdom of Spain and SODIGA have done no more in this respect than insist on the strict observance of the EEC and Spanish law applicable to the industry in question. It follows that Spain cannot be held responsible for the decisions taken by the Claimant with regard to the EIA. Furthermore, the Kingdom of Spain's action is fully consistent with Article 2(1) of the Argentine-Spain Bilateral Investment Treaty, which calls for the promotion of investment in compliance with national legislation.', *Maffezini v. Spain—Award*, above n 89, para 71.

<sup>92</sup> On this concept see P Lalive, 'Ordre public transnational (ou réellement international) et arbitrage international' (1986) *Revue de l'arbitrage* 329; L Matray, 'Arbitrage et ordre public transnational' in J C Schultsz, A-J van den Berg (eds), *The Art of Arbitration—Essays on International Arbitration Liber Amicorum Pieter Sanders* (Kluwer Law and Taxation Publishers: Deventer, 1967) 241.

<sup>93</sup> See Convention on the Settlement of Investment Disputes between States and Nationals of other States, 18 March 1965, 575 UNTS 159 (entered into force on 14 October 1966) ('ICSID Convention'), art 42(1).

<sup>94</sup> United Nations Commission on International Trade Law (UNCITRAL), Arbitration Rules, 1976 ('UNCITRAL Rules'), Article 33(1).

<sup>95</sup> See London Court of International Arbitration (LCIA), Arbitration Rules ('LCIA Rules'), art 22.3.

provisions indicating how the applicable law must be determined in the absence of a choice of law by the parties. Article 42(1) of the ICSID Convention goes a step further because, unlike the other provisions mentioned, it expressly identifies the applicable law:

The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.

Thus, in the absence of a choice of law clause, the laws of the host State and the rules of international law will be applicable. There has been some discussion as to the meaning of the term ‘and’ in Article 42(1).<sup>99</sup> This answer heavily depends upon the specific legal question at issue. Three basic scenarios can be identified.

First, the two bodies of law may have to be ‘separately’ applied, for instance, when the investor has brought both contract claims, which will then be governed by the contract and the host State’s laws, and treaty claims, which will be decided on the basis of the treaty as well as of other relevant rules of international law. As noted by the ad hoc committee in *Vivendi v. Argentina*:

[W]hether there has been a breach of the BIT and whether there has been a breach of contract are different questions. Each of these claims will be determined by reference to its own proper or applicable law—in the case of the BIT, by international law; in the case of the Concession Contract, by the proper law of the contract, in other words, the law of Tucumán [a territorial subdivision of Argentina]. For example, in the case of a claim based on a treaty, international law rules of attribution apply, with the result that the state of Argentina is internationally responsible for the acts of its provincial authorities.<sup>100</sup>

In this first scenario, international environmental law may be applicable to assess a treaty claim (eg whether the conduct of a State allegedly in breach of an investment protection standard was required by an international obligation of that State pursuant to an environmental treaty), whereas domestic environmental law may apply to assess a contract claim (eg whether termination of an investment contract by the host State was justified by the investor’s violation of domestic environmental law).

Second, in deciding treaty claims (whether or not they have been brought together with contract claims), the tribunal may have to consider the operation of domestic laws. Domestic environmental laws may then be indirectly relevant to decide a treaty claim. For instance, in *Azurix v. Argentina*, the claimant had brought treaty claims in connection with a

---

<sup>96</sup> See International Chamber of Commerce (ICC), Arbitration Rules (January 2009) (‘ICC Rules’), art 17(1)-(2).

<sup>97</sup> See Permanent Court of Arbitration (PCA), Optional Rules for Arbitrating Disputes between two Parties of which only one is a State (‘PCA Rules’), art 33(1).

<sup>98</sup> See Stockholm Chamber of Commerce (SCC), Arbitration Rules 2010, art 22(1).

<sup>99</sup> See M Reisman, ‘The Regime for Lacunae in the ICSID Choice of Law Provision and the Question of Threshold’ (2000) 15 *ICSID Review* 362; C Schreuer, ‘Failure to Apply the Governing Law in International Investment Arbitration’ (2002) 7 *Austrian Review of International and European Law* 147; E Gaillard, Y Banifatemi, ‘The Meaning of “and” in Article 42(1), second sentence, of the Washington Convention: The Role of International Law in the ICSID Choice of Law Process’ (2003) 18 *ICSID Review* 375; O Spiermann, ‘Applicable Law’ in P Muchlinsky, F Ortino, C Schreuer (eds) *The Oxford Handbook of International Investment Law* (Oxford University Press, Oxford, 2008) 89.

<sup>100</sup> *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/03, Decision on Annulment of 3 July 2002 (‘*Vivendi v. Argentina—Annulment*’), para 96. See further Z Douglas, *The International Law of Investment Claims* (Cambridge University Press, Cambridge, 2009) 41 et seq.

water concession contract. As part of its defence, Argentina argued that, in the absence of choice of law by the parties, Argentine law was applicable to the dispute. The application of Argentine law was relevant *inter alia* in connection with the standards of quality of the water distributed by the investor. In its award, the tribunal noted that domestic law was relevant for the assessment of the treaty claims, but only as ‘an element of the inquiry’:

Azurix’s claim has been advanced under the BIT and, as stated by the Annulment Committee in Vivendi II, the Tribunal’s inquiry is governed by the ICSID Convention, by the BIT and by applicable international law. While the Tribunal’s inquiry will be guided by this statement, this does not mean that the law of Argentina should be disregarded. On the contrary, the law of Argentina should be helpful in the carrying out of the Tribunal’s inquiry into the alleged breaches of the Concession Agreement to which Argentina’s law applies, but it is only an element of the inquiry because of the treaty nature of the claims under consideration.<sup>101</sup>

As this passage suggests, there is some ambiguity as to the precise status of domestic law. Traditionally, international law views domestic laws as facts, although quite particular ones, in that they may be necessary for the operation of international law. For instance, in the *Pulp Mills* case, after concluding that the requirement to conduct an environmental impact assessment prior to the execution of a project is part of general international law, the ICJ added that general international law does not specify the scope and content of an environmental impact assessment and, for this reason, in the absence of a treaty clause to such effect, ‘it is for each State to determine in its domestic legislation or in the authorization process for the project, the specific content of the environmental impact assessment required in each case’.<sup>102</sup> An alternative view is that tribunals select a given set of norms from both domestic and international law and then apply such set as a distinct body of law. This is how the tribunal in *CMS v. Argentina* seems to have proceeded when it circumscribed the applicable law as follows: ‘there is a close interaction between the legislation and the regulations governing the gas privatization, the License and international law, as embodied both in the Treaty and in customary international law. All of these rules are inseparable and will, to the extent justified, be applied by the Tribunal’.<sup>103</sup>

Third, in those cases where the same legal question is regulated by both domestic and international law, it may be necessary to determine the relative hierarchy of each body of law<sup>104</sup> or even of different norms within the same body of law.<sup>105</sup> Such conflicts will be analysed in section IV of this study, when discussing the legal techniques available to address them.

## 2. Relevance

Let us now turn to the issue of relevance. The scope of the dispute imposes ‘relevance boundaries’ on the selection of the applicable norms. The fact that a provision in an

---

<sup>101</sup> See *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Award of 14 July 2006 (‘*Azurix v. Argentina*’), para 67.

<sup>102</sup> *Pulp Mills case*, above n 8, para 205.

<sup>103</sup> *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/08, Award, 12 May 2005 (‘*CMS v. Argentina—Award*’), para 117. For a theoretical account of this approach see F Grisel, *L’arbitrage international ou le droit contre l’ordre juridique*, thèse Paris I, Pantheon-Sorbonne, 2010.

<sup>104</sup> See *Compañía del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, Award, 17 February 2000 (‘*CDSE v. Costa Rica*’), paras 64-65.

<sup>105</sup> See *S.D. Myers Inc. v. Canada, NAFTA Arbitration* (UNCITRAL Rules), Partial Award, 13 November 2000 (‘*S.D. Myers v. Canada*’), paras 214-215 (italics original) and 255-256.

investment contract or in a BIT or a default rule contained in the rules governing the arbitration may point to international law as the applicable law does not mean that any rule of international law will be relevant for the determination of the case. Relevance is a complex concept, as there are different ways to characterise it and there may also be different degrees of relevance. Arbitral tribunals, as other international jurisdictions, have wide discretion in determining whether and to what extent a given norm is relevant.<sup>106</sup> In conducting such analysis they are guided by several considerations. Let us mention three of them, namely the boundaries of the dispute (i), the pleas of the parties (ii), and some specific uses of environmental norms (iii).

(i) *Boundaries of the dispute*

The starting-point for determining the boundaries of relevance is the definition of the dispute over which a tribunal has asserted jurisdiction. For instance, if the parties have brought treaty (as opposed to contract) claims,<sup>107</sup> the relevance of the contractual layer as well as of the domestic norms governing the contract will be lower. As noted by the tribunal in *Bayindir v. Pakistan*:

As a threshold matter, the Tribunal recalls that its jurisdiction covers treaty and not contract claims. This does not mean that it cannot consider contract matters. It can and must do so to the extent necessary to rule on the treaty claims. It takes contract matters, including the contract's governing municipal law, into account as facts as far as they are relevant to the outcome of the treaty claims. Doing so, it exercises treaty not contract jurisdiction.<sup>108</sup>

This point has already been discussed above in the sub-sections devoted to choice-of-law clauses and default rules, particularly in connection with the *Azurix v. Argentina* case.

(ii) *The pleas of the parties*

Another indication of the relevance of a given (set of) norm(s) is provided, quite obviously, by the pleadings of the parties. For instance, in *Chemtura v. Canada*,<sup>109</sup> the respondent specifically referred to the provisions of the Aarhus Protocol to the Convention on Long-Range Transboundary Air Pollution ('LRTAP Convention')<sup>110</sup> to justify the launching of a special review of lindane, which eventually led to the suspension of the registration of certain lindane-based products manufactured by the claimant.<sup>111</sup> In its award, the tribunal accepted the argument of the respondent, considering that the Aarhus Protocol had indeed been at the origin of the special review process.<sup>112</sup>

Beyond this basic hypothesis, the effect of the parties' pleadings on the tribunal's room for manoeuvre is difficult to determine conceptually. In *Klöckner v. Cameroon*, the *ad hoc*

---

<sup>106</sup> This is a consequence of the *jura novit curia* principle. See Spiermann, above n 99, 90-92, and the case-law cited therein.

<sup>107</sup> On the relations between treaty and contract claims see generally Crawford, above n 85.

<sup>108</sup> See *Bayindir Insaat Turizm Ticaret ve Sanayi A Ş v. Pakistan*, ICSID Case No ARB/03/29, Award, 27 August 2009 ('*Bayindir v. Pakistan*'), para 135. The tribunal in *Bayindir v. Pakistan* relied on the reasoning of the tribunal in *Vivendi II*, above n 17, para 7.3.9.

<sup>109</sup> *Chemtura Corporation (formerly Crompton Corporation) v. Government of Canada*, UNCITRAL, Award, 2 August 2010 ('*Chemtura v. Canada*').

<sup>110</sup> Protocol on Persistent Organic Pollutants to the UNECE Convention on Long-Range Transboundary Air Pollution, of 24 June 1998 ('Aarhus Protocol').

<sup>111</sup> See *Chemtura v. Canada*, above n 109, para 131.

<sup>112</sup> *Ibid.*, paras 139-141.

committee established a distinction between arguments that are within the ‘legal framework established by the Claimant and Respondent’ and those that are ‘beyond’:

As for the Tribunal itself [the one that had issued the award under review], when in the course of its deliberations it reached the provisional conclusion that the true legal basis for its decision could well be different from either of the parties’ respective arguments, it was not, subject to what will be said below, in principle prohibited from choosing its own argument. Whether to reopen the proceeding before reaching a decision and allow the parties to put forward their views on the arbitrators’ ‘new’ thesis is rather a question of expedience. The real question is whether, by formulating its own theory and argument, the Tribunal goes beyond the ‘legal framework’ established by the Claimant and Respondent.<sup>113</sup>

The tribunal gave an example of this ‘*hors sujet*’ by referring to a hypothetical case in which the tribunal would have ‘rendered its decision on the basis of tort while the pleas of the parties were based on contract’.<sup>114</sup> Aside from such extreme cases, the tribunal considered that ‘arbitrators must be free to rely on arguments which strike them as the best ones, even if those arguments were not developed by the parties (although they could have been).’<sup>115</sup>

Thus, a tribunal would have some freedom to introduce environmental questions even if the parties have not focused on such questions in their pleadings. Conversely, when such questions have been raised and the tribunal does not deem them relevant for the resolution of the case, it would also have some leeway to leave them aside. In practice, however, a tribunal would be well advised to give the parties an opportunity to comment on such issues and/or to explain why it does not consider certain arguments relevant.

This latter issue can be illustrated by reference to the decision of the tribunal in *Glamis v. United States*.<sup>116</sup> The case concerned an open-pit gold mining project, the development of which was prevented on the basis of environmental and human rights reasons.<sup>117</sup> Several groups sought to intervene invoking domestic and international environmental and other norms.<sup>118</sup> These arguments were to some extent echoed in the respondent’s briefs.<sup>119</sup> It was therefore understandable that, until the very moment when the tribunal issued its award,

---

<sup>113</sup> *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais*, ICSID Case No. ARB/81/2, Decision on Annulment, 3 May 1985 (‘*Klöckner v. Cameroon*’), para 91.

<sup>114</sup> *Ibid.*

<sup>115</sup> *Ibid.* However, the tribunal added a caveat: ‘Even if it is generally desirable for arbitrators to avoid basing their decision on an argument that has not been discussed by the parties, it obviously does not follow that they therefore commit a “serious departure from a fundamental rule of procedure”. Any other solution would expose arbitrators to having to do the work of the parties’ counsel for them and would risk slowing down or even paralyzing the arbitral solution to disputes ... [b]earing in mind what was said above regarding jurisdiction, it is impossible to hold that the Tribunal failed to respect the principle of due process’ or the equality of the parties’, *ibid.*, paras 91-92.

<sup>116</sup> *Glamis Gold Ltd. v. The United States of America*, NAFTA Arbitration (UNCITRAL), Award of 16 May 2009 (‘*Glamis v. United States*’).

<sup>117</sup> See C Knight, ‘A Regulatory Minefield: Can the Department of Interior say “No” to a Hardrock Mine?’ (2002) 73 *University of Colorado Law Review* 619.

<sup>118</sup> See Quechan Indian Nation Amicus Application & Submission, 19 August 2004; Friends of the Earth Amicus Application, 30 September 2005; Friends of the Earth Amicus Submission, 30 September 2005; Sierra Club & Earthworks Application for Leave to File a Non-Party Submission, 16 October 2006; Submission of Non-Disputing Parties Sierra Club & Earthworks, 16 October 2006; Quechan Indian Nation Application for Leave to File Supplementary Non-Party Submission, 16 October 2006; Supplemental Submission of Non-Disputing Party Quechan Indian Nation, 16 October 2006, all available at <<http://www.naftaclaims.com>> (last accessed on 26 April 2010).

<sup>119</sup> See Respondent’s Counter-Memorial, of 19 September 2006, 33 et seq, available at <<http://www.naftaclaims.com>> (last accessed on 26 April 2010).



some commentators referred to the potential of such decision for clarifying the relations between foreign investment and the environment.<sup>120</sup> For those groups and commentators, it came as a disappointment to see the tribunal's explanations as to why it preferred not to decide many of the most controversial issues pertaining to the environmental and human rights dimensions of the dispute. The tribunal gave the following explanation for proceeding as it did:

First, a tribunal should confine its decision to the issues presented by the dispute before it. The Tribunal is aware that the decision in this proceeding has been awaited by private and public entities concerned with environmental regulation, the interests of indigenous peoples, and the tension sometimes seen between private rights in property and the need of the State to regulate the use of property. These issues were extensively argued in this case and considered by the Tribunal. However, given the Tribunal's holdings, the Tribunal is not required to decide many of the most controversial issues raised in this proceeding. The Tribunal observes that a few awards have made statements not required by the case before it. The Tribunal does not agree with this tendency; it believes that its case-specific mandate and the respect demanded for the difficult task faced squarely by some future tribunal instead argues for it to confine its decision to the issues presented.<sup>121</sup>

An alternative way to handle considerations that the tribunal deems of limited relevance would be to mention them without, however, integrating them in the analysis.<sup>122</sup>

(iii) *Specific uses of environmental norms*

A given norm may be relevant for different purposes, including (a) as the norm governing a particular conduct, (b) as an interpretation tool, or (c) as mere inspirational guidance.

An illustration of (a) is provided by the *SPP v. Egypt* case, where the tribunal considered that the UNESCO World Heritage Convention<sup>123</sup> governed the respondent's conduct. The tribunal noted, in this regard, that there was no question that 'the UNESCO Convention [was] relevant: the Claimants themselves acknowledged during the proceedings before the French *Cour d'Appel* that the Convention obligated the Respondent to abstain from acts or contracts contrary to the Convention'.<sup>124</sup> Also, in *Chemtura v. Canada*, the tribunal considered that the Aarhus Protocol, and more specifically the undertaking to reassess the restricted uses of lindane contemplated in Annex II to this protocol, governed the conduct of Canada.<sup>125</sup>

Regarding (b), environmental norms may also be relevant for the purpose of interpreting the scope of an investment protection clause. For instance, in *Parkerings v. Lithuania*, the tribunal interpreted the most-favoured-nation clause of the applicable bilateral investment treaty in the light of UNESCO World Heritage Convention to conclude that two foreign investors were not in a like position.<sup>126</sup> In a similar vein, in the *Pulp Mills* case, the ICJ excluded the application, as such, of the multilateral environmental agreements and principles of general international law invoked by Argentina, while stressing that such

---

<sup>120</sup> See J Cantegreil, 'Implementing Human Rights in the NAFTA Regime—The Potential of a Pending Case: *Glamis Corp v. USA*' in Dupuy et al, above n 10, 367.

<sup>121</sup> *Glamis v. United States*, above n 116, para 8.

<sup>122</sup> This path was arguably followed in a water-related case, *Biwater v. Tanzania*, above n 17, para 392.

<sup>123</sup> See *Southern Pacific Properties (Middle East) Limited (SPP) v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award of 20 May 1992 ('*SPP v. Egypt*').

<sup>124</sup> *Ibid*, para 78.

<sup>125</sup> See *Chemtura v. Canada*, above n 109, paras 139-141.

<sup>126</sup> See *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007 ('*Parkerings v. Lithuania*'), para 392.

agreements and principles remained relevant to interpret the provisions of the Statute of the River Uruguay.<sup>127</sup>

Finally, environmental or human rights law may be relevant as an inspirational source (c). An example would be the *Tecmed v. Mexico* case, where the tribunal turned to the case-law of the European Court of Human Rights (ECtHR), despite the fact that Mexico was not a party to the European Convention on Human Rights (ECHR), for intellectual guidance in applying the expropriation clause of the applicable BIT.<sup>128</sup>

### C. Procedural Matters

The range of procedural issues potentially influenced by the incorporation of environmental matters in international proceedings is broad enough to have raised the question of the need for an international environmental court,<sup>129</sup> as well as to have justified, in the 1990s, the creation of a special chamber of the ICJ focusing on environmental matters<sup>130</sup> or the adoption by the PCA, in 2001, of a specific set of arbitration rules for natural resource and environmental disputes.<sup>131</sup> In this sub-section, the analysis focuses on two main procedural issues, namely (1) the role of non-disputing parties, and (2) the challenges posed by environmental matters in terms of evidentiary procedures.

#### 1. Role of non-disputing parties

It is useful first to look at how environmental considerations can be introduced into a foreign investment dispute (i) before assessing the reasons explaining the intervention of non-disputing parties in investment proceedings (ii) and the legal framework applicable to such intervention (iii).

##### (i) Raising environmental issues

---

<sup>127</sup> See *Pulp Mills case*, above n 8, paras 64-66.

<sup>128</sup> See *Tecmed v. Mexico*, above n 18, para 122. Unless the approach of the ECtHR were to be considered as a reflection of international customary law or of general principles of law, the reasoning of the tribunal could not be deemed to be an application of Article 31(3)(c) of the Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331 (entered into force on 27 January 1980) ('VCLT'). The ECtHR's role is therefore merely inspirational.

<sup>129</sup> See E Hey, *Reflections on an International Environmental Court* (Kluwer, The Hague, 2000).

<sup>130</sup> The Chamber for Environmental Matters was established in July 1993, pursuant to Article 26(1) of the ICJ Statute, which entitles the Court to 'form one or more chambers, composed of three or more judges as the Court may determine, for dealing with particular categories of cases; for example labour cases and cases relating to transit and communications', Statute of the International Court of Justice, 26 June 1945, Art. 26(1). See Press Release 93/20, Constitution of a Chamber of the Court for Environmental Matters, 19 July 1993, <<http://www.icj-cij.org/presscom/files/7/10307.pdf>> (last accessed on 20 February 2010). However, this chamber was never put to use and, in 2006, after thirteen years, it was eventually decided that it would not be reconstituted. On this issue See E Valencia Ospina, 'The Use of Chambers of the International Court of Justice', in V Lowe, M Fitzmaurice (eds), *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings* (Cambridge University Press, Cambridge, 1996) 503; J E Viñuales, 'The Contribution of the International Court of Justice to the Development of International Environmental Law: A Contemporary Assessment' (2008) 32 *Fordham International Law Journal* 232-233.

<sup>131</sup> See Permanent Court of Arbitration Optional Rules for Arbitration of Disputes relating to Natural Resources and/or the Environment ('PCA Environment Rules'), <[http://www.pca-cpa.org/upload/files/ENVIRONMENTAL\(3\).pdf](http://www.pca-cpa.org/upload/files/ENVIRONMENTAL(3).pdf)> (last accessed on 20 February 2010). On the PCA Environment Rules see D P Ratliff, 'The PCA Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment' (2001) 14 *Leiden Journal of International Law* 887.

How can environmental considerations be introduced into a foreign investment dispute? The first part of the answer to this question is quite obvious. It is the prerogative of the parties to a dispute to refer to all those considerations that they deem relevant in support of their case. Despite the fact that, in practice, host States will be the ones most likely finding support for their argumentation in environmental considerations,<sup>132</sup> such considerations may also serve to buttress the legal case of an investor. As already mentioned, in *Allard v. Barbados* the investor refers, in support of its investment claims, to both domestic and international environmental law, including the Ramsar Wetlands Convention<sup>133</sup> and the Convention on Biological Diversity.<sup>134</sup>

Second, environmental considerations could be introduced by the tribunal itself. This point has been discussed in some detail in the preceding sub-section, in the context of issues relating to the applicable law.

The third and remaining procedural access point is the submission of a non-disputing party.<sup>135</sup> Such submissions have significantly increased in the last years in both investment<sup>136</sup> and other international proceedings.<sup>137</sup> As noted above, our analysis will focus on only two aspects relevant to understand the role of such non-disputing parties in environment-related disputes, namely the reasons for and the emerging legal framework applicable to such intervention.

#### (ii) *Reasons for third-party intervention*

The reasons underlying third-party intervention can be better understood by reference to the historical roots of this phenomenon, which can be traced back to the early history of the English legal system.<sup>138</sup> This affiliation has two interesting implications for the understanding of the role of this institution.

---

<sup>132</sup> See Viñuales, above n 13; Reiner, Schreuer, above n 51, 88-90.

<sup>133</sup> See Convention on Wetlands of International Importance especially as Waterfowl Habitat, of 2 February 1971, 996 UNTS 245 (entered into force on 21 December 1975) ('Ramsar Convention').

<sup>134</sup> See Convention on Biological Diversity, of 5 June 1992, 1760 UNTS 79 (entered into force on 29 December 1993).

<sup>135</sup> See above n 11.

<sup>136</sup> In the context of investment disputes conducted under the aegis of ICSID, the following cases have triggered environment-related interventions by non-disputing parties: *Piero Foresti, Laura de Carli and others v. Republic of South Africa*, ICSID Case No. ARB(AF)/07/1 ('*Foresti v. South Africa*'); *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/19 (*Suez v. Argentina—03/19*); *Suez, Sociedad General de Aguas de Barcelona S.A. and InterAguas Servicios Integrales del Agua S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/17 ('*Suez v. Argentina—03/17*'); *Biwater v. Tanzania*, above n 17; *Aguas del Tunari v. Bolivia*, above n 17. In the context of investment disputes concerning the application of NAFTA, the following cases have triggered environment-related interventions by non-disputing parties: *Methanex Corporation v. United States of America*, NAFTA (UNCITRAL), Award of 3 August 2005 ('*Methanex v. United States*'); *Glamis v. United States*, above n 116.

<sup>137</sup> Even limiting the analysis to *amicus curiae* intervention, the examples of such interventions are numerous. See D Shelton, 'The Participation of Nongovernmental Organizations in International Judicial Proceedings' (1994) 88 *American Journal of International Law* 611; H Ruiz Fabri, J-M Sorel (eds), *Le tiers à l'instance devant les juridictions internationales* (Pedone, Paris, 2005); L Boisson de Chazournes, M Mbengue, 'L'Amicus Curiae devant l'organe de règlement des différends de l'OMC' in S Maljean-Dubois (ed), *Droit de l'Organisation Mondiale du Commerce et protection de l'environnement* (Bruylant/CERIC, Brussels, 2003) 400.

<sup>138</sup> On this early practice see the note on *Amici Curiae* in (1921) 34 *Harvard Law Review* 773 ('Harvard Note'); E Angell, 'The Amicus Curiae: American Development of English Institutions' (1967) 16 *International & Comparative Law Quarterly* 1017.

First, *amicus* intervention provided an avenue to bring points of law or fact to the attention of courts in an epoch characterised by considerable uncertainty as to the contents of the law.<sup>139</sup> Nowadays, the centre of gravity of such function would be instead on points of fact (e.g. informing the tribunal on the specific environmental consequences of a given project) or, to a lesser extent, on legal questions requiring specific knowledge (e.g. the application of certain environmental conventions to the issues under consideration). One difficulty with such function stems, however, from the potential inclination of *amici curiae* to forgo objectivity in favour of advocating a broader cause.<sup>140</sup>

The second and related implication of the origins of *amicus* intervention concerns its potential contribution to the legitimacy of courts' decisions. To the extent that, in the common law tradition, certain decisions had force of law and, as a result, could potentially modify the legal situation of third parties, *amicus* intervention served to give a voice to such third parties.<sup>141</sup> In the modern law of foreign investment, this function could be illustrated by reference to Article 1128 of NAFTA, which allows NAFTA member States to intervene in investment proceedings against one of them,<sup>142</sup> or to *Foresti v. South Africa*,<sup>143</sup> where the tribunal took pains to give civil society groups the opportunity to express their views, and even requested feedback from such groups on the adequacy of the intervention framework.<sup>144</sup>

### (iii) Applicable framework

The discussion of *Foresti v. South Africa* takes us to the analysis of the legal framework for *amicus* intervention. The dispute arose from a mining investment made by Italian nationals, who claimed *inter alia* that they had been expropriated by South Africa as a result of measures adopted by this latter in the context of Black Economic Empowerment (BEE) policies to eliminate the consequences of the apartheid regime. Given the public ramifications of the dispute, the tribunal anticipated that several civil society groups would likely seek to intervene. It therefore prepared, in agreement with the parties, a short summary of the dispute as well as rules governing *amicus* intervention.<sup>145</sup>

---

<sup>139</sup> In Abbott's *Dictionary of Terms and Phrases* an *amicus* is defined as: 'A friend of the court. A term applied to a bystander, who without having an interest in the cause, of his own knowledge makes suggestion on a point of law or of fact for the information of the presiding judge'. Holthouse's *Law Dictionary* stresses the contribution of *amicus* intervention to the correct application of the law: 'When a judge is doubtful or mistaken in matter of law, a bystander may inform the court thereof as *amicus curiae*. Counsel in court frequently act in this capacity when they happen to be in possession of a case which the judge has not seen or does not at the moment remember'. Both dictionaries are quoted in S Krislov, 'The Amicus Curiae Brief: From Friendship to Advocacy' (1963) 72 *Yale Law Journal* 694-695.

<sup>140</sup> See F V Harper, E D Etherington, 'Lobbyists before the Court' (1953) 101 *University of Pennsylvania Law Review* 1172; J D Kearney, T W Merrill, 'The Influence of Amicus Curiae Briefs on the Supreme Court' (2000) 148 *University of Pennsylvania Law Review* 743; B Stern, 'L'entrée de la société civile dans l'arbitrage entre État et investisseur' (2002) *Revue de l'arbitrage* 334.

<sup>141</sup> See S Krislov, *The Amicus Curiae Brief: From Friendship to Advocacy*, above n 139, 698.

<sup>142</sup> Article 1128 of NAFTA provides: 'On written notice to the disputing parties, a Party may make submissions to a Tribunal on a question of interpretation of this Agreement.'

<sup>143</sup> *Foresti v. South Africa*, above n 136.

<sup>144</sup> *Foresti v. South Africa*, above n 136, Letter of 5 October 2009 from the Secretary of the Tribunal, <<http://www.investmenttreatynews.org/cms/news/archive/2009/10/10/an-icsid-tribunal-introduces-innovative-steps-into-non-disputing-party-procedure.aspx>> (last accessed on 26 April 2010) ('*Foresti—Letter from Tribunal*').

<sup>145</sup> See *Foresti v. South Africa*, Agreed text for potential non-disputing parties ('*Foresti v. South Africa—Intervention Instructions*').

Despite its technical rooting in Rule 41(3) of the ICSID's Additional Facility Arbitration Rules,<sup>146</sup> the document prepared by the tribunal can arguably be seen as a current statement of the basic requirements for the submission of *amicus* briefs:

Non-disputing parties seeking to make a written submission should file a petition with the Tribunal for leave to file a written submission and such petition should include the following information:

- the identity and background of the petitioner, the nature of its membership if it is an organization, and the nature of its relationships, if any, to the Parties to the dispute;
- the nature of the petitioner's interest in the case;
- whether the petitioner has received financial or other material support from any of the Parties or from any person connected with the Parties in this case; and
- the reasons why the Tribunal should accept the petitioner's written submission.<sup>147</sup>

Thereafter, two petitions were submitted, one from the International Commission of Jurists, a human rights organization,<sup>148</sup> and another from a group of four non-governmental organisations ('NGOs'), including two focusing on environmental protection.<sup>149</sup>

In its decision granting leave for intervention,<sup>150</sup> the tribunal authorized the petitioners not only to submit written briefs, but also to access redacted versions of documents of the case file, and it even left open the possibility of granting them access to the hearing.<sup>151</sup> Even more interesting was the system established by the tribunal to receive feedback from the *amici curiae*:

In view of the novelty of the NDP procedure, after all submissions, written and oral, have been made the Tribunal will invite the Parties and the NDPs to offer brief comments on the fairness and effectiveness of the procedures adopted for NDP participation in this case. The Tribunal will then include a section in the award, recording views (both concordant and divergent) on the fairness and efficacy of NDP participation in this case and on any lessons learned from it.<sup>152</sup>

The introduction by the tribunal of this additional step was in all likelihood due to the exceptionally sensitive context of the case, in which procedural openness could no doubt

---

<sup>146</sup> Article 41(3), Arbitration (Additional Facility) Rules, available at <<http://icsid.worldbank.org/ICSID/StaticFiles/facility/iii.htm>> (last accessed on 26 April 2010).

<sup>147</sup> *Foresti v. South Africa, Intervention Instructions*, above n 145, 2.

<sup>148</sup> See Petition for participation as Non-disputing party pursuant to Article 41(3) of the ICSID Arbitration (Additional Facility) Rules, presented by the International Commission of Jurists, available at <[http://www.icj.org/IMG/ICJ\\_Petition\\_Foresti\\_v\\_RSA\\_19\\_Aug2009.pdf](http://www.icj.org/IMG/ICJ_Petition_Foresti_v_RSA_19_Aug2009.pdf)> (last accessed on 26 April 2010).

<sup>149</sup> See Petition for Limited Participation as Non-Disputing Parties in Terms of Articles 41(3), 27, 39, and 35 of the Additional Facility Rules, presented by the Centre for Applied Legal Studies (CALs), the Center for International Environmental Law (CIEL), the International Centre for the Legal Protection of Human Rights (INTERIGHTS), and the Legal Resources Centre (LRC), available at <<http://www.interights.org/view-document/index.htm?id=543>> (last accessed on 26 April 2010).

<sup>150</sup> See *Foresti—Letter from Tribunal*, above n 144.

<sup>151</sup> The tribunal stated, in this regard: 'Accordingly, the Tribunal has taken the view that the NDPs must be allowed access to those papers submitted to the Tribunal by the Parties that are necessary to enable the NDPs to focus their submissions upon the issues arising in the case and to see what positions the Parties have taken on those issues. The NDPs must also be given adequate opportunity to prepare and deliver their submissions in sufficient time before the hearing for the Parties to be able to respond to those submissions. The Tribunal does not at this stage envisage that the NDPs will be permitted to attend or to make oral submissions at the hearing. A final decision on those questions will be taken after March 12, 2010, by which date the Parties will have responded to the NDP submissions', *ibid*, 1-2.

<sup>152</sup> *Ibid*, 2 *in fine*.

add legitimacy to any future decision made by the tribunal on the merits of the dispute.<sup>153</sup> It must be noted, in addition, that the procedure established by the tribunal was not exactly novel. Although neither the access to the file nor the potential access to the hearing had been previously granted to non-governmental organizations acting as *amici curiae*, the requirements set out by the tribunal for *amicus* intervention are fundamentally the same as those established by both previous tribunals and international instruments.<sup>154</sup>

In essence, *amicus* intervention is allowed if the petitioner can make a substantive (points of law or fact) and procedural (enhancing legitimacy) contribution to the proceedings,<sup>155</sup> without severely encroaching on the parties due process and confidentiality rights (proportionality). Whereas the first two requirements are the same for the three types of requests (written intervention, access to document, access to the hearing) usually made by *amici curiae*, the third requirement is more demanding with respect to two of these requests (access to documents and to the hearing).<sup>156</sup>

Environment-related disputes, such as those concerning water services, natural resources extraction, waste treatment facilities, or regulated substances are particularly prone to present broader public considerations,<sup>157</sup> which a tribunal should take into account in reaching a decision. An important function of *amicus* intervention in this context is therefore to assist the tribunal in understanding such broader public repercussions as well as to enhance the legitimacy of arbitration proceedings by presenting the perspective of civil society. In order to perform such function, however, *amici curiae* must be both competent and representative of relevant constituencies. Representativeness further supposes the absence of bias arising from any relevant relation with one of the parties, especially financial relations. Such are the conceptual underpinnings of the requirements set for *amicus* intervention.

## 2. Evidentiary issues

Environment-related disputes present some specific challenges in terms of evidence as a result of both the highly technical nature and the considerable scientific uncertainty often associated with environmental issues. In order to deliberate the merits of an investment dispute with environmental components, tribunals must not only understand in some detail

---

<sup>153</sup> However, thereafter, the claimant requested the discontinuance of the proceedings. The respondent opposed such request and asked, in turn, for a default award. Beginning of August 2010, the tribunal rendered a discontinuance award ordering the claimants to pay part of the respondent's costs. See *Foresti v. South Africa*, above n 136, Award of 4 August 2010 ('*Foresti v. South Africa—Award*').

<sup>154</sup> See the remarks of the tribunals in *Suez v. Argentina - 03/19*, above n 136, Order in Response to a Petition for Transparency and Participation as Amicus Curiae, 19 May 2005 (Order I), paras 17-29; *Suez v. Argentina—03/19*, above n 136, Order in Response to a Petition by Five Non-Governmental Organizations for Permission to Make an Amicus Curiae, 12 February 2007 (Order II), para 15; *Suez v. Argentina—03/17*, above n 136, Order in Response to a Petition for Participation as Amicus Curiae, 17 March 2006 (Order), paras 17-34; *Biwater v. Tanzania*, above n 17, Procedural Order No. 5 (Order 5), paras 46-61. See also ICSID Arbitration Rules (2006), Article 37(2). In *Suez v. Argentina—03/19*, the tribunal took position on the conditions that it had set, prior to the entry into force of the new Article 37(2) of the ICSID Arbitration Rules, for the admission of *amicus* briefs and found them to be in accordance with the new rules, Order II, para 15. For a survey of codification efforts regarding *amicus* intervention See Grisel, Viñuales, above n 11, 402-413.

<sup>155</sup> The tribunal in *Biwater v. Tanzania* seemed to imply that either one of these two conditions (substantive contribution and legitimacy enhancement) would be sufficient, Order 5, above n 154, para 54.

<sup>156</sup> See ICSID Arbitration Rules (2006), Article 32(2); *Suez v. Argentina—03/19*, Order I, above n 154, para 6; *Suez v. Argentina—03/17*, Order, above n 154, para 7.

<sup>157</sup> On the public dimensions of investment arbitration see G van Harten, *Investment Arbitration and Public Law* (Oxford University Press, Oxford, 2007).

complex environmental processes but may also have to take position on a scientific debate where the views of the experts presented by the parties are often at odds. This can be challenging for judges or arbitrators who, as a rule, do not have a sufficient scientific background to understand the intricacies of such complex processes.<sup>158</sup> In order to respond to such challenge, international courts and tribunals could follow four main approaches,<sup>159</sup> namely (i) to downplay the need for an explicit decision on the scientific merits of each position, (ii) to appoint an independent expert to assist the tribunal, (iii) to adjust the burden or the standard of proof, or (iv) to defer to the scientific assessment made by specialized agencies. Here, we will focus on the first three avenues, leaving the fourth for our discussion of the margin of appreciation doctrine in section IV below.<sup>160</sup>

(i) *Downplaying the role of science*

The first approach can be illustrated by reference to a number of international proceedings where the adjudicators were asked by the parties, either explicitly or (more often) implicitly, to take position on a scientific debate.

In *Gabčíkovo-Nagymaros*,<sup>161</sup> Hungary argued, to justify its non performance of a treaty with Slovakia for the construction of a system of dams, that if it had conducted the works as planned ‘the environment—and in particular the drinking water resources—in the area would have been exposed to serious dangers’.<sup>162</sup> In the course of the proceedings, both Hungary and Slovakia presented what the Court itself qualified as an impressive amount of scientific material to buttress their respective argumentations. In its decision, however, the Court considered that ‘it [was] not necessary in order to respond to the questions put to it in the Special Agreement for it to determine which of those points of view is scientifically better founded’.<sup>163</sup>

This may appear as an exceptional solution to the extent that the Court was able to decide the issue for which the scientific evidence had been adduced on the basis of different legal grounds. But such a way of proceeding is not uncommon.<sup>164</sup> To take another example, the panel established by the WTO to decide the *EC Asbestos* case noted, in the same vein:

In relation to the scientific information submitted by the parties and the experts, the Panel feels bound to point out that it is not its function to settle a scientific debate, not being composed of experts in the field or the possible human health risks posed by asbestos. Consequently, the Panel does not intend to set itself up as arbiter of the opinions expressed by the scientific community.<sup>165</sup>

---

<sup>158</sup> This point was underlined in the Joint-Dissenting Opinion of Judges Al-Khasawneh and Simma in the *Pulp Mills* case, above n 8, para 2 (stating that ‘the Court has evaluated the scientific evidence brought before it by the Parties in ways that we consider flawed methodologically’).

<sup>159</sup> On these and other techniques see J E Viñuales, ‘Legal Techniques for Dealing with Scientific Uncertainty in Environmental Law’ (2010) 43 *Vanderbilt Journal of Transnational Law* 437; L Savadogo, ‘Le recours des juridictions internationales à des experts’ (2004) 50 *Annuaire français de droit international* 231; M Orellana, ‘The Role of Science in Investment Arbitrations Concerning Public Health and the Environment’ (2006) 17 *Yearbook of International Environmental Law* 48.

<sup>160</sup> See below section IV(C)(2)(iii).

<sup>161</sup> See *Gabčíkovo-Nagymaros*, above n 8.

<sup>162</sup> *Ibid.*, para 55.

<sup>163</sup> *Ibid.*

<sup>164</sup> See below section IV(C)(2)(iii).

<sup>165</sup> European Communities—Measures Affecting Asbestos and Asbestos-Containing Products, Panel Report, Doc. WT/DS135/R, 18 September 2000, para 8.181. See also *Continental Shelf (Libya v. Malta)*, [1985] ICJ Rep

It seems reasonable not to require international adjudicators to take a position in an unsettled or at least arguable scientific debate. But the problem with this solution is that it is sometimes impossible to decide a legal dispute without forming a general opinion on the scientific debate underlying it, and that adjudicators do in practice form such an opinion, whether or not it is spelled out in the final decision. An alternative way of proceeding would consist of providing adjudicators with the assistance they need to reach a reasonable and informed opinion on the science underlying the law.

(ii) *Scientific assistance*

A number of arbitration and procedural rules contain specific provisions allowing the tribunal to appoint its own expert. For instance, Article 27(1) of the UNCITRAL Arbitration Rules states:

The arbitral tribunal may appoint one or more experts to report to it, in writing, on specific issues to be determined by the tribunal. A copy of the expert's terms of reference, established by the arbitral tribunal, shall be communicated to the parties.<sup>166</sup>

Similarly, the IBA Rules on the Taking of Evidence in International Commercial Arbitration, frequently used in investment cases, provide in Article 6(1):

The Arbitral Tribunal, after having consulted with the Parties, may appoint one or more independent Tribunal-Appointed Experts to report to it on specific issues designated by the Arbitral Tribunal. The Arbitral Tribunal shall establish the terms of reference for any Tribunal-Appointed Expert report after having consulted with the Parties. A copy of the final terms of reference shall be sent by the Arbitral Tribunal to the Parties.<sup>167</sup>

Still another illustration of this possibility is provided by Article 27(1) of the PCA Environment Rules:

After having obtained the views of the parties, the arbitral tribunal may upon notice to the parties appoint one or more experts to report to it, in writing, on specific issues to be determined by the tribunal. A copy of the expert's terms of reference, established by the arbitral tribunal, shall be communicated to the parties.<sup>168</sup>

The PCA Environment Rules also provide an alternative method to assist tribunals, namely the possibility to ask the parties to provide it with non technical summaries or explanations of the scientific or technological issues relevant to assess the merits of the dispute.<sup>169</sup>

---

36, para 41; *Southern Bluefin Tuna Cases (New Zealand v. Japan; Australia v. Japan)*, Provisional Measures, ITLOS Nos. 3 and 4, 1999 ('*Bluefin Tuna—ITLOS*'), paras 40, 65, all quoted in Orellana, above n 159, 52-53.

<sup>166</sup> UNCITRAL Arbitration Rules, above n 94, art 27(1).

<sup>167</sup> International Bar Association, Rules on the Taking of Evidence in International Commercial Arbitration ('IBA Evidence Rules'), art 6(1).

<sup>168</sup> PCA Environment Rules, above n 131, art 27(1). Other examples of this type of provision include the following: ICJ Statute, art 50; WTO Understanding on Rules and Procedures Governing the Settlement of Disputes, art 13(2); United Nations Convention on the Law of the Sea, of 10 December 1982, 1833 UNTS 3 (entered into force on 16 November 1994) ('UNCLOS'), art 289; NAFTA, art 1133. In their Joint Dissenting Opinion in the *Pulp Mills* case, judges Al-Khasawneh and Simma regretted, in particular, that the Court did not resort to the possibility offered by Article 50 of the Court's Statute, above n 158, para 8.

<sup>169</sup> Article 24(4) of the PCA Environment Rules provides: 'The arbitral tribunal may request the parties jointly or separately to provide a nontechnical document summarizing and explaining the background to any scientific, technical or other specialized information which the arbitral tribunal considers to be necessary to understand fully the matters in dispute'.



Although such possibility is not expressly mentioned in other arbitration and procedural rules, it is arguably encompassed by the tribunals' general procedural powers.<sup>170</sup>

(iii) *Adjustments to evidentiary standards*

This approach is more controversial, as deviations from the basic rules governing the burden and the standard of proof in international adjudication<sup>171</sup> should be admitted only under particular circumstances.<sup>172</sup> The difficulties involved in establishing environmental risk or harm in international proceedings<sup>173</sup> may, however, justify some adjustment of those basic rules. In this regard, two main avenues could be followed.

The first possibility would be to shift the burden of proof from the claimant to the respondent by means of a treaty provision. For instance, under the London Dumping Convention, as amended by the 1996 Protocol, it is for the party dumping industrial waste at sea to prove that such dumping does not harm the environment.<sup>174</sup> A conventional shift of the burden of proof has also been proposed by the European Community within the context of the Doha round in connection with the relations between trade restrictions in multilateral environmental agreements and the general exceptions clause in Article XX of the GATT.<sup>175</sup> According to this proposal, a trade restriction based on a multilateral environmental agreement would be presumed to fall within the general exceptions clause in Article XX unless otherwise established by the party affected by the measure.<sup>176</sup> Such solution can be seen as an application of one of the formulations of the precautionary principle.<sup>177</sup> In the absence of an agreement along the lines of the foregoing examples, a shift of the burden of proof seems unlikely in the present state of international law. In the *Pulp Mills* case, Argentina argued that the Statute of the River Uruguay implicitly adopted a precautionary approach whereby the burden of proving that the mills would not cause significant damage to the environment was on Uruguay.<sup>178</sup> The ICJ rejected this argument stating that 'while a precautionary approach may be relevant in the interpretation and application of the

---

<sup>170</sup> See L Creig, W W Park, J Paulsson, *International Chamber of Commerce Arbitration* (3<sup>rd</sup> edn, Oceana/Oxford University Press, New York, 2000), 300 et seq; D Caron, L M Caplan, M Pellonpaa, *The UNCITRAL Arbitration Rules. A Commentary* (Oxford University Press, New York, 2006), 25 et seq; C Schreuer, L Malintoppi, A Reinisch, A Sinclair, *The ICSID Convention. A Commentary* (2<sup>nd</sup> edn, Cambridge University Press, Cambridge, 2009), 672 et seq.

<sup>171</sup> On these two concepts see C Santulli, *Droit du contentieux international* (Montchrestien, Paris, 2005) paras 846-868. See also PCA Environment Rules, Article 24(1): 'Each party shall have the burden of proving the facts relied on to support its claim or defense'; UNCITRAL Arbitration Rules, Article 24(1), with identical language; *Bayindir v. Pakistan*, above n 108, paras 140-143; *Pulp Mills case*, above n 8, para 162.

<sup>172</sup> See the reasoning of the ICJ in the *Corfu Channel Case* with respect to the use of circumstantial evidence: *Corfu Channel Case (UK v. Albania)*, [1949] ICJ Rep 4, 18.

<sup>173</sup> See E Truilhé-Marengo, 'Les règles relatives à la preuve: quelle place pour l'incertitude scientifique?' in Maljean-Dubois, above n 137, 443.

<sup>174</sup> See Birnie, Boyle, Redgwell, above n 5, 158-159, referring to the 1996 Protocol to the London Convention.

<sup>175</sup> See General Agreement on Tariffs and Trade, 1947, incorporated into the General Agreement on Tariffs and Trade, of 15 April 1994 ('GATT'), Article XX(b) and (g), <[http://www.wto.org/english/docs\\_e/legal\\_e/legal\\_e.htm](http://www.wto.org/english/docs_e/legal_e/legal_e.htm)> (last accessed on 26 April 2010).

<sup>176</sup> See Committee on Trade and Environment, *Resolving the Relationship Between the WTO Rules and Multilateral Environmental Agreements*, communication by the European Communities of 19 October 2000, WT/CTE/W/170, paras 10, 15.

<sup>177</sup> See D Bodansky, 'Deconstructing the Precautionary Principle' in D Caron, H N Scheiber (eds), *Bringing New Ocean Waters* (Brill, The Hague, 2004) 381.

<sup>178</sup> See *Pulp Mills case*, above n 8, para 160.

provisions of the Statute, it does not follow that it operates as a reversal of the burden of proof'.<sup>179</sup>

The second possibility would be to maintain the burden of proof on the party alleging a fact while relaxing the standard for proving such fact. For instance, in the *EC—Hormones* case,<sup>180</sup> the WTO Appellate Body confirmed that, under the SPS Agreement,<sup>181</sup> the claimant only needs to make a prima facie showing that the respondent is in breach of its obligations, after which the burden of proving an exception shifts to the respondent.<sup>182</sup> The International Tribunal on the Law of the Sea (ITLOS) has followed an arguably similar approach in the *Southern Bluefin Tuna* cases, in that it seems to apply precautionary reasoning to somewhat compensate for the absence of conclusive indications on a fact alleged by the petitioner.<sup>183</sup> However, this approach has not been followed consistently.<sup>184</sup>

\* \* \*

The foregoing analysis of the issues that may arise in investment proceedings in connection with the environmental components of a dispute leads to the following conclusions: (1) environmental claims may be brought before an investment tribunal (i) in the form of an investment claim or (ii) potentially also as an independent head of claim, under a broadly formulated jurisdictional clause, for breach of either the host State's environmental laws or of international environmental law, if the applicable treaty contains a referral clause; (2) references in the applicable investment treaties to investments made 'in accordance with the laws' of the host State bring to bearing domestic (and potentially international) environmental laws in defining the scope of protected investments for jurisdictional purposes in cases where, for instance, an investment has been initially made in wilful, albeit covert, violation of such laws; (3) domestic and/or international environmental laws may be applicable to an investment dispute (i) through a choice of law clause contained in an investment contract or in an investment treaty, (ii) through an indirect reference in a treaty or a domestic investment code limiting the scope of protection to investments made 'in

---

<sup>179</sup> Ibid, para 164.

<sup>180</sup> See *EC Measures concerning meat and meat products (hormones)*, 16 January 1998, WT/DS26/AB/R, WT/DS48/AB/R ('*EC—Hormones*').

<sup>181</sup> See Agreement on Sanitary and Phytosanitary Measures, of 15 April 1994 ('SPS Agreement'), available at: <[http://www.wto.org/english/docs\\_e/legal\\_e/legal\\_e.htm](http://www.wto.org/english/docs_e/legal_e/legal_e.htm)> (last accessed on 26 April 2010).

<sup>182</sup> See *EC—Hormones*, para 109, stating: 'In accordance with our ruling in *United States—Shirts and Blouses*, the Panel should have begun the analysis of each legal provision by examining whether the United States and Canada had presented evidence and legal arguments sufficient to demonstrate that the EC measures were inconsistent with the obligations assumed by the European Communities under each Article of the *SPS Agreement* addressed by the Panel, i.e., Articles 3.1, 3.3, 5.1 and 5.5. Only after such a *prima facie* determination had been made by the Panel may the onus be shifted to the European Communities to bring forward evidence and arguments to disprove the complaining party's claim.'

<sup>183</sup> The standard of proof applied seems to be lower than the one applicable for provisional measures. See *Bluefin Tuna—ITLOS*, above n 165, noting the following in paras 79-80: 'Considering that there is scientific uncertainty regarding measures to be taken to conserve the stock of southern bluefin tuna and that there is no agreement among the parties as to whether the conservation measures taken so far have led to the improvement in the stock of southern bluefin tuna ... Considering that, although the Tribunal cannot conclusively assess the scientific evidence presented by the parties, it finds that measures should be taken as a matter of urgency to preserve the rights of the parties and to avert further deterioration of the southern bluefin tuna stock.' See also *Case concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore)*, Provisional Measures, ITLOS Case No. 12, Order, 8 October 2003 ('*Land Reclamation—ITLOS*'), paras 93-96.

<sup>184</sup> See *The MOX Plant Case (Ireland v. United Kingdom)*, Provisional Measures, ITLOS Case No. 10, Order, 3 December 2001 ('*MOX Plant—ITLOS*'), paras 69-81.

accordance with the laws' of the host State, or (iii) through a default clause in the rules governing the arbitration proceedings; (4) whether environmental law is relevant for the resolution of an investment dispute will depend *inter alia* on (i) the scope of the dispute over which the tribunal asserts jurisdiction, (ii) the norms invoked by the parties in their pleas or identified by the tribunal *ex officio* or, still, by a submission of a non-disputing party, and (iii) such norms may be relevant in different forms, including as a primary norm governing the conduct of the host State, an interpretation tool or a mere inspirational guide; (5) the usefulness of non-disputing parties' intervention in environment-related investment disputes is conditioned upon their ability to make a contribution in terms of substance and legitimacy, and subject to a proportionality test; (6) the environmental components of an investment dispute may pose specific challenges in terms of evidentiary procedures, which in practice could be handled *inter alia* by (i) downplaying the need for an explicit decision on the merits of the scientific debate underlying the dispute, (ii) appointing an independent expert to assist the tribunal, or (iii) adjusting the burden or the standard of proof.

#### IV. INVESTMENT CLAIMS

The issues analysed in this section all concern the assessment of the merits of environment-related investment disputes. International law provides a number of legal techniques to determine which norm(s) prevail(s) in a case where conduct potentially in breach of international investment law is adopted to fulfil an obligation arising from international environmental law. It also provides conflict rules for cases in which a domestic law or a measure taken for environmental reasons conflicts with an investment protection standard. The techniques applicable in the case of 'normative conflicts' (B) are not the same as those applied to deal with 'legitimacy conflicts' (C). In order to understand the respective scopes of these 'conflict rules', it is necessary to look first at the conceptual aspects of the distinction between these two types of conflicts (A). Finally, environmental considerations may have an impact on the assessment of compensation (D).

##### A. *Normative conflicts v. legitimacy conflicts*

In order for a 'normative conflict' to exist, an international environmental norm must require a State to adopt certain conduct. In other words, it must be a sufficiently precise international obligation. There are different degrees in which an international environmental norm may 'require' the adoption of certain conduct. Let us elaborate on this point in the light of those environmental norms that have been or could likely be invoked in the context of investment disputes.

First, the norm in question may clearly command the adoption of certain conduct. For instance, pursuant to Article 4(5) of the Basle Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal ('Basle Convention') '[a] Party shall not permit hazardous wastes or other wastes to be exported to a non-Party or to be imported from a non-Party.'<sup>185</sup> Were a host State to enact regulations preventing such exports to non-parties, such behaviour could squarely be characterised as an application of an international

---

<sup>185</sup> Article 4(5), Basle Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, of 22 March 1989, 1673 UNTS 57 (entered into force 5 May 1992)('Basle Convention').

environmental obligation.<sup>186</sup> In a similar vein, a provision such as the one contained in Annex II of the Aarhus Protocol clearly requires the conduct of a reassessment of certain uses of lindane, although such reassessment may also be triggered by domestic health and environmental considerations.<sup>187</sup>

However, many environmental conventions contain less commanding requirements. For instance, Article 3(1) of the Kyoto Protocol provides:

The Parties included in Annex I shall, individually or jointly, ensure that their aggregate anthropogenic carbon dioxide equivalent emissions of the greenhouse gases listed in Annex A do not exceed their assigned amounts, calculated pursuant to their quantified emission limitation and reduction commitments inscribed in Annex B and in accordance with the provisions of this Article, with a view to reducing their overall emissions of such gases by at least 5 per cent below 1990 levels in the commitment period 2008 to 2012.<sup>188</sup>

In this case, although there is a specific emissions objective for States having undertaken quantified targets, the means to achieve those objectives are left to each State. It would therefore be less clear whether a specific measure adopted by a State in furtherance of its obligations under the Kyoto Protocol could be characterised as strictly required by an international environmental obligation.

A somewhat less stringent variant of this type of requirement appears in a number of international treaties dealing with the protection of habitats and biological diversity. For instance, paragraphs 1 and 4 of Article 2 of the Ramsar Convention require States to designate (at least) one or more suitable wetland(s) within their territory for inclusion in the list of wetlands of international importance.<sup>189</sup> A number of consequences follow from the voluntary act of designation, including the formulation and implementation of plans to promote the conservation of listed wetlands<sup>190</sup> or the creation of nature reserves on wetlands.<sup>191</sup> Whereas the designation of one wetland in its territory is mandatory under the Convention, the State has considerable discretion in the selection of particular zones as protected wetlands as well as in the specific measures to be adopted for their protection. Were a State to select a zone near the location of an industrial plant owned by a foreign investor and thereafter adopt stringent regulations restricting the activities of such investor, it would be unclear whether such conduct is commanded by international environmental law.<sup>192</sup> Conversely, if a State failed to adopt or implement stringent environmental regulations, or established only a limited protection framework, it would be unclear whether such conduct would be in breach of international environmental law.

---

<sup>186</sup> In *S.D. Myers v. Canada*, above n 105, the respondent argued that it had acted in accordance with Article 4(5) of the Basle Convention. See Counter-Memorial, of 5 October 1999, para 106, <<http://www.naftaclaims.com>> (last accessed on 26 April 2010).

<sup>187</sup> See *Chemtura v. Canada*, above n 109, paras 131 and 137-142.

<sup>188</sup> Kyoto Protocol, above n 39, art 3(1).

<sup>189</sup> Ramsar Convention, above n 133, art 2(1) and (4).

<sup>190</sup> *Ibid*, art 3(1).

<sup>191</sup> *Ibid*, art 4(1).

<sup>192</sup> This issue arose in *Empresa Lucchetti v. Peru*, in connection with the construction and operation of a pasta factory near a protected wetland (Pantanos de Villa). However, the tribunal found that it lacked jurisdiction over the dispute, a decision that was confirmed on annulment. See *Empresa Lucchetti S.A. and Lucchetti Peru S.A. v. Republic of Peru*, ICSID Case No. ARB/03/4, Decision of 7 February 2005 ('*Lucchetti v. Peru—Jurisdiction*'); *Industria Nacional de Alimentos S.A. and Indalsa Perú S.A. v. Republic of Peru*, ICSID Case No. ARB/03/4, Decision on Annulment of 7 February 2005 ('*Lucchetti v. Peru—Annulment*'). A similar issue arose in *SPP v. Egypt*, above n 123, para 154, in connection with a site protected under the UNESCO World Heritage Convention, see below IV.C(2)(i).

Even less stringent are the requirements established by the Convention on Biological Diversity or by the Western Hemisphere Convention. Article 6 of the Convention on Biological Diversity states:

Each Contracting Party shall, in accordance with its particular conditions and capabilities:

(a) Develop national strategies, plans or programmes for the conservation and sustainable use of biological diversity or adapt for this purpose existing strategies, plans or programmes which shall reflect, inter alia, the measures set out in this Convention relevant to the Contracting Party concerned; and

(b) Integrate, as far as possible and as appropriate, the conservation and sustainable use of biological diversity into relevant sectoral or cross-sectoral plans, programmes and policies.<sup>193</sup>

The Western Hemisphere Convention is even less precise as to the specific obligations undertaken by the States parties:

The Contracting Governments will explore at once the possibility of establishing in their territories national parks, national reserves, nature monuments, and strict wilderness reserves as defined in the preceding article. In all cases where such establishment is feasible, the creation thereof shall be begun as soon as possible after the effective date of the present Convention ... [t]he Contracting Governments agree to adopt, or to propose such adoption to their respective appropriate law-making bodies, suitable laws and regulations for the protection and preservation of flora and fauna within their national boundaries but not included in the national parks, national reserves, nature monuments, or strict wilderness reserves to in Article II hereof. Such regulations shall contain proper provisions for the taking of the specimens of flora and fauna for scientific study and investigation by properly accredited individuals and agencies.<sup>194</sup>

Thus formulated, these provisions leave such a broad discretion to States that measures taken under their umbrella could be reasonably considered, depending on the perspective that one adopts, either as conduct required by an international obligation or, conversely, as an essentially domestic initiative.

A similar analysis could also be conducted with respect to investment protection standards. From the specific provisions on direct expropriation or on performance requirements, to the less precise protections such as the national treatment and most-favoured-nation clauses, to the broad provisions on full protection and security or fair and equitable treatment, the requirements of investment protection are increasingly open to debate, and they would have largely remained so if it had not been for the contribution of the case-law arising from investment disputes.<sup>195</sup>

The preceding observations are useful to understand more fully the distinction between normative and legitimacy conflicts. As a result of the varying degree of precision with which different environmental norms are formulated, as illustrated by the abovementioned examples, normative and legitimacy conflicts may enter into subtle interactions. For

---

<sup>193</sup> Convention on Biological Diversity, above n 134, art 6.

<sup>194</sup> Convention on Nature Protection and Wild Life Preservation in the Western Hemisphere, of 12 October 1940, 56 Stat. 1354, TS 981 (entered into force on 1 May 1942) ('Western Hemisphere Convention'), arts II(1) and V(1).

<sup>195</sup> For overviews of the foreign investment case-law see E Gaillard, *La jurisprudence du CIRDI*, vols I–II (Pedone, Paris, 2004–2010); T Weiler (ed) *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law* (Cameron May, London, 2005); J Foubert, D Khayat, *Recueil des commentaires des décisions du CIRDI* (Bruylant, Brussels, 2009); R Happ, N Rubins, *Digest of ICSID Awards and Decisions 2003–2007* (Oxford University Press, Oxford, 2009).

instance, the conflict arising in a situation where a State has adopted an adverse environmental measure based on Article 6 of the Convention on Biological Diversity would in practice be very similar to one in which the environmental measure makes no reference to such article or, still, to one in which the host State is not a party to that convention. In the same vein, the conflict arising where a measure has been adopted pursuant to Annex II of the Aarhus Protocol would also be very similar, despite the more specific content of Annex II, to a conflict where the measure has been adopted on the basis of domestic environmental and health considerations. At the margin, the distinction between normative and legitimacy conflicts turns on whether an international environmental norm can reasonably be invoked as a norm governing the conduct of the host State, as opposed to a mere source of inspiration.<sup>196</sup> In this latter case, international environmental law would not be directly applicable and the conflict would be one of legitimacy. The boundary between normative and legitimacy conflicts is even thinner if an international environmental norm is invoked as an interpretation tool, as in this case it would be intervening as applicable law and not simply as policy. Indeed, Article 31(3)(c) of the VCLT refers to ‘any relevant rules of international law applicable in the relations between the parties’<sup>197</sup> as a tool for systemic integration.<sup>198</sup>

Despite the thin boundary between normative and legitimacy conflicts, the distinction remains important because the rules applicable to solving normative conflicts are different from those applicable to solving legitimacy conflicts. The former set of rules consists, essentially, of specific conflict rules contained in treaties and general conflict rules arising from general international law.<sup>199</sup> These rules are technically not applicable to legitimacy conflicts, in which the opponents are an international instrument (most often an investment treaty) and a national instrument (most often environment-related domestic law or measures).<sup>200</sup> Legitimacy conflicts call for a more composite set of conflict rules, including specific conflict rules in treaties, rules governing the relations between international and domestic laws, rules of conflicts of laws *stricto sensu* (private international law), rules governing the hierarchy of norms within a domestic legal system, or rules defining the scope of the State’s regulatory powers.

### *B. Normative conflicts*

---

<sup>196</sup> See above section III.B.(2)(iii) of our analysis of the relevance of an environmental norm (i) as a primary rule governing the conduct of the host State, (ii) an interpretation tool, or (iii) as a mere source of inspiration.

<sup>197</sup> VCLT, above n 128, art 31(3)(c).

<sup>198</sup> See below section IV.B(2)(v).

<sup>199</sup> See Report-Fragmentation, above n 2, para 18.

<sup>200</sup> It must be noted, however, that the international law component of a legitimacy conflict could also stem from international environmental law. For instance, an investment made in reliance of the legal framework of an internationally protected area could be adversely affected by a more liberal investment code or another investment-related measure that lowers the level of environmental protection on which the profitability of the initial investment is based. A potential example would be provided by the *Allard v. Barbados* case, above n 19. Other examples could be derived from investment-related cases before regional human rights courts. For instance, in the *Awás Tigni* case, the Inter-American Court of Human Rights upheld the customary right to property of an indigenous community over its ancestral land against the right of property of an investor, to whom Nicaragua had granted a concession over the same lands. See *Mayagna (Sumo) Awás Tingni Community v. Nicaragua*, IACHR, 31 August 2001, Series C No. 79, para 164. On the case-law of regional human rights courts relating to investment see De Sena, ‘Economic and Non-Economic Values in the Case Law of the European Court of Human Rights’ in Dupuy et al, above n 10, 208; U Kriebbaum, ‘Is the European Court of Human Rights an Alternative to Investor-State Arbitration?’ in Dupuy et al, above n 10, 219; P Nikken, ‘Balancing of Human Rights and Investment Law in the Inter-American System of Human Rights’ in Dupuy et al, above n 10, 246.

The approaches available to solving normative conflicts can be either (1) specific, focusing explicitly on the relations between investment and environmental protection, or (2) general, i.e. applicable to any potential conflict of international obligations.

### *1. Specific conflict rules*

As the interactions between foreign investment and environmental protection became better understood, negotiators and policy-makers were minded to take such interactions specifically into account in the drafting of agreements.<sup>201</sup> As it will be discussed in the context of legitimacy conflicts, the environmental provisions contained in investment and free trade agreements focus mainly on the scope for domestic environmental regulation. There are, however, some investment and free trade agreements which contain specific language on the relations between international investment law and international environmental law.

Among the first treaties to include such language, one must mention the NAFTA. Article 104 of NAFTA states that:

1. In the event of any inconsistency between this Agreement and the specific trade obligations set out in:

- a) the Convention on International Trade in Endangered Species of Wild Fauna and Flora, done at Washington, March 3, 1973, as amended June 22, 1979,
- b) the Montreal Protocol on Substances that Deplete the Ozone Layer, done at Montreal, September 16, 1987, as amended June 29, 1990,
- c) the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, done at Basel, March 22, 1989, on its entry into force for Canada, Mexico and the United States, or
- d) the agreements set out in Annex 104.1,

such obligations shall prevail to the extent of the inconsistency, provided that where a Party has a choice among equally effective and reasonably available means of complying with such obligations, the Party chooses the alternative that is the least inconsistent with the other provisions of this Agreement.

2. The Parties may agree in writing to modify Annex 104.1 to include any amendment to an agreement referred to in paragraph 1, and any other environmental or conservation agreement.<sup>202</sup>

The annex to which this provision refers guided the reasoning of the tribunal in *S.D. Myers v. Canada* with respect to the relations between the Basle Convention and the NAFTA. The tribunal noted in this regard:

The drafters of the NAFTA evidentially considered which earlier environmental treaties would prevail over the specific rules of the NAFTA in case of conflict. Annex 104 provided that the Basel Convention would have priority if and when it was ratified by the NAFTA Parties ... Even if the Basel Convention were to have been ratified by the NAFTA Parties, it should not be presumed that CANADA would have been able to use it to justify the breach of a specific NAFTA provision because ... *where a party has a choice among equally effective and reasonably available alternatives*

---

<sup>201</sup> The following discussion is based on a survey by the Organisation of Economic Cooperation and Development (OECD) focusing on a sample of 269 investment and free trade agreements concluded by the 30 OECD members (as well as the 9 non-member adherents): OECD, *International Investment Law: Understanding Concepts and Tracking Innovation*, 2008 ('OECD 2008 Study').

<sup>202</sup> NAFTA, above n 48, art 104.

for complying... with a Basel Convention obligation, it is obliged to choose the alternative that is ...least inconsistent... with the NAFTA. If one such alternative were to involve no inconsistency with the Basel Convention, clearly this should be followed.<sup>203</sup>

The NAFTA also contains other references potentially relevant for the relations between international investment law and international environmental law. Its preamble expressly refers to the need to act ‘in a manner consistent with environmental protection and conservation’, to ‘promote sustainable development’ and to ‘strengthen the development and enforcement of environmental laws and regulations’.<sup>204</sup> Moreover, the States parties to the NAFTA concluded a side agreement focusing specifically on environmental cooperation,<sup>205</sup> which will be discussed below in connection with legitimacy conflicts.

Another provision addressing a potential conflict between international investment law and international environmental law is Article 72(c) of the CARIFORUM—European Union Economic Partnership Agreement (EPA) signed on 15 October 2008,<sup>206</sup> which states, in relevant part:

Investors do not manage or operate their investments in a manner that circumvents international environmental or labour obligations arising from agreements to which the EC Party and the Signatory CARIFORUM States are parties.

This provision is somewhat less clear than Article 104 of NAFTA, because it does not state that the environmental instruments identified prevail over the obligations of the State parties regarding economic co-operation. Rather, it stresses the importance of certain environmental treaties in connection with the activities contemplated in the Partnership Agreement. A similar, albeit slightly less assertive, approach is followed in Article 69 of the EU-Russia Agreement on Partnership and Cooperation, which states, in relevant part:

1. Bearing in mind the European Energy Charter and the Declaration of the Lucerne Conference of 1993, the Parties shall develop and strengthen their co-operation on environment and human health.
2. Co-operation shall aim at combating the deterioration of the environment and in particular: ...
  - waste reduction, recycling and safe disposal, implementation of the Basle Convention;
  - implementation of the Espoo Convention on Environmental Impact Assessment in a transboundary context.<sup>207</sup>

Again, the focus of this provision is on the implementation of environmental treaties and not on solving conflicts between international investment law and international environmental law. A similar focus appears in Article 5(3) of the Belgian/Luxembourg model BIT, which reads as follows:

---

<sup>203</sup> *S.D. Myers Inc. v. Canada*, above n 105, paras 214-215 (italics original) and 255-256.

<sup>204</sup> NAFTA, above n 48, preamble.

<sup>205</sup> North American Agreement on Environmental Cooperation, of 17 December 1992, 32 ILM 1519 (entered into force on 1 January 1994) (‘NAAEC’).

<sup>206</sup> Economic Partnership Agreement between the Cariforum States and the European Community and its Member States, of 15 October 2008.

<sup>207</sup> Agreement on partnership and cooperation establishing a partnership between the European Communities and their Member States, of one part, and the Russian Federation, of the other part, of 26 June 1994, reproduced in *OECD 2008 Study*, above n 201, 223-224.



The Contracting Parties reaffirm their commitments under the international environmental agreements, which they have accepted. They shall strive to ensure that such commitments are fully recognised and implemented by their domestic legislation.<sup>208</sup>

This approach is not limited to the treaty practice of the European Union or of some European States. It also seems to characterize the practice of the United States regarding the conclusion of free trade agreements (FTAs).

Indeed, several FTAs concluded by the United States such as the so-called CAFTA-DR<sup>209</sup> or those with Australia, Chile, Morocco, Oman, Peru or Singapore, contain a specific provision on 'Relationship to Environmental Agreements'. With some variation in wording from one treaty to the other, this provision essentially stresses the importance of environmental agreements and the need to enhance the mutual supportiveness between environmental and trade agreements. For instance, Article 17.12.1 of CAFTA-DR states:

The Parties recognise that multilateral environmental agreements to which they are all party play an important role in protecting the environment globally and domestically and that their respective implementation of these agreements is critical to achieving the environmental objectives of these agreements. The Parties further recognise that this Chapter and the ECA [side environmental agreement] can contribute to realising the goals of those agreements. Accordingly, the Parties shall continue to seek means to enhance the mutual supportiveness of multilateral environmental agreements to which they are all party.<sup>210</sup>

In the same vein, Article 18.8 of the US-Singapore provides that:

The Parties recognise the critical role of multilateral environmental agreements in addressing some environmental challenges, including through the use of carefully tailored trade measures to achieve specific environmental goals and objectives. Recognising that WTO Members have agreed in paragraph 31 of the Ministerial Declaration adopted on 14 November 2001 in Doha to negotiations on the relationship between existing WTO rules and specific trade obligations set out in multilateral environmental agreements, the Parties shall consult on the extent to which the outcome of those negotiations applies to this Agreement.<sup>211</sup>

Other FTAs concluded by the United States contain similar provisions, with some minor variations of wording.<sup>212</sup>

Without minimizing the normative significance of such provisions, upon closer examination, most of them appear to be insufficient to solve potential conflicts between international investment law and international environmental law. If their scope is evaluated in the light of the criteria set by the ILC Group on Fragmentation for the elaboration of conflict clauses,<sup>213</sup> arguably none of the aforementioned provisions would reach the bar,

---

<sup>208</sup> Belgian/Luxembourg model BIT, Article 5(3), quoted in *OECD 2008 Study*, above n 201, 177. The same language appears in the BIT between Belgium and the Democratic Republic of Congo, *ibid*.

<sup>209</sup> Dominican Republic—Central America—United States Free Trade Agreement, of 5 August 2004 (initially concluded on 28 May 2004, by and between the United States, Costa Rica, El Salvador, Guatemala, Honduras and Nicaragua, later joined the Dominican Republic), 43 ILM 514 ('CAFTA-DR').

<sup>210</sup> CAFTA-DR, reproduced in *OECD 2008 Study*, above n 201, 214.

<sup>211</sup> US-Singapore FTA, reproduced in *ibid*, 212.

<sup>212</sup> See US-Australia FTA, art 19.8; US-Chile FTA, art 19.9; US-Morocco FTA, art 17.7; US-Oman FTA, art 17.9; US-Peru FTA, art 18.12, reproduced in *ibid*, 206-212.

<sup>213</sup> Paragraph 30 of the Conclusions-Fragmentation, notes in connection with conflict clauses: 'When States enter into a treaty that might conflict with other treaties, they should aim to settle the relationship between such treaties by adopting appropriate conflict clauses. When adopting such clauses, it should be borne in mind that: (a) They may not affect the rights of third parties; (b) They should be as clear and specific as possible. In particular, they should be directed to specific provisions of the treaty and they should not undermine the object

except perhaps for Article 104 of NAFTA. In order to supplement the operation of such conflict rules, tribunals may turn to more general conflict rules.

## 2. *General conflict rules*

There are several approaches in general international law to solving conflicts between two or more international obligations. Such approaches may be based on the following considerations: (i) the order in which norms grounded on different sources are applied in practice, (ii) the relative substantive hierarchy of different norms, (iii) priority by reason of the degree of specificity of different norms, (iv) priority by reason of the temporal relations between norms, and (v) systemic integration techniques.

### (i) *Sequential application*

The first approach concerns the relations between norms grounded on different formal sources of international law. Whereas it is generally admitted in public international law that there is no hierarchy among formal sources,<sup>214</sup> the application of norms arising from different sources follows certain logic.<sup>215</sup>

According to this logic, both treaty and customary law are considered to be principal sources of international law, whereas general principles of law are treated as subsidiary sources.<sup>216</sup> Despite their great importance in practice, especially in the investment field,<sup>217</sup> judicial decisions and the teachings of the most highly qualified publicists are only auxiliary sources, in that they help identify the contents of norms founded on formal sources.<sup>218</sup> Finally, the possibility for a tribunal to judge *ex aequo et bono* should be seen an alternative formal source of international law, based on the consent of the parties to a dispute.<sup>219</sup>

Thus, in practice, it would be highly unlikely, although theoretically possible, that a normative conflict between a rule arising from a treaty and one arising from general principles of law be solved in favour of the latter. Normative conflicts will, as a rule, arise between either two treaty (or customary) norms or between a treaty norm and a norm of customary international law. Such more specific normative conflicts could be solved by reference to the different substantive hierarchy of the norms involved, to their relative degree of specificity or to their temporal relations.<sup>220</sup>

### (ii) *Lex superior*

---

and purpose of the treaty; (c) They should, as appropriate, be linked with means of dispute settlement', above n 2.

<sup>214</sup> For a discussion of this question see M Akehurst, 'The Hierarchy of the Sources in International Law' (1974-1975) 47 *British Yearbook of International Law* 273.

<sup>215</sup> See Conclusions-Fragmentation, above n 2, para 31; G Abi-Saab, 'Les sources du droit international: essai de déconstruction' in R Rama Montaldo (dir.), *Le droit international dans un monde en mutation. Liber Amicorum en hommage au Professeur Eduardo Jiménez de Aréchaga, vol. I* (Montevideo, 1994) 29.

<sup>216</sup> Abi-Saab, above n 215, 33.

<sup>217</sup> See G Kaufmann-Kohler, 'Arbitral Precedent: Dream, Necessity or Excuse?' (2007) 23 *Arbitration International* 357.

<sup>218</sup> Abi-Saab, above n 215, 34.

<sup>219</sup> *Ibid.*, 35.

<sup>220</sup> See Report-Fragmentation, above n 2, para 18.

In contemporary international law, the existence of hierarchical relations between norms depends upon the contents of such norms.<sup>221</sup> A norm is in a hierarchical relation in respect of another if it (or a specific conflict rule) expressly states so or if it possesses a given character that as such carries hierarchical effect.

For instance, a norm will be hierarchically inferior to another if it (or a specific conflict rule) expressly states so. This hypothesis has been studied in connection with specific conflict rules, which in some cases give priority to environmental norms over investment protection clauses. Conversely, a norm (or a specific conflict rule referring to such norm) may assert priority over another with an ensuing hierarchical effect. An example where such assertion of hierarchy has been widely recognised is Article 103 of the Charter of the United Nations,<sup>222</sup> which confers material hierarchy to any obligation arising from the Charter over any obligation arising from other agreements. Certain norms, referred to as peremptory norms or *jus cogens*, possess a particular character that excludes any derogation from them, except for potential derogations stemming from a norm with the same character.<sup>223</sup>

There has been some discussion as to whether at least some international environmental norms are of a peremptory nature.<sup>224</sup> However, there does not seem to be sufficient evidence to conclude that in the current state of international law this is the case; most of the arguments advanced to support *jus cogens* status are purely theoretical or have been disproved by subsequent developments.<sup>225</sup> This is not to say that environmental norms cannot display some hierarchical effects through other channels.

For instance, environmental norms can help characterise certain interests as essential, which in turn would open the way for the invocation of necessity or public emergency clauses. In the *Gabčíkovo-Nagymaros* case, the ICJ preferred not to discuss the question of whether a peremptory norm had arisen that commanded the protection of the

---

<sup>221</sup> On this topic see J H Weiler, A L Paulus, 'The Structure of Change in International Law or is there a Hierarchy of Norms in International Law?' (1997) 8 *European Journal of International Law* 545; M Koskenniemi, 'Hierarchy in International Law: A Sketch' (1997) 8 *European Journal of International Law* 566; D Shelton, 'Normative Hierarchy in International Law' (2006) 100 *American Journal of International Law* 291.

<sup>222</sup> Article 103 of the United Nations Charter states: 'In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.' On this provision, see Conclusions-Fragmentation, above n 2, paras 34-36 et 40-41; Report-Fragmentation, above n 2, paras 328-360; Ch Cadoux, 'La supériorité du droit des Nations Unies sur le droit des Etats Membres', (1959) *Revue Générale de Droit International Public* 649; R Bernhardt, Article 103', in B Simma (ed), *The Charter of the United Nations: A Commentary* (Oxford University Press, New York, 2002) 1293. See, however, the decision of the European Court of Justice in Joined Cases C-402/05 P & C-415/05 P, *Kadi & Al Barakaat v. Council of the European Union*, 3 CMLR 41 (2008).

<sup>223</sup> This characterization is provided in Article 53 of the VCLT, above n 128. On the concept of *jus cogens* see Conclusions-Fragmentation, above n 3, paras 32-33, 38, 40-41; Report-Fragmentation, above n 3, paras 361-379; A Verdross, 'Jus dispositivum and jus cogens in International Law' (1966) 60 *American Journal of International Law* 55; G Gaja, 'Jus cogens beyond the Vienna Convention', *Recueil des cours* 172 (1981) 271; G M Danilenko, 'International jus cogens. Issues of Law-Making' (1991) 2 *European Journal of International Law* 42; R Kolb, *Théorie du Jus Cogens international : Essai de relecture du concept* (PUF/IUHEI, Paris/Geneva, 2001); A Orakhelashvili, *Peremptory Norms in International Law* (Oxford University Press, Oxford, 2006).

<sup>224</sup> See E Kornicker, *Jus cogens und Umweltvölkerrecht. Kriterien, Quellen und Rechtsfolgen zwingender Völkerrechtsnormen und deren Anwendung auf das Umweltvölkerrecht* (Schriftenreihe für Internationales Recht, bund 78, 1997); E Kornicker, 'State Community Interests, jus cogens and Protection of the Global Environment: Developing Criteria for Peremptory Norms', (1998-1999) 11 *Georgetown International Environmental Law Review* 101; Orakhelashvili, above n 223, 65.

<sup>225</sup> See Fitzmaurice, above n 1, 132 et seq; J E Viñuales, 'La protección del medio ambiente y su jerarquía normativa en derecho internacional' (2008) 13 *International Law. Revista Colombiana de Derecho Internacional* 11.

environment.<sup>226</sup> Yet, it considered that the protection of the environment amounted to an essential interest. To justify this latter conclusion, the ICJ referred to its Advisory Opinion in *Legality of Nuclear Weapons*, issued the previous year, where the Court had asserted the customary nature of States' obligation to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control.<sup>227</sup>

The importance attached to certain interests, and specifically to the protection of the environment, is also relevant in connection with the interpretation of certain treaty clauses to accommodate environmental or human rights considerations. In the *Gabčíkovo-Nagymaros* case, the ICJ discussed this point by reference to Articles 15, 19 and 20 of the treaty in question, which contemplated the possibility to adapt the project to take into account emerging norms of international law.<sup>228</sup> However, the Court asserted the need for adaptation of treaty clauses in stronger and more general terms when it stated that:

Throughout the ages, mankind has, for economic and other reasons, constantly interfered with nature. In the past, this was often done without consideration of the effects upon the environment. Owing to new scientific insights and to a growing awareness of the risks for mankind—for present and future generations—of pursuit of such interventions at an unconsidered and unabated pace, new norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past. This need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development.<sup>229</sup>

Vice-president Weeramantry further developed this passage in his Separate Opinion. He noted that what he called the 'principle of contemporaneity in the application of environmental norms' was important to 'all treaties dealing with projects impacting on the environment', and that such need was insufficiently taken into account by Article 31(3)(c) of the VCLT.<sup>230</sup> This principle has been used by the ICJ in the *Pulp Mills* case in connection with the interpretation of the Statute of the River Uruguay.<sup>231</sup> In the practice of investment tribunals, a similar question has arisen in some water-related disputes where the human right to water appeared relevant for assessing the scope of the investment protection clauses invoked by the investors or the necessity defence.<sup>232</sup> These issues will be further discussed in subsequent sections.

---

<sup>226</sup> *Gabčíkovo-Nagymaros*, above n 8, para 112.

<sup>227</sup> *Ibid*, para 53, referring to *Legality of Nuclear Weapons*, above n 74, para 29.

<sup>228</sup> *Gabčíkovo-Nagymaros*, above n 8, para 112.

<sup>229</sup> *Ibid*, para 140.

<sup>230</sup> *Ibid*, Weeramantry—Separate Opinion, 114.

<sup>231</sup> See *Pulp Mills case*, above n 8, paras 66, 194, 197 and 204. This latter paragraph refers to a passage of the *Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, Judgment of 13 July 2009, para 64, where the Court stated that 'there are situations in which the parties' intent upon conclusion of the treaty was, or may be presumed to have been, to give the terms used—or some of them—a meaning or content capable of evolving, not one fixed once and for all, so as to make allowance for, among other things, developments in international law.' (emphasis added).

<sup>232</sup> See *Suez, Sociedad General de Aguas de Barcelona, S.A., and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19, Amicus Curiae Submission, 4 April 2007 ('*Suez—Amicus Submission*'), <[http://www.ciel.org/Publications/SUEZ\\_Amicus\\_English\\_4Apr07.pdf](http://www.ciel.org/Publications/SUEZ_Amicus_English_4Apr07.pdf)> (last accessed on 27 February 2010). In their submission, the *amici* noted, with reference to the decision of the tribunal in *LG&E v. Argentina*, that: a state of necessity is identified by those conditions in which a State is threatened by a serious danger ... to the possibility of maintaining its essential services in operation', *Suez—Amicus Submission*, paras 27-28. See *Viñuales*, above n 13, 750-752.

Despite the possibility of such hierarchical effects, as a rule, absent an amendment to the UN Charter introducing environmental obligations or the emergence of a peremptory environmental norm, normative conflicts will most likely be solved by reference to either a specific conflict rule or some other general methods discussed next.

(iii) *Lex specialis*

Another frequently used approach is to compare the degree of specificity of the norms potentially applicable to the same situation, an approach often referred to as the principle *lex specialis derogat legi generalis*.<sup>233</sup> This principle rests on the idea that

special law, being more concrete, often takes better account of the particular features of the context in which it is to be applied than any applicable general law. Its application may also often create a more equitable result and it may often better reflect the intent of the legal subjects.<sup>234</sup>

Thus, the rationale for justifying the prevalence of a special rule over a general one is that special rules are assumed to be better adapted to a specific situation than rules governing a much broader range of situations. The level of specialty or generality of a norm may however be difficult to assess.

For instance, Article 15(5) of the Convention on Biological Diversity provides that '[a]ccess to genetic resources shall be subject to prior informed consent of the Contracting Party providing such resources, unless otherwise determined by that Party.'<sup>235</sup> This norm could conflict with an investment protection standard in a BIT such as a clause providing for fair and equitable treatment of foreign investors. Indeed, a situation could arise in which an investor having established a laboratory in a developing country with the consent of the host State suddenly sees its operation license revoked on the grounds that such consent was not sufficiently informed. In such a situation, it would be difficult to reach a conclusion on the basis of the *lex specialis* principle.

If we look at the rationale of this principle, it would not be unreasonable to argue that Article 15(5) is more specifically adapted than any investment protection accorded in general terms for any type of investment. And yet, depending on the facts of the dispute, one could also make a persuasive case in favour of protecting the investment based on good faith or proportionality considerations. Moreover, as noted in the section relating to the applicable law, the fact that the dispute is heard by an investment tribunal does not exclude the potential application of international environmental law, nor does it preclude the admissibility of an environmental claim. International investment law may be argued to be a highly specialized field,<sup>236</sup> but this is not a reason to exclude environmental matters from the consideration of investment tribunals. In other terms, the fact that international investment law may be considered as a specialized regime does not mean that investment protection standards must be treated as *lex specialis* in case of a normative conflict. This is but one illustration of the potential problems in resorting to the principle of *lex specialis* to solve potential conflicts between branches of international law that, until recently, had evolved in relative autarchy, paying little or no attention to each other.

---

<sup>233</sup> See Conclusions-Fragmentation, above n 2, paras 5-16; Report-Fragmentation, above n 2, paras 46-222.

<sup>234</sup> See Conclusions-Fragmentation, above n 2, para 7.

<sup>235</sup> Convention on Biological Diversity, above n 134, art 15(5).

<sup>236</sup> See *Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Preliminary Objections, Judgment of 24 May 2007, General List No. 103 ('*Diallo case*'), paras 88, 90.

(iv) *Lex posterior*

Another potentially relevant approach is to focus on the temporal dimension of norms. According to this approach, commonly referred to as *lex posterior derogat legi priori*, later norms should in principle supersede earlier law.<sup>237</sup> The impact of this approach is conditioned by three main considerations.

As noted by the ILC Group on Fragmentation, it cannot be ‘automatically extended to the case where the parties to the subsequent treaty are not identical to the parties of the earlier treaty’.<sup>238</sup> The Group further noted:

In case of conflicts or overlaps between treaties in different regimes, the question of which of them is later in time would not necessarily express any presumption of priority between them. Instead, States bound by the treaty obligations should try to implement them as far as possible with the view of mutual accommodation and in accordance with the principle of harmonization.<sup>239</sup>

Furthermore, where the conflict arises between provisions in treaties that belong to different regimes ‘special attention should be given to the independence of the means of settlement chosen’.<sup>240</sup>

The two latter considerations seem relevant in connection with the potential formal or informal bias of international courts and tribunals created under the aegis of a field-specific treaty or system of treaties, such as regional human rights courts or the WTO dispute settlement body, in favour of their own regime.<sup>241</sup> They may also be relevant for the investment context, where tribunals are often constituted on the basis of an investment treaty (as well as, as the case may be, the ICSID Convention) for the purpose of deciding a specific investment dispute. We are, however, not aware of any investment or other case specifically applying the *lex posterior* principle in order to establish priority between an investment protection standard and a norm of international environmental law.

(v) *Systemic integration*

Interpretation techniques may operate not only in conflict solving but also, and more importantly, in conflict characterization. As noted by the ILC Group on Fragmentation:

Whether there is a conflict and what can be done with *prima facie* conflicts depends on the way the relevant rules are interpreted ... Interpretation does not intervene only once it has already been

---

<sup>237</sup> See VCLT, above n 128, art 30; Conclusions-Fragmentation, above n 2, paras 24-30; Report-Fragmentation, above n 2, paras 223-323.

<sup>238</sup> Conclusions-Fragmentation, above n 2, para 25.

<sup>239</sup> *Ibid*, para 26.

<sup>240</sup> *Ibid*, para 28.

<sup>241</sup> The Group on Fragmentation refers, in this regard, to a case before the ECtHR, *Slivenko and others v. Latvia* (Decision as to the admissibility of 23 January 2002) ECHR 2002-II, 482-483, paras 60-61, where the Court concluded that the ECHR prevailed over a previous treaty between Latvia and Russia: It follows from the text of Article 57(1) of the [ECHR], read in conjunction with Article 1, that ratification of the Convention by a State presupposes that any law then in force in its territory should be in conformity with the Convention ... In the Court’s opinion, the same principles must apply as regards any provisions of international treaties which a Contracting State has concluded prior to the ratification of the Convention and which might be at variance with certain of its provisions’, Conclusions-Fragmentation, above n 2, para 25, note 17.

ascertained that there is conflict. Rules appear to be compatible or in conflict as a result of interpretation.<sup>242</sup>

In the context of investment disputes with environmental components, the use of interpretative techniques at the conflict characterization phase is important because it allows tribunals to avoid in some measure making controversial statements on the relative weight of investment and environmental protection.<sup>243</sup> In fact, some of the approaches already discussed (or that will be discussed later) in connection with conflict rules can also be seen as involving interpretative techniques to the extent that they seek to circumscribe the contours of investment protection standards so as to carve out some space for environmental regulation.

In a number of international instruments, the concept of mutual supportiveness has been used as a tool for avoiding conflicts between trade and environmental requirements. The so-called ‘principle of mutual supportiveness’ seeks to articulate multilateral environmental agreements with international trade agreements through a harmonising interpretation.<sup>244</sup> The concept of mutual supportiveness can be seen as a specific application of a general interpretation technique that is receiving increasing attention from legal commentators,<sup>245</sup> namely the so-called principle of ‘systemic integration’, provided for in Article 31(3)(c) of the VCLT. This provision states: ‘There shall be taken into account, together with the context: ... (c) any relevant rules of international law applicable in the relations between the parties.’<sup>246</sup> The underlying rationale of this principle is explained by the ILC Group on Fragmentation as follows:

All treaty provisions receive their force and validity from general law, and set up rights and obligations that exist alongside rights and obligations established by the other treaty provisions and rules of customary international law. None of such rights or obligations has any intrinsic priority against the others.<sup>247</sup>

The Group further notes that, sometimes, there will be no need to go beyond the framework of the treaty itself for purposes of its interpretation, and adds that: ‘Article 31(3)(c) deals with the case where material sources external to the treaty are relevant in its interpretation. These may include other treaties, customary rules or general principles of law.’<sup>248</sup> This latter

---

<sup>242</sup> Fragmentation-Report, above n 2, para 412.

<sup>243</sup> See J E Viñuales, ‘Conflit de normes en droit international: normes environnementales vs. protection des investissements’, in Société française pour le droit international, *Le droit international face aux enjeux environnementaux* (Pedone, Paris, 2010) 407.

<sup>244</sup> See L Boisson de Chazournes, M Mbengue, ‘A propos du principe du soutien mutuel. Les relations entre le Protocole de Cartagena et les Accords de l’OMC’ (2007) 111 *Revue Générale de Droit International Public* 829. Mutual supportiveness has attracted renewed attention as a result of a much commented case brought before the WTO dispute settlement body: *European Communities—Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R, 29 September 2006.

<sup>245</sup> Such renewed attention stems primarily from some observations made by the ICJ in the *Oil Platforms case (Islamic Republic of Iran v. United States of America)*, [2003] ICJ Rep 161, para 41. See C McLachlan, ‘The Principle of Systemic Integration and Article 31 3) c) of the Vienna Convention’ (2005) 54 *International & Comparative Law Quarterly* 279.

<sup>246</sup> VCLT, above n 128, art 31(3)(c).

<sup>247</sup> Report-Fragmentation, above n 2, para 414.

<sup>248</sup> Conclusions-Fragmentation, above n 2, para 18.

observation seems important in the light of a number of investment disputes where systemic integration appeared relevant.<sup>249</sup> The following disputes illustrate this point.

One early reference to systemic integration in connection with international environmental law appears in the *Gabčíkovo-Nagymaros* case and, more specifically, in the Separate Opinion of vice-president Weeramantry. As already noted when discussing hierarchical effects among different norms of international law, the ICJ stressed the importance of taking into account new environmental norms in interpreting existing treaties. In his opinion, Judge Weeramantry referred expressly to Article 31(3)(c) of the VCLT as a vector for the ‘principle of contemporaneity in the application of environmental norms’. In the *Pulp Mills* case, the Court also referred to this provision in connection with the interpretation of the Statute of the River Uruguay. Implying that the interpretation of treaties in the light of ‘any relevant rules of international law applicable in the relations between the parties’ was a rule of customary international law, the Court stressed that consideration of such other rules for interpretation purposes had no bearing on the scope of its jurisdiction.<sup>250</sup>

In some investment cases, tribunals have deployed systemic integration reasoning<sup>251</sup> to assess allegations of discrimination against foreign investors. In *S.D. Myers v. Canada*, the tribunal interpreted the term ‘like circumstances’ in Article 1102 of NAFTA (national treatment) by reference to its ‘legal context’, which, according to the tribunal, included:

[T]he various provisions of the NAFTA, its companion agreement the NAAEC and principles that are affirmed by the NAAEC (including those of the Rio declaration). The principles that emerge from that context, to repeat, are as follows ... states have the right to establish high levels of environmental protection. They are not obliged to compromise their standards merely to satisfy the political or economic interests of other states ... states should avoid creating distortions to trade ... environmental protection and economic development can and should be mutually supportive.<sup>252</sup>

The NAAEC, which stands for North-American Agreement on Environmental Cooperation, is a parallel though separate agreement concluded by the three members of NAFTA.<sup>253</sup> The preamble of the NAAEC reaffirms ‘the Stockholm Declaration on the Human Environment of 1972 and the Rio Declaration on Environment and Development of 1992’.<sup>254</sup> Some parts of these declarations, most notably Principles 21 of the Stockholm Declaration and 2 of the Rio Declaration, are declaratory of customary international law.<sup>255</sup> Thus, the tribunal also included in the legal context of Article 1102 of NAFTA principles of customary international law. Eventually, the tribunal concluded that the export ban affecting the investor was nevertheless a breach of Article 1102.<sup>256</sup>

---

<sup>249</sup> For a discussion of the use of Article 31(3)(c) in other international courts and tribunals see Report-Fragmentation, above n 2, paras 433-460; McLachlan, above n 245, 293-309.

<sup>250</sup> See *Pulp Mills case*, above n 8, paras 65-66.

<sup>251</sup> The fact that in most cases tribunals do not refer explicitly to Article 31(3)(c) of the VCLT is secondary. As noted by the Group on Fragmentation: ‘it is really immaterial whether or not a tribunal expressly chooses to invoke article 31(3)(c). These general rules and principles are applicable as a function of their mere “generality” and their validity is based on nothing grander than their having passed what Thomas Franck calls the “but of course test”—a more or less unstable “common sense of the international community (Governments, judges, scholars)”’, Report-Fragmentation, above n 2, para 468.

<sup>252</sup> *S.D. Myers v. Canada*, above n 105, para 247.

<sup>253</sup> NAAEC, above n 205.

<sup>254</sup> *Ibid*, preamble.

<sup>255</sup> See *Legality of Nuclear Weapons*, above n 74.

<sup>256</sup> *S.D. Myers v. Canada*, above n 105, paras 255-256.



Another illustration is given by *Parkerings v. Lithuania*, where the tribunal interpreted the most-favoured-nation clause of the applicable investment treaty in the light of different considerations, including the fact that the projects of the two investors did not have the same consequences for a UNESCO protected site. The tribunal noted:

[T]he fact that the [Claimant's] MSCP [multi-storey car park] project in Gedimino extended significantly more into the Old Town as defined by the UNESCO, is decisive. Indeed, the record shows that the opposition raised against the [Claimant's] projected MSCP were important and contributed to the Municipality decision to refuse such a controversial project. The historical and archaeological preservation and environmental protection could be and in this case were a justification for the refusal of the project. The potential negative impact of the [Claimant's] project in the Old Town was increased by its considerable size and its proximity with the culturally sensitive area of the Cathedral. Consequently, [Claimant's] MSCP in Gedimino was not similar with the MSCP constructed by [the other investor].<sup>257</sup>

The interpretation provided by the tribunal thus carved out some space for the incorporation of environmental considerations in assessing the scope of the MFN (but also the national treatment) clause. After noting the similarities between the MFN and the national treatment clauses, as well as of other discrimination standards, the tribunal set out the following test for assessing whether two investors are in like-circumstances:

In order to determine whether *Parkerings* was in *like circumstances* with *Pinus Proprius*, and thus whether the MFN standard has been violated, the Arbitral Tribunal considers that three conditions should be met:

- (i) *Pinus Proprius* must be a foreign investor;
- (ii) *Pinus Proprius* and *Parkerings* must be in the same economic or business sector;
- (iii) The two investors must be treated differently. The difference of treatment must be due to a measure taken by the State. No policy or purpose behind the said measure must apply to the investment that justifies the different treatments accorded. *A contrario*, a less favourable treatment is acceptable if a State's legitimate objective justifies such different treatment in relation to the specificity of the investment.<sup>258</sup>

Thus, reference to recognised environmental objectives identified in international environmental instruments, such as the UNESCO World Heritage Convention, could potentially justify differentiated treatment.

Systemic integration could also be a useful tool for redefining the boundaries of expropriation clauses in investment treaties, particularly with respect to its relations with environmental regulation.<sup>259</sup> This issue will be further discussed in connection with the police powers doctrine.<sup>260</sup>

Finally, reference to systemic integration has also been made in the context of some water-related disputes. In the *amicus* brief presented in *Suez v. Argentina*, the *amici* exhorted the tribunal to follow this interpretive approach:

In application of this principle of systemic interpretation, human rights law can add color and texture to the standards of treatment included in a BIT. In addition, systemic interpretation is particularly apt

---

<sup>257</sup> *Parkerings v. Lithuania*, above n 126, para 392.

<sup>258</sup> *Ibid*, para 371.

<sup>259</sup> These relations have received considerable attention from legal commentators. For an up-to-date legal analysis and review of the legal literature see Robert-Cuendet, above n 10.

<sup>260</sup> See below section IV.C(2)(iii).

when the terms of a treaty are by their nature open-textured, such as the fair and equitable treatment standard. A contextual interpretation of language in a BIT is also necessary because investment and human rights law seem to encounter frictions at the level of regimes, particularly in regards to quantitative policy space available for social development. Indeed, the ‘regulatory chill’ that may result from certain interpretations of investment disciplines could reduce the capabilities of States to fulfill their human rights obligations, including their duty to regulate. In that sense, a contextual interpretation leads to normative dialogue, accommodation, and mutual supportiveness among human rights and investment law.<sup>261</sup>

Interestingly, and no doubt aware of the realities of investment arbitration, the *amici curiae* contemplated the possibility of a conflict of norms between human rights (including the right to water) and investment protection standards, but advocated rather for a harmonized reading of the applicable treaty in the light of human rights.<sup>262</sup> This observation is quite perceptive, given the general reluctance of investment tribunals openly to decide potential conflicts between investment protection and public policy objectives. Argentina had instead argued that the application of investment protection standards was trumped by the human right to water. In its decision on liability, the tribunal avoided making a determination on the relevant hierarchy of investment protection standards and the international norms relating to the human right to water. In the view of the tribunal ‘Argentina [was] subject to both international obligations, i.e. human rights *and* treaty obligations, and [had to] respect both of them equally. Under the circumstances of these cases, Argentina’s human rights obligations and its investment treaty obligations [were] not inconsistent, contradictory, or mutually exclusive’.<sup>263</sup>

### C. Legitimacy conflicts

The rules applicable to solve legitimacy conflicts are diverse in nature, reflecting the diversity of forms that such conflicts can take. However, for the purposes of their analysis, one can make a distinction between (1) specific conflict rules and (2) general conflict rules.

#### 1. Specific conflict rules

As noted above when discussing normative conflicts, environmental considerations are increasingly being taken into account in the drafting of agreements. The OECD’s survey of 269 investment and free trade agreements found indeed that FTAs tend to include express language on environmental issues, whereas such reference is rather exceptional in BITs.<sup>264</sup> Such language mostly concerns the scope for domestic environmental regulation in three main forms, namely the assertion of a right to adopt environmental regulations, the statement that it is inappropriate for States to lower environmental regulations to attract foreign investment, and certain environmental exceptions either general or specific (in connection with some investment protection clauses, such as those on expropriation or on performance requirements).

---

<sup>261</sup> Suez—Amicus Submission, above n 232, 15.

<sup>262</sup> Ibid, 17, stating that ‘a question that arises under the particular factual circumstances of the case is whether strict compliance with every term of the concession contract was at all compatible with the human rights obligations of the State. This question may involve a conflict of norms situation, addressed further below. This conflict of norms issue need not arise, however, if the F&ET standard is interpreted under a human rights lens.’

<sup>263</sup> *Suez v. Argentina—03/19*, above n 136, para 262 (italics original); see also *Suez v. Argentina—03/17—Liability*, above n 136, para 240.

<sup>264</sup> See *OECD 2008 Study*, above n 201, 141 et seq.

One of the earliest manifestations of this trend towards the introduction of environmental considerations in trade and investment treaties appears in the text of NAFTA. Chapter 11 of NAFTA contains the three types of environmental clauses identified above. Article 1114 reads as follows:

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 undertaken in a manner sensitive to environmental concerns.
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. If a Party considers that another Party has offered such an encouragement, it may request consultations with the other Party and the two Parties shall consult with a view to avoiding any such encouragement.

This provision circumscribes the boundaries of environmental regulation of foreign investment. An exercise of regulatory power which unreasonably interferes with foreign investment would not be ‘consistent’ with Chapter 11. Conversely, regulatory competition by relaxing environmental standards would be ‘inappropriate’. This latter component is strengthened by the mechanisms established in the NAAEC,<sup>265</sup> which contemplates both non-compliance and individual complaint procedures in case a State party does not respect its own environmental regulations.<sup>266</sup> Chapter 11 of NAFTA also contains specific environmental exceptions to the prohibition of performance requirements. Article 1106(2) provides, in relevant part, that ‘[a] measure that requires an investment to use technology to meet generally applicable health, safety or environmental requirements shall not be construed to be inconsistent with paragraph 1(f) [protection against forced transfer of technology]’. In addition, Article 1106(6) provides for a more general exception to the prohibition of performance requirements:

Provided that such measures are not applied in an arbitrary or unjustifiable manner, or do not constitute a disguised restriction on international trade or investment, nothing in paragraph 1b) or c) or 3a) or b) shall be construed to prevent any Party from adopting or maintaining measures, including environmental measures: a) necessary to secure compliance with laws and regulations that are not inconsistent with the provisions of this Agreement; b) necessary to protect human, animal or plant life or health; or c) necessary for the conservation of living or non-living exhaustible natural resources.

Another early manifestation of the same trend appears in the Energy Charter Treaty, concluded around the same time as NAFTA, which also addresses the relations between environment and investment, albeit with a somewhat different accent. Indeed, Article 19(1) of the ECT emphasizes that the protection of the environment should not be pursued through economically inefficient measures:

In pursuit of sustainable development and taking into account its obligations under those international agreements concerning the environment to which it is party, each Contracting Party shall strive to minimize in an economically efficient manner harmful Environmental Impacts occurring either

---

<sup>265</sup> See NAAEC, above n 205.

<sup>266</sup> Ibid, art 14.

within or outside its Area from all operations within the Energy Cycle in its Area, taking proper account of safety.<sup>267</sup>

These provisions suggest that by the early 1990s environmental protection had gained considerable strength, not only politically but also legally.

Later generations of BITs or FTAs have further developed this approach expressly addressing the relations between foreign investment and environmental protection. For instance, the investment chapter of CAFTA-DR<sup>268</sup> contains specific provisions on issues such as performance requirements,<sup>269</sup> the adoption, maintenance and enforcement of environmental regulations<sup>270</sup> and the scope of indirect expropriation.<sup>271</sup> In a similar vein, several model BITs have also incorporated express references to the relations between foreign investment and environmental protection. Examples include the 2004 model BIT of the United States<sup>272</sup> and Canada,<sup>273</sup> as well as the current model BIT of Belgium/Luxembourg,<sup>274</sup> Finland,<sup>275</sup> the Netherlands<sup>276</sup> and Sweden.<sup>277</sup>

The potential effect of some of these clauses must not be underestimated, especially when they are formulated as exceptions to specific investment protection clauses. The impact of more broadly formulated clauses, such as Article 1114 of NAFTA or Article 19(1) of the ECT, is more difficult to assess. Such treaty clauses would, for instance, provide limited assurance to a State contemplating the adoption of domestic environmental regulations with potentially adverse effects on foreign investors established in its territory. To take one example, the implementation of the international climate change regime may increasingly require countries to adopt far-reaching environmental measures to curb emissions. Such measures may in turn affect the profitability of foreign investments made prior to their adoption. But not every type of measure will entail the same litigation risk. Some measures may appear more compatible than others with the obligations assumed by a State in connection with the protection of foreign investment, and therefore present a lower litigation risk. Given the substantial amounts often at stake in foreign investment proceedings, a State may be well advised to undertake an assessment of potential litigation risks, and provisions like those referred to above would be of little help in conducting such an assessment. Similarly, on the assumption that the host State would take an adverse environmental measure, such provisions would provide limited guidance to a foreign firm (or its legal counsel) in assessing the probability of recovering an investment made in an environmentally sensitive sector. Such provisions would be of limited use even for arbitral tribunals tasked with solving an investment dispute with environmental dimensions, particularly when the dispute has a significant public dimension and the tribunal is, as is

---

<sup>267</sup> See ECT, above n 50. The requirements of Article 19 of the ECT are further developed by the Energy Charter Protocol on Energy Efficiency and Related Environmental Aspects (PEEREA), negotiated, opened for signature and entered into force at the same time as the ECT, on 17 December 1994, 2081 UNTS 3.

<sup>268</sup> See CAFTA-DR, above n 209.

<sup>269</sup> See *ibid*, art 10.9(3).

<sup>270</sup> See *ibid*, art 10.11.

<sup>271</sup> See *ibid*, Annex 10-B, Section 4(b).

<sup>272</sup> See Canada's 2004 Model BIT, arts 10 and 11, reproduced in *OECD 2008 Study*, above n 201, 178-179.

<sup>273</sup> See United States' 2004 Model BIT, preamble, arts 8, 12 and 32, and Annex B (expropriation), reproduced in *ibid*, 183-185.

<sup>274</sup> See Belgium/Luxembourg's Model BIT, preamble, reproduced in *ibid*, 180.

<sup>275</sup> See Finland's 2004 Model BIT, art 5, reproduced in *ibid*, 176-177.

<sup>276</sup> See The Netherlands' 2004 Model BIT, preamble, reproduced in *ibid*, 182.

<sup>277</sup> See Sweden's 2003 Model BIT, preamble, reproduced in *idem*.

often the case, reluctant to make an open pronouncement on the relative hierarchy between investment protection and environmental considerations.<sup>278</sup> For these reasons, it is important to discuss which additional approaches could be used to deal with potential conflicts between investment and environmental protection.

## 2. General conflict rules

There are different approaches to solving legitimacy conflicts. In this sub-section, the analysis focuses on the following: (i) rules governing the relations between international and domestic law, (ii) rules governing conflicts of laws belonging to different domestic legal systems or within one domestic system, (iii) rules governing the scope of the State's regulatory powers including in case of necessity.

### (i) Relations between domestic and international law

The relation between international and domestic law is a traditional subject of study by international law scholars.<sup>279</sup> The purpose of the following remarks is limited to an assessment of this relation's relevance in the context of legitimacy conflicts between investment and environmental protection. As noted when discussing the law applicable to investment disputes, there is some controversy as to the specific relations between international and domestic law. But such divergence of views does not affect one fundamental point, namely that when there is inconsistency between domestic and international law, international courts and tribunals give priority to the latter.

An apposite illustration is provided by the decision of the tribunal in *SPP v. Egypt*.<sup>280</sup> In this case, brought under the aegis of ICSID, the investor claimed that it had been expropriated in breach of a domestic law and an investment agreement of 1974. The parties disagreed as to the law applicable to the dispute. The respondent argued that the parties had implicitly agreed to apply Egyptian law and, therefore, under Article 42(1) first sentence of the ICSID Convention, the dispute was to be exclusively governed by Egyptian law. The respondent further argued that international law could apply only to the extent it had been incorporated in Egyptian law, as was the case of the UNESCO World Heritage Convention.<sup>281</sup> The claimants argued, for their part, that there was no such implicit choice of law and, as a result, international law was applicable in accordance with Article 42(1) second sentence of the ICSID Convention.<sup>282</sup> The tribunal considered that both Egyptian law

---

<sup>278</sup> See Viñuales, above n 243.

<sup>279</sup> See Ch Rousseau, *Droit international public* (9<sup>th</sup> edn, Dalloz, Paris, 1979) 3-16; A Cassese, *International Law* (Oxford University Press, Oxford, 2001) 162-171; H Triepel, *Völkerrecht und Landesrecht* (Hirschfeld, Leipzig, 1899); H Triepel, 'Les rapports entre le droit interne et le droit international', *Recueil des cours* 1 (1923) 77; D Anzilotti, 'Il diritto internazionale nei giudizi interni', in *Scritti di diritto internazionale pubblico*, vol. 1, (Cedam, Padova, 1956 [1905]); D. Anzilotti, *Cours de droit international* (Sirey, Paris, 1929) 49; H Kelsen, 'Les rapports de système entre le droit interne et le droit international', *Recueil des cours* 14 (1926) 231; H Kelsen, 'La transformation du droit international en droit interne' (1936) *Revue Générale de Droit International Public* 5. Regarding this question from the perspective of international investment law, see M Sasson, *Substantive Law in Investment Treaty Arbitration. The Unsettled Relationship between International Law and Municipal Law* (Kluwer, The Hague, 2010).

<sup>280</sup> *SPP v. Egypt*, above n 123.

<sup>281</sup> *Ibid*, paras 75-76.

<sup>282</sup> *Ibid*, para 77.

and international law, including the UNESCO World Heritage Convention, were applicable to the dispute.<sup>283</sup> It further stated:

When municipal law contains a lacuna, or international law is violated by the exclusive application of municipal law, the Tribunal is bound in accordance with Article 42 of the Washington Convention to apply directly the relevant principles and rules of international law.<sup>284</sup>

This position, which ascribes a supplemental and corrective role to international law over domestic law, has received considerable support in the investment case-law.<sup>285</sup> Under the specific circumstances of the *SPP v. Egypt* case, the application of international law was important because the host State had argued *inter alia* that the allegedly expropriatory acts had been taken pursuant to its obligations under the UNESCO World Heritage Convention.<sup>286</sup> Egypt had ratified this latter convention in 1975, i.e. some three years before the adoption of the measures challenged, in 1978. However, the World Heritage Committee had not registered the sites proposed by Egypt for the Committee's list of protected sites until 1979. Based on this latter fact, the tribunal considered that the obligation to protect the site had not arisen until 1979, i.e. after the date of the expropriatory acts. Thus, these acts could not be justified as conduct required by the provisions of the UNESCO World Heritage Convention.<sup>287</sup> More importantly for our purpose, the tribunal considered that from 1979

---

<sup>283</sup> Ibid, paras 78-80.

<sup>284</sup> Ibid, para 84.

<sup>285</sup> See Dolzer, Schreuer, above n 60, 269-270.

<sup>286</sup> Pursuant to Article 4 of the UNESCO Convention '[e]ach State Party to this Convention recognizes that the duty of ensuring the identification, protection, conservation, presentation and transmission to future generations of the cultural and natural heritage referred to in Articles 1 and 2 and situated on its territory, belongs primarily to that State. It will do all it can to this end, to the utmost of its own resources and, where appropriate, with any international assistance and co-operation, in particular, financial, artistic, scientific and technical, which it may be able to obtain.' Article 5(d) of the Convention further states that '[t]o ensure that effective and active measures are taken for the protection, conservation and presentation of the cultural and natural heritage situated on its territory, each State Party to this Convention shall endeavour, in so far as possible, and as appropriate for each country ... to take the appropriate legal, scientific, technical, administrative and financial measures necessary for the identification, protection, conservation, presentation and rehabilitation of this heritage'. These protection obligations are effected through a listing system whereby States propose sites to be included in a list managed by the World Heritage Committee. According to Article 11(1)-(2) '[e]very State Party to this Convention shall, in so far as possible, submit to the World Heritage Committee an inventory of property forming part of the cultural and natural heritage, situated in its territory and suitable for inclusion in the list provided for in paragraph 2 of this Article. This inventory, which shall not be considered exhaustive, shall include documentation about the location of the property in question and its significance ... On the basis of the inventories submitted by States in accordance with paragraph 1, the Committee shall establish, keep up to date and publish, under the title of "World Heritage List", a list of properties forming part of the cultural heritage and natural heritage, as defined in Articles 1 and 2 of this Convention, which it considers as having outstanding universal value in terms of such criteria as it shall have established. An updated list shall be distributed at least every two years', Convention for the Protection of the World Cultural and Natural Heritage, of 16 November 1972, 1037 UNTS 151 (entered into force on 17 December 1975) ('UNESCO Convention').

<sup>287</sup> The tribunal noted, in this regard, that '[i]n the Tribunal's view, the UNESCO Convention by itself does not justify the measures taken by the Respondent to cancel the project, nor does it exclude the Claimants' right to compensation. According to the system of the Convention, as acknowledged by the Respondent, 'le classement est finalement le fait des autorités internationales de l'Unesco (Comité)'. Thus, the choice of sites to be protected is not imposed externally, but results instead from the State's own voluntary nomination. Consequently, the date on which the Convention entered into force with respect to the Respondent is not the date on which the Respondent became obligated by the Convention to protect and conserve antiquities on the Pyramids Plateau. It was only in 1979, after the Respondent nominated 'the pyramid fields' and the World Heritage Committee accepted that nomination, that the relevant international obligations emanating from the Convention became binding on the Respondent. Consequently, it was only from the date on which the Respondent's nomination of the 'pyramid fields' was accepted for inclusion in the inventory of property to be protected in the UNESCO Convention in 1979 that a hypothetical continuation of the Claimants' activities interfering with antiquities in the

onwards the obligations of Egypt under the Convention prevailed over the protections granted to investors. As a result, the compensation due to the investor could not take into account gains that would have accrued after the emergence of the obligation under the Convention.<sup>288</sup> The priority of international environmental law over domestic investment disciplines was implied in this conclusion.

The corrective role of international law was also discussed in *CDSE v. Costa Rica*, a dispute concerning the expropriation of a biodiversity-rich land for purposes of its protection. At stake were the different approaches to the valuation of the property expropriated arising, respectively, from the laws of Costa Rica and from international law. The tribunal applied the second sentence of Article 42(1) of the ICSID Convention and concluded that international investment law was controlling:

This leaves the Tribunal in a position in which it must rest on the second sentence of Article 42(1) ('In the absence of such agreement ...') and thus apply the law of Costa Rica and such rules of international law as may be applicable. No difficulty arises in this connection. The Tribunal is satisfied that the rules and principles of Costa Rican law which it must take into account, relating to the appraisal and valuation of expropriated property, are generally consistent with the accepted principles of public international law on the same subject. To the extent that there may be any inconsistency between the two bodies of law, the rules of public international law must prevail. Were this not so in relation to takings of property, the protection of international law would be denied to the foreign investor and the purpose of the ICSID Convention would, in this respect, be frustrated ... [t]he parties' divergent positions lead, in substance, to the same conclusion, namely, that, in the end, international law is controlling. The Tribunal is satisfied that, under the second sentence of Article 42(1), the arbitration is governed by international law.<sup>289</sup>

Although the tribunal referred to the rules on 'appraisal and valuation of expropriated property', which have apparently nothing to do with environmental matters, it is important to note that the respondent's arguments on quantum were partly based on its domestic environmental laws. According to the respondent, such laws restricted and even prohibited the commercial development of the expropriated site, with obvious consequences for the estimation of the fair market value of the property.<sup>290</sup> Moreover, we know from an article published by counsel for Costa Rica that the respondent had invoked a number of environmental treaties as part of its argumentation on quantum,<sup>291</sup> which were dismissed rather hastily by the tribunal in a footnote to the award.<sup>292</sup> The tribunal's conclusion in this case would suggest that an act of expropriation for environmental purposes is subject to the

---

area could be considered as unlawful from the international point of view', see *SPP v. Egypt*, above n 123, para 154.

<sup>288</sup> See *ibid.*, para 191.

<sup>289</sup> *CDSE v. Costa Rica*, above n 104, paras 64-65.

<sup>290</sup> *Ibid.*, paras 34-35.

<sup>291</sup> See Ch Brower, J Wong, 'General Valuation Principles: The Case of Santa Elena', in Weiler, above n 195, 764.

<sup>292</sup> The tribunal stated, in the body of the award, that '[w]hile an expropriation or taking for environmental reasons may be classified as a taking for a public purpose, and thus may be legitimate, the fact that the Property was taken for this reason does not affect either the nature or the measure of the compensation to be paid for the taking. That is, the purpose of protecting the environment for which the Property was taken does not alter the legal character of the taking for which adequate compensation must be paid.<sup>32</sup> The international source of the obligation to protect the environment makes no difference' (para 71). Footnote 32 to this paragraph added: 'For this reason, the Tribunal does not analyse the detailed evidence submitted regarding what Respondent refers to as its international legal obligation to preserve the unique ecological site that is the Santa Elena Property', *CDSE v. Costa Rica*, above n 104, para 71.

rules on compensation arising from international investment law, irrespective of whether domestic valuation and environmental laws would lead to a different result.

A different conclusion as to the relations between international investment law and domestic (and European) environmental law was reached by the tribunal in *Maffezini v. Spain*.<sup>293</sup> In this case, the tribunal seemed to give priority to the standards for the conduct of environmental impact assessments emanating from both Spanish and European law. The reasoning of the tribunal suggests that, to the extent that they abided by the applicable environmental laws, the Spanish authorities were not in breach of the applicable bilateral investment treaty.<sup>294</sup>

### (ii) Conflicts of (domestic) laws

Legitimacy conflicts may also arise between norms stemming from different domestic systems or within a domestic system. There are essentially two methods to determine the applicable law in such cases.

First, the traditional conflict of laws or private international law methods will be applicable to assess whether and to what extent a foreign law (or the law of a territorial subdivision, in some federal States like the United States) is applicable to the substance of the dispute. As was discussed in the section devoted to applicable law, the main arbitration rules give tribunals some discretion in the selection of the applicable law *inter alia* by allowing tribunals to use the conflict of laws rules that they deem appropriate.<sup>295</sup>

Second, domestic norms may be applicable as a result of their higher substantive hierarchy, as is the case, for instance, of *lois de police* or other overriding norms. Again, arbitration tribunals have considerable leeway in deciding whether or not the *lois de police* of the host State or of other States may be applicable.<sup>296</sup> The limits of such discretion are basically the causes of annulment of the award set out, as the case may be, in Article 52 of the ICSID Convention,<sup>297</sup> in Article V of the New York Convention,<sup>298</sup> or in the relevant provisions of the arbitration laws of the State where the legal seat of the arbitration proceedings has been situated.

### (iii) State regulatory powers

Reference to the State's regulatory powers has emerged in recent years as one of the most important techniques for solving conflicts between investment protection standards and environmental, health or human rights considerations. Although the doctrine of regulatory powers is not as such a conflict rule, it may operate as one to the extent that it shields certain measures taken by the State from being considered as a breach of investment protections.

The scope of the State's regulatory powers is difficult to determine precisely. Commentators and tribunals have often sought to circumscribe this doctrine by reference to

---

<sup>293</sup> *Maffezini v. Spain—Award*, above n 89, paras 65-71.

<sup>294</sup> *Ibid*, para 71. However, the reasoning of the tribunal seems to depend much more on the factual record (the absence of pressure from the Spanish authorities for Maffezini to start the construction of the contemplated chemical plant before having presented a satisfactory EIA) and, potentially, on the grounding in international law of the need to conduct an EIA prior to any project with potential environmental consequences. See on this latter point *Pulp Mills* case, above n 8, para 204.

<sup>295</sup> See above n 94 to 98.

<sup>296</sup> See Radicati di Brozolo, above n 79.

<sup>297</sup> ICSID Convention, above n 93, art 52.

<sup>298</sup> New York Convention, above n 86, art V.



more specific formulations of the underlying concept. In what follows, the analysis focuses on three of these formulations, namely the police powers doctrine, the margin of appreciation doctrine, and emergency and necessity clauses.

*The police powers doctrine*—The police powers doctrine as it is applied in international investment law seems to have developed from two main sources, one rooted in North-American scholarship and practice,<sup>299</sup> and the other in general international law.<sup>300</sup> In both cases it has mostly been discussed and applied in connection with non-compensable expropriations.<sup>301</sup> However, its effect is not to exclude compensation but, more drastically, to exclude a qualification of expropriation, which justifies its treatment as a sort of conflict rule. Moreover, this doctrine has increasingly permeated the drafting of model investment treaties in the last years<sup>302</sup> and has also been discussed and applied in the specific context of environmental regulations adverse to the interests of foreign investors. One may refer in this regard to the general observation made by the tribunal in *S.D. Myers v. Canada*,<sup>303</sup> in connection with the distinction between expropriation and regulation (in this case, the adoption of administrative orders preventing the export of toxic waste across the border between Canada and the United States):

The general body of precedent does not treat regulatory action as amounting to expropriation. Regulatory conduct by public authorities is unlikely to be the subject of legitimate complaint under Article 1110 [expropriation] of the NAFTA, although the Tribunal does not rule out that possibility ... Expropriations tend to involve the deprivation of ownership rights; regulations a lesser interference. The distinction between expropriation and regulation screens out most potential cases of complaints concerning economic intervention by a state and reduces the risk that governments will be subject to claims as they go about their business of managing public affairs.<sup>304</sup>

---

<sup>299</sup> On the North-American source see S Friedman, *Expropriation in International Law* (Stevens, London, 1953) 51; American Law Institute (ALI), *Restatement (Second) of the Law of Foreign Relations of the United States*, 1965, section 197(1)(a); ALI, *Restatement (Third) of the Law of Foreign Relations of the United States*, 1986, section 712, commentary, letter (g); L B Sohn, R R Baxter, 'Draft Convention on the International Legal Responsibility of States for Injuries to Aliens' (1961) 55 *American Journal of International Law* 545 (Harvard Draft 1961) art 10(5). This source has influenced the case-law of the Iran-United States Claims Tribunal and of arbitral tribunals constituted under NAFTA Chapter Eleven. See G H Aldrich, 'What Constitutes a Compensable Taking of Property? The Decisions of the Iran-United States Claims Tribunal' (1994) 88 *American Journal of International Law* 585, referring to the following cases: *Too v. Greater Modesto Insurance Associates*, Award 460-880-2, 29 December 1989, Iran-US CI Trib Rep, vol. 23, 378, *Sedco Inc. v. National Iranian Oil Co.*, ITL 55-129-3, 28 October 1985, Iran-US CI Trib Rep, vol. 9, 248, see also *Sea-Land Services v. Iran*, Award 135-33-1, 22 June 1984, Iran-US CI Trib Rep vol. 6, 149; M Kinnear, A K Bjorklund, J F G Hannaford, *Investment Disputes under NAFTA. An Annotated Guide to NAFTA Chapter 11* (Kluwer Law International, The Hague, 2006), commentary ad Article 1110, 49-55, referring to the following cases: *Pope & Talbot Inc. v. Canada*, NAFTA (UNCITRAL), Interim Merits Award, 26 June 2000, para 99; *S.D. Myers v. Canada*, NAFTA (UNCITRAL), Partial Award, 13 November 2000, paras 287-288; *Marvin Roy Feldman Karpa v. Mexico*, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002, paras 101-105, 110-114; *Methanex v. United States*, NAFTA (UNCITRAL), Award, 3 August 2005, part. IV, D, para 7; *International Thunderbird Gaming Corp. v. Mexico*, NAFTA (UNCITRAL), Award, 26 January 2006, para 127. See also *Fireman's Fund Insurance Company v. Mexico*, ICSID Case No. ARB(AF)/02/1, Award, 14 July 2006, para 176(j).

<sup>300</sup> See Friedman, above n 299; G C Christie, 'What Constitutes a Taking of Property under International Law' (1962) 38 *British Yearbook of International Law* 307 et seq; I Brownlie, *Principles of Public International Law* (Oxford University Press, Oxford, 2008) 535-536; A Newcombe, 'The Boundaries of Regulatory Expropriation in International Law' (2005) 20 *ICSID Review* 1.

<sup>301</sup> See, for instance, Friedman, above n 299, 50-51; Christie, above n 300, 331; Brownlie, above n 300, 536.

<sup>302</sup> See, for instance, US Model BIT 2004, above n 273, Annex B; Canada Model BIT 2004, above n 272, Annex B 13(1). See also our discussion in section IV.C(1) above.

<sup>303</sup> *S.D. Myers v. Canada*, above n 105.

<sup>304</sup> *Ibid*, paras 281-282.

In a subsequent environment-related case, *Methanex v. United States*,<sup>305</sup> this distinction was confirmed and nuanced. The claimant argued that it had been expropriated as a result of a measure adopted by the Californian authorities banning a fuel additive, methyl tertiary-butyl ether (MTBE), which had been found to be a groundwater pollutant. The claimant was not a producer of MTBE but rather of a feedstock, methanol, used in the production of MTBE.<sup>306</sup> The tribunal rejected the claim on the basis that the Californian regulations had been adopted in the use of the State's police powers, and made the following obiter dictum:

[A]s a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, inter alios, a foreign investor or investment is not deemed expropriatory and compensable unless specific commitments had been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation.<sup>307</sup>

This statement has been subsequently confirmed in another investment dispute, albeit not related to environmental regulation, where the tribunal considered, by reference to the *Methanex* award, that:

the principle that a State does not commit an expropriation and is thus not liable to pay compensation to a dispossessed alien investor when it adopts general regulations that are 'commonly accepted as within the police powers of States' forms part of customary law today.<sup>308</sup>

In turn, the *Saluka* award was used as authority in a paragraph of the award in *Chemtura v. Canada*, which provides the clearest formulation of the police powers doctrine in the context of environmental regulation so far:

[T]he Tribunal considers in any event that the measures challenged by the Claimant constituted a valid exercise of the Respondent's police powers. As discussed in detail in connection with Article 1105 of NAFTA, the PMRA took measures within its mandate, in a non-discriminatory manner, motivated by the increasing awareness of the dangers presented by lindane for human health and the environment. A measure adopted under such circumstances is a valid exercise of the State's police powers and, as a result, does not constitute an expropriation.<sup>309</sup>

This strong statement leaves no doubt as to the effects of the police powers doctrine. Interestingly, it is also an implicit acknowledgement of the formulation of the police powers doctrine contained in the Harvard Draft of 1961, although another contemporary decision has nuanced this conclusion.<sup>310</sup> Summarizing, in principle, where a legitimacy conflict arises between a domestic environmental measure and an investment protection clause in a treaty,

---

<sup>305</sup> *Methanex v. United States*, above n 136.

<sup>306</sup> *Ibid*, part IV, ch. D, para 1.

<sup>307</sup> *Ibid*, para 7.

<sup>308</sup> See *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL, Partial Award, 17 March 2006 ('*Saluka v. Czech Republic*'), para 262.

<sup>309</sup> *Chemtura v. Canada*, above n 109, para 266, referring to paragraph 262 of *Saluka v. Czech Republic*.

<sup>310</sup> In *Suez v. Argentina—03/17*, above n 136, Decision on Liability, 31 August 2010 ('*Suez v. Argentina—03/17—Liability*'), the tribunal analyzed Argentina's police powers defence in the light of the Harvard Draft. In this regard, the tribunal made a nuanced statement which is, however, not inconsistent with the position taken by the tribunal in *Chemtura v. Canada*: 'While this Tribunal does not pronounce on the legal authority of the [Harvard] Draft, it does acknowledge that States have a legitimate right to exercise their police powers to protect the public interest and that the doctrine of police powers, as the above-quoted excerpt from the Draft clearly states, has been particularly pertinent in cases of expropriation where tribunals have had to balance an investor's property rights with the legitimate and reasonable need for the State to regulate', para 147.

the former would ‘prevail’ if it is not *ultra vires*, pursues a public purpose and is not discriminatory, unless the host State has given specific assurances to the investor that such regulation would not be adopted.

With respect to this latter condition, the *Methanex* tribunal referred *inter alia* to another environment-related dispute, namely *Waste Management v. Mexico*,<sup>311</sup> where the tribunal considered that in assessing a potential breach of Article 1105 of NAFTA ‘it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant’.<sup>312</sup> The same reasoning appears in the *Metalclad v. Mexico* case,<sup>313</sup> in connection with the refusal by the local Mexican authorities to issue a construction permit on environmental grounds. The tribunal considered that such refusal was *ultra vires* and contrary to the previous assurances received by the investor from the federal Mexican authorities.<sup>314</sup> However, upon application by Mexico, the award was partially set aside by the Supreme Court of British Columbia on the grounds that the tribunal had exceeded its powers by introducing an obligation of transparency in Article 1105 of NAFTA and deciding the dispute on such basis.<sup>315</sup>

Another case addressing the impact of specific assurances is *MTD v. Chile*<sup>316</sup> where the tribunal concluded that Chile had breached the fair and equitable treatment standard of the applicable BIT by reason of the incoherent behaviour of its authorities. Whereas the Chilean Foreign Investment Commission (FIC) had approved the investment plan of the investor, the Minister of Urban Development rejected the application made by MTD for the necessary zoning changes on the grounds that the project fell foul of the urban development policy of the Santiago area. Significantly, the investor had not conducted a due diligence inquiry into the feasibility of its project from the perspective of zoning. In its argumentation, the respondent heavily relied on a meeting where, allegedly, the investor had been made aware of the fact that the project was contrary to planning regulations. The tribunal did not resolve this factual issue. Instead, it focused on the assurances given by the FIC, which it found decisive to allocate regulatory risk between the investor and the host State. It thus concluded that Chile had breached the applicable BIT:

[T]he Tribunal agrees that it is the responsibility of the investor to assure itself that it is properly advised, particularly when investing abroad in an unfamiliar environment. However, in the case before us, Chile is not a passive party and the coherent action of the various officials through which Chile acts is the responsibility of Chile, not of the investor. Whether the Claimants acted responsibly or diligently in reaching a decision to invest in Chile is another question ... Chile claims that it had no obligation to inform the Claimants and that the Claimants should have found out by themselves what the regulations and policies of the country were. The Tribunal agrees with this statement as a matter of principle, but Chile also has an obligation to act coherently and apply its policies consistently, independently of how diligent an investor is. Under international law (the law that this

---

<sup>311</sup> See *Waste Management Inc. v. Mexico*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004 (*Waste Management II*).

<sup>312</sup> *Ibid*, para 98.

<sup>313</sup> *Metalclad v. Mexico*, above n 18.

<sup>314</sup> *Ibid*, paras 79-101.

<sup>315</sup> See *United Mexican States v. Metalclad*, 2001 BCSC 664, Supreme Court of British Columbia, Reasons for the Judgment (2 May 2001), paras 67-77.

<sup>316</sup> *MTD Equity Sdn Bhd and MTD Chile SA v. Republic of Chile*, ICSID Case No. ARB/01/7, Award of 25 May 2004 (*MTD v. Chile—Award*).

Tribunal has to apply to a dispute under the BIT), the State of Chile needs to be considered by the Tribunal as a unit.<sup>317</sup>

Chile sought annulment of the award arguing, *inter alia*, that the tribunal had confused attribution and breach. The ad hoc committee agreed that ‘to mix up attribution and breach would require explanation and would indicate confusion’ but rejected Chile’s argument that the tribunal had committed an annulable error.<sup>318</sup>

These three cases stress the importance of specific assurances given to a foreign investor, even when the State authorities act *ultra vires* or when the investor does not exercise due diligence. One may wonder, however, how far such reasoning can go and, particularly, whether such assurances would suffice to uphold investment protection clauses over environmental measures even in those cases where the assurances have been given by a former government in conscious disregard of environmental considerations. In such a situation, two competing values would be at stake, namely the legitimate need to protect the environment and the reasonable expectations of the investors when making the investment. Although the reasoning of the tribunals in *Metalclad v. Mexico*, *MTD v. Chile* and *Methanex v. United States* would seem to prioritize the latter, some remarks appearing in these awards tend to nuance this conclusion, by pointing to the legitimate environmental concerns of the host State<sup>319</sup> as well as to the need, for the investor, reasonably to anticipate the evolution of environmental regulation.<sup>320</sup> In other words, not any specific assurance could be reasonably relied upon by an investor who, at the same time, should be aware of the growing demands of environmental protection.<sup>321</sup> This would suggest that real environmental threats may sometimes prevail over any specific assurances.<sup>322</sup>

Aside from this specific hypothesis, a more general question arises as to the conditions under which certain environmental objectives could trump specific assurances given to foreign investors. Admittedly, this is a fact-sensitive assessment that cannot be settled once and for all. As a rule of thumb, one may, however, introduce a distinction based on the type of environmental purpose. Thus, when an environmental regulation is adopted as a result of a new scientific understanding of a given substance in order to protect human health, either

---

<sup>317</sup> Ibid, paras 164-165.

<sup>318</sup> *MTD Equity Sdn Bhd and MTD Chile SA v Chile*, ICSID Case No ARB/01/7, Decision on Annulment of 16 February 2007 (*‘MTD v. Chile—Annulment’*), para 89.

<sup>319</sup> Indeed, in *Metalclad v. Mexico*, the tribunal noted that its conclusion was ‘not affected by NAFTA Article 1114, which permits a Party to ensure that investment activity is undertaken in a manner sensitive to environmental concerns. The conclusion of the Convenio and the issuance of the federal permits show clearly that Mexico was satisfied that this project was consistent with, and sensitive to, its environmental concerns’, *Metalclad v. Mexico*, above n 18, para 98.

<sup>320</sup> In *Methanex v. United States*, the tribunal noted, in connection with the question of whether Methanex had received specific assurances that ‘[n]o such commitments were given to Methanex. Methanex entered a political economy in which it was widely known, if not notorious, that governmental environmental and health protection institutions at the federal and state level, operating under the vigilant eyes of the media, interested corporations, non-governmental organizations and a politically active electorate, continuously monitored the use and impact of chemical compounds and commonly prohibited or restricted the use of some of those compounds for environmental and/or health reasons ... Methanex entered the United States market aware of and actively participating in the process. It did not enter the United States market because of special representations made to it’, *Methanex v. United States*, above n 136, part IV, ch. D, paras 9-10.

<sup>321</sup> In *Bayindir v. Pakistan*, the tribunal noted that some specific assurances could not be relied upon when it is clear that the political volatility of a country places such assurances under a high risk of being frustrated, above n 108, paras 193-194.

<sup>322</sup> For a policy analysis of the impact of unilateral commitments to investment protection see K Tienhaara, ‘Unilateral Commitments to Investment Protection: Does the Promise of Stability Restrict Environmental Policy Development?’ (2006) 17 *Yearbook of International Environmental Law* 139.

directly or indirectly (by protecting the proximate human environment), environmental regulation should have more chances to prevail. Conversely, when an environmental regulation is adopted mostly for efficiency purposes, i.e. to manage a known environmental threat with more cost-effective means, previous assurances given to investors would be likely to prevail. Between these two extremes, the balance between environmental protection and legal certainty would be more difficult to strike.

*The margin of appreciation doctrine*—Another expression of the doctrine of regulatory powers is the so-called margin of appreciation doctrine, developed by the ECtHR<sup>323</sup> on the basis of the practice of several European civil law jurisdictions,<sup>324</sup> and subsequently adopted by other human rights as well as other bodies.<sup>325</sup> This doctrine was initially formulated in the context of derogations from human rights standards in accordance with Article 15 of the ECHR,<sup>326</sup> and it was later used for the interpretation of individual rights under Articles 6 (due process) and 8 (right to private and family life, extended to cover environmental aspects) of the Convention, and Article 1 (right to private property) of the First Protocol. In the *Handyside case*, the Court formulated the underlying rationale of this doctrine as follows:

[I]t is not possible to find in the domestic law of the various Contracting States a uniform European conception of morals. The view taken by their respective laws of the requirements of morals varies from time to time and from place to place, especially in our era which is characterised by a rapid and far-reaching evolution of opinions on the subject. By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the ‘necessity’ of a ‘restriction’ or ‘penalty’ intended to meet them ... This margin is given both to the domestic legislator (‘prescribed by law’) and to the bodies, judicial amongst others, that are called upon to interpret and apply the laws in force.<sup>327</sup>

Thus, the margin of appreciation is, in essence, a standard of deference given to the national authorities to assess a situation because of their better position to understand it. This is particularly important for environment-related disputes where a regulatory agency focusing on health or environmental protection takes measures that are subsequently challenged by the investor as being in breach of international investment law.

Three main questions arise in this connection. The first is whether such doctrine is applicable in the context of investment disputes. This seems to be the case, if one judges by the reasoning of the tribunals in *Methanex*<sup>328</sup> and *Glamis Gold*.<sup>329</sup> Indeed, both tribunals seem to have considered that their role was not to judge the scientific conclusions on which the measures challenged by the investors were based, but only the acceptability of the process followed to reach such conclusions. The tribunal in *Chemtura v. Canada* also

---

<sup>323</sup> See Y Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Intersentia, Antwerp, 2002); M Hutchinson, ‘The Margin of Appreciation Doctrine in the European Court of Human Rights’ (1999) 48 *International and Comparative Law Quarterly* 638.

<sup>324</sup> See Arai-Takahashi, above n 323, 2-3, referring to the theories of ‘*marge d’appréciation*’ applied by the French *Conseil d’Etat* and of ‘*Ermessensspielraum*’ applied by German courts.

<sup>325</sup> In particular, the Inter-American Court of Human Rights and the United Nations Human Rights Committee, see *ibid*, 4.

<sup>326</sup> See *Ireland v. United Kingdom*, ECHR, Judgment of 18 January 1978, A 25, para 207, quoted in *ibid*, 5.

<sup>327</sup> See *Handyside v. United Kingdom*, ECHR, Judgment of 7 December 1976, A 24, para 48, quoted in *ibid*, 7-8.

<sup>328</sup> See *Methanex v. United States*, above n 136, part III, ch. A, para 101.

<sup>329</sup> See *Glamis v. United States*, above n 116, para 779.

followed this approach.<sup>330</sup> However, it took a more nuanced position as regards the question of whether its scope of review was limited by a margin of appreciation doctrine,<sup>331</sup> which takes us to the second question.

The second question concerns, indeed, the tribunal's scope of review regarding the assessments conducted by such specialized agencies. Part of the answer to this second question has already been given in connection with the first question. Tribunals must not focus on the science but on the process. However, the articulation between science and process is not entirely clear.<sup>332</sup> Moreover, focusing only on process may sometimes lead to unsatisfactory solutions as, under some circumstances, it could be unreasonable to penalize a State which took a decision based on sound science but through a procedurally inefficient process. Assuming the result of the regulatory process to be the same, mere procedural breaches would be relevant only where and to the extent that they have imposed an unnecessarily heavy burden on the claimant. In other terms, the articulation between science and process must leave some room to accommodate proportionality considerations. For instance, in *Chemtura v. Canada*, the tribunal considered that the delays in the registration process of a lindane-free replacement pesticide submitted by the claimant did not amount to a violation of the Article 1105 of NAFTA.<sup>333</sup>

The third question concerns the differences between the margin of appreciation doctrine and the police powers doctrine. Although the concepts underlying these two doctrines overlap to some extent, some differences of accent can be identified. One such difference has been identified by the tribunal in *Suez v. Argentina—03/17*, according to which the police powers doctrine would be relevant only in connection with expropriation because the same considerations underlying this doctrine are already taken into account in the definition and scope of other standards of investment protection, such as fair and equitable treatment.<sup>334</sup> Another difference rests on the reason for deferring to State authorities. Whereas the police powers doctrine is based on the deference due by tribunals to the policy choices made by State authorities, including the level of environmental or health protection, the margin of appreciation doctrine, as applied in the investment context,<sup>335</sup>

---

<sup>330</sup> See *Chemtura v. Canada*, above n 109, paras 133-134.

<sup>331</sup> *Ibid*, para 123, noting that '[i]n assessing whether the treatment afforded to the Claimant's investment was in accordance with the international minimum standard, the Tribunal must take into account all the circumstances, including the fact that certain agencies manage highly specialized domains involving scientific and public policy determinations. This is not an abstract assessment circumscribed by a legal doctrine about the margin of appreciation of specialized regulatory agencies. It is an assessment that must be conducted *in concreto*.'

<sup>332</sup> In *Methanex v. United States*, the tribunal made explicit what it gathered from the discussion of scientific evidence. See *Methanex v. United States*, above n 136, part III, ch. A, para 102.

<sup>333</sup> See *Chemtura v. Canada*, above n 109, paras 217-220.

<sup>334</sup> See *Suez v. Argentina—03/17—Liability*, above n 136, stating in paragraph 148 that 'the application of the police powers doctrine as an explicit, affirmative defense to treaty claims *other* than for expropriation is inappropriate, because in judging those claims and applying such principles as full protection and security and fair and equitable treatment, both of which are considered in subsequent sections of this Decision, a tribunal must take account of a State's reasonable right to regulate. Thus, if a tribunal finds that a State has violated treaty standards of fair and equitable treatment and full protection and security, it must of necessity have determined that such State has exceeded its reasonable right to regulate. Consequently, for that same tribunal to make a subsequent inquiry as to whether that same State has exceeded its legitimate police powers would require that tribunal to engage in an inquiry it has already made. In short, a decision on the application of the police powers doctrine in such circumstance would be duplicative and therefore inappropriate.'

<sup>335</sup> In the context of the ECtHR, the doctrine serves much broader purposes, including the adaptation of the European Convention standards to the cultural and political specificities of each State party to the Convention. See above n 324.

seeks rather to avoid second guessing the assessment of the relevant material made by a specialized agency.<sup>336</sup> Still another difference is that, as it has already been noted, the police powers doctrine concerns liability, whereas the margin of appreciation doctrine concerns factual analysis. Indeed, if the police powers doctrine is found to shield a given measure, the result is that such measure is not in breach of investment protection standards (expropriation). By contrast, the deference to a scientific assessment conducted by State authorities is only a finding of fact, which may or may not lead to liability. An additional difference, that flows from the one just mentioned, concerns the room for proportionality reasoning within the two doctrines, which seems to be larger within the margin of appreciation doctrine. Thus, in a case where a measure has been adopted for environmental reasons, the application of the police powers doctrine would tend to be more favourable to the host State, as it would in principle exempt it from liability. By contrast, the application of the margin of appreciation doctrine may allow a tribunal to defer to the environmental assessment conducted by the State authorities while considering that the measures taken on that basis were not proportional. In *Tecmed v. Mexico*,<sup>337</sup> the tribunal analyzed the refusal by the local authorities to renew a license for the operation of a landfill facility in the light of both the police powers and margin of appreciation doctrines. The tribunal subjected the characterisation of a measure as legitimate under the police powers doctrine to domestic instead of to international law.<sup>338</sup> This preliminary (and debatable) step allowed the tribunal to make some additional room for assessing the conformity of the measures with the applicable investment treaty, without reviewing the reasons and motivations that led to the adoption of the measure challenged.<sup>339</sup> Thus, it placed itself under the margin of appreciation doctrine. In fact, the tribunal recognised that even those regulations that have a legitimate public purpose, such as environmental protection, could fall under the expropriation clause of the treaty.<sup>340</sup> It then proceeded to a proportionality analysis, borrowed from the case-law of the ECtHR:

[A]fter establishing that regulatory actions and measures will not be initially excluded from the definition of expropriatory acts, in addition to the negative financial impact of such actions or measures, the Arbitral Tribunal will consider, in order to determine if they are to be characterized as expropriatory, whether such actions or measures are proportional to the public interest presumably protected thereby and to the protection legally granted to investments, taking into account that the significance of such impact has a key role upon deciding the proportionality. *Although the analysis starts at the due deference owing to the State when defining the issues that affect its public policy or the interests of society as a whole, as well as the actions that will be implemented to protect such*

---

<sup>336</sup> To understand this distinction a useful, albeit not entirely accurate, analogy could be made to the different roles in United States federal law of, on one hand, the act of State doctrine and, on the other, of judicial deference to statutory interpretation by specialized agencies. This analogy must be nuanced in a number of ways, including the fact that the Act of State doctrine accounts for the respect due by the organs of one State vis-à-vis the organs of another State, and that administrative statutory interpretation belongs to the province of legal, as opposed to factual reasoning. On the Act of State doctrine see L Henkin, 'Act of State Today: Recollections in Tranquility' (1967) 6 *Columbia Journal of Transnational Law* 175; F L Kirgis, 'Understanding the Act of State Doctrine's Effect' (1988) 82 *American Journal of International Law* 58. On administrative statutory interpretation see *Chevron U.S.A. Inc v. National Resources Defence Council Inc.*, 467 U.S. 867 (1984). For a discussion of the standards laid out in this case see A Scalia, 'Judicial Deference to Administrative Interpretation of Law' (1989) *Duke Law Journal* 511; R J Krotoszynsky, 'Why Deference?: Implied Delegations, Agency Expertise, and the Misplaced Legacy of Skidmore' (2002) 54 *Administrative Law Review* 735.

<sup>337</sup> *Tecmed v. Mexico*, above n 18.

<sup>338</sup> *Ibid*, para 119.

<sup>339</sup> *Ibid*, para 120.

<sup>340</sup> *Ibid*, para 121, referring to a controversial conclusion in *CDSE v. Costa Rica*.

values, such situation does not prevent the Arbitral Tribunal, without thereby questioning such due deference, from examining the actions of the State in light of Article 5(1) of the Agreement to determine whether such measures are reasonable with respect to their goals, the deprivation of economic rights and the legitimate expectations of who suffered such deprivation. There must be a reasonable relationship of proportionality between the charge or weight imposed to the foreign investor and the aim sought to be realized by any expropriatory measure. To value such charge or weight, it is very important to measure the size of the ownership deprivation caused by the actions of the state and whether such deprivation was compensated or not.<sup>341</sup>

This paragraph suggests that, under the margin of appreciation doctrine, the link between deference and exemption of liability is mediated by the concept of proportionality whereas, under the police powers doctrine, proportionality plays a part only with respect to whether the doctrine is applicable or not. Once applied, the police powers doctrine excludes liability. This difference has also some bearing in connection with issues of compensation, as it will be discussed later.

*Emergency and necessity clauses*—Still another expression of the State regulatory powers is provided by emergency and necessity clauses. There is some overlap between such clauses and the two doctrines discussed above. Indeed, some of the traditional hypotheses covered by both the police powers and the margin of appreciation doctrines were situations of public emergency.<sup>342</sup> Here, the analysis focuses instead on the relevance of public emergency clauses in investment treaties as well as of the customary international rule governing the necessity defence for the protection of environmental interests.

The potential application of the necessity defence for the protection of environmental interests was recognised for the first time in the *Gabčíkovo-Nagymaros* case, before the International Court of Justice.<sup>343</sup> In this case, the Court expressly admitted that

the concerns expressed by Hungary for its natural environment in the region affected by the Gabčíkovo-Nagymaros Project related to an ‘essential interest’ of that State, within the meaning given to that expression in Article 33 of the Draft of the International Law Commission.<sup>344</sup>

In this particular case, Hungary had raised concerns relating *inter alia* to the potential effects of the construction projects contemplated in a treaty of 1977 on the aquifer providing Budapest with freshwater. Despite recognising the importance of environmental protection, the ICJ rejected Hungary’s argument on the grounds that some of the conditions for the admissibility of the customary necessity defence were not met.

Public emergency clauses and the necessity defence have also been invoked in the context of a series of investment disputes relating to the Argentine crisis of 2001-2003.<sup>345</sup>

---

<sup>341</sup> *Tecmed v. Mexico*, above n 18, para 122 (emphasis added), referring to the decision of ECtHR *In the case of James and Others*, Judgment of 21 February 1986, 63, 24.

<sup>342</sup> See above nn 299, 301, 326.

<sup>343</sup> See *Gabčíkovo-Nagymaros*, above n 8. On the so-called ‘ecological necessity’ see above n 12.

<sup>344</sup> *Gabčíkovo-Nagymaros*, above n 8, para 53.

<sup>345</sup> See *Continental Casualty v. Argentine Republic*, ICSID Case No. ARB/03/9, Award of 5 September 2008 (*Continental Casualty v. Argentina*); *Metalpar c. Argentine Republic*, ICSID Case No. ARB/03/5, Award of 6 June 2008 (*Metalpar v. Argentina*); *Sempra Energy v. Argentine Republic*, ICSID Case No. ARB/02/16, Award of 28 September 2007 (*Sempra v. Argentina—Award*), Decision on Annulment of 29 June 2010 (*Sempra v. Argentina—Annulment*); *Enron and Ponderosa Assets v. Argentine Republic*, ICSID Case No. ARB/01/3, Award of 22 May 2007 (*Enron v. Argentina—Award*), Decision on Annulment of 30 July 2010 (*Enron v. Argentina—Annulment*); *LG&E v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on liability of 13 October 2006 (*LG&E—Liability*), Award of 25 July 2007 (*LG&E—Award*); *CMS v. Argentina—Award*, above n 103, *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/08, Decision on



Although these cases do not focus on environmental issues, they remain relevant to assess the potential operation of emergency and necessity clauses in connection with such issues. The first case in which the tribunal admitted an argument of necessity to justify the breach of an investment treaty is *LG&E v. Argentina*.<sup>346</sup> The respondent had argued that the measures challenged by the investor were justified under both Article XI of the Argentina—United States BIT<sup>347</sup> and the customary rule on necessity codified in Article 25 of the ILC Articles on State Responsibility.<sup>348</sup> Article XI of the applicable BIT could in fact be considered as a public emergency rather than as a necessity clause. It provides the following:

This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfilment of its obligations with respect to the maintenance or restoration of international peace or security or the protection of its own essential security interests.<sup>349</sup>

The tribunal in *LG&E* found that such clause was applicable under the specific circumstances that prevailed in Argentina from 2001 to 2003:

While unemployment, poverty and indigency rates gradually increased from the beginning of 1998, they reached intolerable levels by December 2001. Unemployment reached almost 25%, and almost half of the Argentine population was living below poverty. The entire healthcare system teetered on the brink of collapse. Prices of pharmaceuticals soared as the country plunged deeper into the deflationary period, becoming unavailable for low-income people. Hospitals suffered a severe shortage of basic supplies. Investments in infrastructure and equipment for public hospitals declined as never before. These conditions prompted the Government to declare the nationwide health emergency to ensure the population's access to basic health care goods and services. At the time, one quarter of the population could not afford the minimum amount of food required to ensure their subsistence. Given the level of poverty and lack of access to healthcare and proper nutrition, disease followed. Facing increased pressure to provide social services and security to the masses of indigent and poor people, the Government was forced to decrease its per capita spending on social services by 74% ... By December 2001, there was widespread fear among the population that the Government would default on its debt and seize bank deposits to prevent the bankruptcy of the banking system. Faced with a possible run on banks, the Government issued on 1 December 2001 Decree of Necessity and Emergency No. 1570/01. The law triggered widespread social discontent. Widespread violent demonstrations and protests brought the economy to a halt, including effectively shutting down transportation systems. Looting and rioting followed in which tens of people were killed as the conditions in the country approached anarchy. A curfew was imposed to curb lootings ... By 20 December 2001, President De la Rúa resigned. His presidency was followed by a succession of presidents over the next days, until Mr. Eduardo Duhalde took office on 1 January 2002, charged with the mandate to bring the country back to normal conditions ... All of these devastating

---

Annulment, 25 September 2007 ('*CMS v. Argentina—Annulment*'). For a discussion of these awards see Ch Leben, 'L'état de nécessité dans le droit international de l'investissement' (2005) 3 *Les Cahiers de l'arbitrage* 47; J E Viñuales, 'State of Necessity and Peremptory Norms in International Investment Law' (2008) 14 *NAFTA: Law and Business Review of the Americas* 79; J Fourret, 'CMS c/ LG&E ou l'état de nécessité en question' (2007) *Revue de l'arbitrage* 249; A Reinisch, 'Necessity in International Investment Arbitration: An Unnecessary Split of Opinions in Recent ICSID Cases?' (2007) 8 *Journal of World Investment & Trade* 191.

<sup>346</sup> *LG&E v. Argentina—Liability*, above n 345.

<sup>347</sup> Treaty between the United States of America and the Argentine Republic concerning the Reciprocal Encouragement and Protection of Investment, 14 November 1991, 31 ILM 124 ('Argentina-US BIT').

<sup>348</sup> Responsibility of States for Internationally Wrongful Acts, G.A. Res. 56/83, U.N. Doc A/RES/56/83, 12 December 2001 ('ILC Articles'), art 25.

<sup>349</sup> Argentina-US BIT, above n 347, art XI.

conditions—economic, political, social—in the aggregate triggered the protections afforded under Article XI of the Treaty to maintain order and control the civil unrest.<sup>350</sup>

It then confirmed its reasoning by reference to the customary rule on necessity, but without technically applying it.<sup>351</sup>

The second case in which a necessity argument was admitted in the context of the Argentine crisis is *Continental Casualty v. Argentina*.<sup>352</sup> Although both the customary and the treaty-based defence were invoked by Argentina, the decision of the tribunal on admitting the defence was, again, based on Article XI of the Argentina-US BIT, and not on the requirements for the admissibility of the customary necessity defence.<sup>353</sup> The tribunal clearly spelled out how the operation of Article XI would simply exclude the existence of a breach instead of excusing an existing breach, as would arguably be the case of the customary necessity defence.<sup>354</sup> More specifically, the tribunal described Article XI as a safeguard, in the meaning usually given to this term in the international trade context, which in fact limits the scope of the substantive investment disciplines.<sup>355</sup> This had the important consequence of making the availability of such emergency clause less exceptional than the customary necessity defence. As noted by the tribunal:

[I]n view of these differences between the situation regulated under Art. 25 ILC Articles and that addressed by Art. XI of the BIT, the conditions of application are not the same. The strict conditions to which the ILC text subjects the invocation of the defence of necessity by a State is explained by the fact that it can be invoked in any context against any international obligation. Therefore 'it can only be accepted on an exceptional basis.' This is not necessarily the case under Art. XI according to its language and purpose under the BIT. This leads the Tribunal to the conclusion that invocation of Art. XI under this BIT, as a specific provision limiting the general investment protection obligations (of a 'primary' nature) bilaterally agreed by the Contracting Parties, is not necessarily subject to the same conditions of application as the plea of necessity under general international law.<sup>356</sup>

Moreover, in interpreting the scope of the term 'essential security interests' used in Article XI, the tribunal retained a fairly broad characterization encompassing the protection of the environment, an element which could be used in future investment cases.<sup>357</sup> Thus, the

---

<sup>350</sup> *LG&E v. Argentina—Liability*, above n 345, paras 234-237.

<sup>351</sup> The tribunal reasoned as follows: 'While the Tribunal considers that the protections afforded by Article XI have been triggered in this case, and are sufficient to excuse Argentina's liability, the Tribunal recognizes that satisfaction of the state of necessity standard as it exists in international law (reflected in Article 25 of the ILC's Draft Articles on State Responsibility) supports the Tribunal's conclusion', *ibid*, para 245. This *modus operandi* is important because it contrasts with the reasoning of the tribunal in *CMS v. Argentina*, which applied both the treaty provision and the customary requirements for the admissibility of necessity together (see *CMS v. Argentina—Award*, above n 103, paras 357-358). On annulment, the CMS tribunal was severely criticized for having proceeded in this manner. According to the Ad Hoc Committee: 'Those two texts having different operation and content, it was necessary for the Tribunal to take a position on their relationship and to decide whether they were both applicable in the present case. The Tribunal did not enter into such an analysis, simply assuming that Article XI and Article 25 are on the same footing ... In doing so the Tribunal made another error of law. One could wonder whether state of necessity in international law goes to the issue of wrongfulness or that of responsibility. But in any case, the excuse based on customary international law could only be subsidiary to the exclusion based on Article XI', *CMS v. Argentina—Annulment*, above n 345, paras 131-132.

<sup>352</sup> See *Continental Casualty v. Argentina*, above n 345.

<sup>353</sup> See *ibid*, para 162.

<sup>354</sup> *Ibid*, para 164. See also V Lowe, 'Precluding Wrongfulness or Responsibility: A Plea for Excuses' (1999) 10 *European Journal of International Law* 405.

<sup>355</sup> See *Continental Casualty v. Argentina*, above n 345, para 164.

<sup>356</sup> *Ibid*, para 167.

<sup>357</sup> The tribunal noted the following in this regard: 'As to "essential security interests," it is necessary to recall that international law is not blind to the requirement that States should be able to exercise their sovereignty in the

protection of environmental interests would be technically possible under both the customary necessity defence and at least some public emergency clauses.

This latter point has been confirmed in the two *Suez v. Argentina* cases with respect to the protection of what can be seen as environment-related interests, namely access to water. The customary necessity defence was discussed in connection with the right to water by both the respondent and the *amici curiae*. The *Amicus* Brief referred *inter alia* to the observation of the LG&E tribunal that ‘a state of necessity is identified by those conditions in which a State is threatened by a serious danger ... to the possibility of maintaining its essential services in operation’.<sup>358</sup> However, whereas the necessity defence was well articulated by the respondent, its application seems to have been excluded by the *amici curiae*. This point is noteworthy because it underlines the ambiguities of the distinction between primary and secondary norms in the law of State responsibility, particularly in the context of circumstances precluding wrongfulness.<sup>359</sup> Indeed, the *amici* stressed the fact that ‘the state of necessity does not apply to human rights treaties that provide guarantees to human rights in times of national emergency’<sup>360</sup> such as the American Convention on Human Rights. The purpose of this assertion is not entirely clear. First, the *Amicus* brief itself referred to provisions encompassing the right to water in instruments that do not impose such limitations on their relevant primary norms.<sup>361</sup> Second, even in those instruments that do impose limitations on their primary norms, not every primary norm can be limited in a public emergency. For instance, Article 6(1) of the International Covenant on Civil and Political Rights, also referred to by the *amici* as encompassing the right to water,<sup>362</sup> is one of the provisions from which it cannot be derogated on grounds of public emergency. Third, irrespective of whether the scope of primary norms is limited or not, such norms may entertain a more subtle relationship with the necessity defence, for instance, by attaching importance to an interest to facilitate its characterization as an essential interest.<sup>363</sup> Primary norms<sup>364</sup> have already played such role in connection with the crystallization of environmental protection as an essential interest in the meaning of the customary rule codified by Article 25 of the ILC Articles. In any event, the necessity defence was rejected

---

interest of their population free from internal as well as external threats to their security and the maintenance of a peaceful domestic order. It is well known that the concept of international security of States in the Post World War II international order was intended to cover not only political and military security but also the economic security of States and of their population. The Preamble to the Charter of the United Nations and, even more relevant for the present case, that of the International Monetary Fund support this approach. As noted by the International Law Commission, States have invoked necessity “to protect a wide variety of interests, including safeguarding the environment, preserving the very existence of the State and its people in time of public emergency, or ensuring the safety of a civilian population”, *ibid*, para 175.

<sup>358</sup> See *Suez—Amicus Submission*, above n 232, 27-28.

<sup>359</sup> See E David, ‘Primary and Secondary Rules’, in J Crawford, A Pellet, S Olleson (eds) *The Law of International Responsibility* (Oxford University Press, Oxford, 2010) 29 et seq.

<sup>360</sup> *Suez—Amicus Submission*, above n 232, 28.

<sup>361</sup> *Ibid*, 4, referring *inter alia* to arts 11(1) and 12 of the International Covenant on Economic, Social and Cultural Rights, of 16 December 1966, 993 UNTS 3 (entered into force on 3 January 1976) (‘ICESCR’), which does not impose such limitations.

<sup>362</sup> See *Suez—Amicus Submission*, above n 232, 7, referring *inter alia* to Article 6(1) of the International Covenant on Civil and Political Rights, of 16 December 1966, 999 UNTS 171 (entered into force on 23 March 1976) (‘ICCPR’). Article 4(2) of the ICCPR expressly prohibits derogations, even in times of public emergencies, from Article 6.

<sup>363</sup> See above section IV.B(2)(ii). We have discussed this point more generally in Viñuales, above n 345.

<sup>364</sup> We refer here to the customary principles codified in Principle 21 of the Stockholm Declaration on the Human Environment and in Principle 2 of the Rio Declaration on Environment and Development, see Viñuales, above n 130, 248-249.

in the two *Suez v. Argentina* cases, although the tribunals acknowledged that ‘[t]he provision of water and sewage services ... certainly was vital to the health and well-being of [the population] and was therefore an essential interest of the Argentine State’.<sup>365</sup>

The rejection of the necessity defence in two other cases<sup>366</sup> has been considered as a ground for annulment by the ad hoc committees formed in these cases.<sup>367</sup> The reasoning of the ad hoc committees on this point is debatable but, in any case, it does not undermine the proposition that a threat to an environmental interest may potentially trigger the customary necessity defence or a public emergency clause.

#### D. Issues of Compensation

The question of whether a taking based on environmental (or human rights) reasons should be compensated or not has attracted some attention from legal commentators.<sup>368</sup> Broadly speaking, there are two opposite approaches with regard to compensation for environment-related takings. One considers environmental justifications as irrelevant (1); the other holds that takings for environmental reasons are non-compensable (2). Between these two stances, one may identify some middle-ground positions followed in some cases (3).

##### 1. The irrelevance thesis

The first approach focuses on the sole effects of a deprivation of property. It holds that such taking must be compensated irrespective of its reasons. The awards in *CDSE v. Costa Rica*<sup>369</sup> and *Metalclad v. Mexico* illustrate this first stance. The dispute in *CDSE v. Costa Rica* concerned the amount due for the direct expropriation of a land that the claimant had acquired in order to build a resort. The respondent had invoked a number of domestic and international environmental instruments to challenge the calculation of the amount of compensation. The tribunal held the following view:

While an expropriation or taking for environmental reasons may be classified as a taking for a public purpose, and thus may be legitimate, the fact that the property was taken for this reason does not affect either the nature or the measure of compensation to be paid for the taking. That is, the purpose of protecting the environment for which the property was taken does not alter the legal character of the taking for which adequate compensation must be paid. The international source of the obligation to protect the environment makes no difference.<sup>370</sup>

This stance was confirmed in *Metalclad v. Mexico*,<sup>371</sup> this time with respect to a regulatory taking. The claimant argued that Mexico had breached Articles 1105 (minimum standard of treatment) and 1110 (expropriation) as a result of the acts and omissions of the municipal

---

<sup>365</sup> See *Suez v. Argentina—03/17—Liability*, above n 136, para 238; *Suez v. Argentina—03/19—Liability*, above n 136, para 260.

<sup>366</sup> See *Sempra v. Argentina—Award*, above n 345, paras 344-354, 364-391; *Enron v. Argentina—Award*, above n 345, paras 303-313, 331-342.

<sup>367</sup> See *Sempra v. Argentina—Annulment*, above n 345, paras 186-219 (ground: manifest excess of powers for not applying Article XI of the Argentina-US BIT); *Enron v. Argentina—Annulment*, above n 345, paras 355-395 (grounds: failure to state reasons and manifest excess of powers in connection with the application of the customary necessity defence), paras 400-405 (ground: manifest excess of powers for not applying Article XI of the Argentina-US BIT).

<sup>368</sup> See above n 259.

<sup>369</sup> *CDSE v. Costa Rica*, above n 104.

<sup>370</sup> *Ibid*, para 71.

<sup>371</sup> *Metalclad v. Mexico*, above n 18.

authorities in connection with the construction of a waste disposal landfill. Indeed, whereas the federal government had granted a permit for the project and represented that no further permits were required, the local authorities declined to grant a second construction permit and subsequently declared the area to be an ecological preserve. The tribunal held that, irrespective of the environmental reasons invoked by Mexico, the measures amounted to both a breach of the minimum standard of treatment and a compensable expropriation:

Although not strictly necessary for its conclusion, the Tribunal also identifies as a further ground for a finding of expropriation the Ecological Decree issued by the Governor of SLP on September 20, 1997. This Decree covers an area of 188,758 hectares within the 'Real de Guadalcázar' that includes the landfill site, and created therein an ecological preserve. This Decree had the effect of barring forever the operation of the landfill ... The Tribunal is not persuaded by Mexico's representation to the contrary. The Ninth Article, for instance, forbids any work inconsistent with the Ecological Decree's management program. The management program is defined by the Fifth Article as one of diagnosing the ecological problems of the cacti reserve and of ensuring its ecological preservation. In addition, the Fourteenth Article of the Decree forbids any conduct that might involve the discharge of polluting agents on the reserve soil, subsoil, running water or water deposits and prohibits the undertaking of any potentially polluting activities. The Fifteenth Article of the Ecological Decree also forbids any activity requiring permits or licenses unless such activity is related to the exploration, extraction or utilization of natural resources ... The Tribunal need not decide or consider the motivation or intent of the adoption of the Ecological Decree. Indeed, a finding of expropriation on the basis of the Ecological Decree is not essential to the Tribunal's finding of a violation of NAFTA Article 1110. However, the Tribunal considers that the implementation of the Ecological Decree would, in and of itself, constitute an act tantamount to expropriation.<sup>372</sup>

These cases would suggest that international obligations (or related considerations) other than those provided for in investment treaties are simply not relevant for the assessment of compensation for expropriation. However, other tribunals have followed an entirely different approach.

## 2. *The police powers thesis*

Indeed, as pointed out when discussing the police powers doctrine, some tribunals have held that deprivations of property resulting from environmental regulations are not compensable or, more precisely, that they do not even constitute an expropriation.

Perhaps the clearest formulation of this stance appears in the decision of the tribunal in a dispute without environmental dimensions, namely *Saluka v. Czech Republic*,<sup>373</sup> where the tribunal made the following statement:

In the opinion of the Tribunal, the principle that a State does not commit an expropriation and is thus not liable to pay compensation to a dispossessed alien investor when it adopts general regulations that are 'commonly accepted as within the police powers of States' forms part of customary law today.<sup>374</sup>

One may consider, of course, that the doctrine of police powers focuses only on liability and not on compensation. Although we agree with this view, this is not to say that environmental considerations may not as such exclude compensation, even in cases where there has been an expropriation. In *SPP v. Egypt*,<sup>375</sup> the tribunal concluded that Egypt had

---

<sup>372</sup> Ibid, paras 109-111.

<sup>373</sup> *Saluka v. Czech Republic*, above n 308.

<sup>374</sup> Ibid, para 262.

<sup>375</sup> *SPP v. Egypt*, above n 123.

expropriated the investors. However, in assessing compensation, the tribunal excluded the amounts of damages corresponding to the period after the emergence of Egypt's obligations of protection in accordance with the UNESCO World Heritage Convention. The tribunal reasoned as follows:

Even if the Tribunal were disposed to accept the validity of the Claimant's DCF calculations, it could only award *lucrum cessans* until 1979, when the obligations resulting from the UNESCO Convention with respect to the Pyramids Plateau became binding on the Respondent. From that date forward, the Claimant's activities on the Pyramids Plateau would have been in conflict with the Convention and therefore in violation of international law, and any profits that might have resulted from such activities are consequently non-compensable.<sup>376</sup>

This is clear statement in favour of incorporating environmental considerations in the calculation of compensation. The question then becomes how exactly such incorporation should be operated.

### 3. *Middle grounds*

A number of tribunals have followed approaches that can be situated between the two preceding stances. The reasoning of the tribunals in *Methanex v. United States*,<sup>377</sup> *MTD v. Chile*<sup>378</sup> and *Tecmed v. Mexico*<sup>379</sup> in connection with the police powers and margin of appreciation doctrines has already been discussed. Here, the analysis will therefore focus on those aspects of these decisions that could assist in clarifying the impact of environmental considerations on the assessment of damage.

In *Methanex v. United States*,<sup>380</sup> the tribunal took a stance that, in essence, corresponds to police powers thesis. It concluded indeed that the measures adopted by the Californian authorities banning MTBE fell within the scope of the State's police powers and, as a result, were not an expropriation in the meaning of Article 1110 of NAFTA. What is interesting for the issue of compensation is the caveat introduced by the tribunal regarding situations where the host State has given specific assurances that an adverse regulation will not be adopted. A situation could arise where the State has given such specific assurances to an investor on the basis of its contemporaneous scientific understanding of an environmental question. We could think, for instance, of topics on which the scientific community is divided, or of fields where a major scientific or technological breakthrough permits the replacement of a lesser evil (i.e. a very important product with some undesirable consequences but with no serious substitute)<sup>381</sup> with a new healthier product. After new developments in the scientific

---

<sup>376</sup> Ibid, para 191. The tribunal specifically noted that its reasoning applied to the calculation of compensation: 'The next factor invoked by the Respondent to mitigate the amount of compensation in the present case is the fact that the reclassification of the land on the Pyramids Plateau was a lawful act. This factor, however, has already been taken into consideration in the Tribunal's decision not to award compensation based on profits that might have accrued to the Claimants after the date on which areas on the Plateau were registered with the World Heritage Committee', *ibid*, para 250. See the analysis of L Liberti, 'The Relevance of Non-Investment Treaty Obligations in Assessing Compensation' in Dupuy et al, above n 10, 557.

<sup>377</sup> *Methanex v. United States*, above n 136.

<sup>378</sup> *MTD v. Chile*, above n 316.

<sup>379</sup> *Tecmed v. Mexico*, above n 18.

<sup>380</sup> *Methanex v. United States*, above n 136.

<sup>381</sup> An example is the continuing use of DDT, one of the most widely known persistent organic pollutants, in some developing countries, as an effective way to fight malaria. See WHO gives indoor use of DDT a clean bill of health for controlling malaria, press release of 15 September 2006, <<http://www.who.int/mediacentre/news/releases/2006/pr50/en/print.html>> (last accessed on 21 April 2010).

understanding of the question, the State decides, despite its previous assurances, to adopt a measure that makes the investor's business unviable. The question would then be how to balance environmental and investment protection. Admittedly, the solution will heavily depend on the specific facts of the case as well as on the ability of counsel to mobilise such facts in support of a claim. But broadly speaking, there are two possible solutions.

One would be to bring the situation under the umbrella of the police powers doctrine and conclude that the measures are not an expropriation.<sup>382</sup> A similar reasoning could also intervene *mutatis mutandis* in connection with a claim for breach of fair and equitable treatment if the possibility of a change in the scientific understanding of a product was reasonably predictable, as it may be the case for heavily regulated products.

The other alternative would be to conclude that, as a result of the assurances given to the investor, the measures are not covered by the police powers doctrine and constitute an expropriation. What is unclear is whether the amount of compensation could be adjusted to take into account the specific circumstances in which the expropriation intervened. There are different ways to incorporate such considerations in the assessment of compensation.

One approach would be to reduce the amount of compensation to take into account the degree of diligence or reasonableness of the investor. In *MTD v. Chile*, the tribunal considered that the investor, which had acted negligently in assessing regulatory risks, had to bear part of the damages that it had suffered. The tribunal considered, indeed, that such damage was attributable to business risk because the investor could have mitigated it if it had deployed better business judgment.<sup>383</sup>

Another approach, in the context of the hypothetical situation described above, would be to assess the value of the expropriated asset as a going concern and/or of the *lucrum cessans* resulting from the expropriation by reference to a shorter time horizon. The time horizon may be limited by reference to international legal developments, as in *SPP v. Egypt*,<sup>384</sup> or by the specific characteristics of some markets.<sup>385</sup> Markets in highly regulated products or activities sometimes face fast-moving scientific and technological environments, which may limit their lifespan. Indeed, specific assurances are not insurances against all odds. It may also happen that the investor knew, at the time it invested, that a market was still profitable in some countries but not in others, as a result of different perceptions of a health or an environmental risk. An apposite illustration would be tobacco-related investments made in emerging markets based on specific assurances of the host State.<sup>386</sup> In

---

<sup>382</sup> See above section IV.C(2)(iii).

<sup>383</sup> *MTD v. Chile—Award*, above n 316, paras 242-243. The damages assessment of the tribunal withstood an annulment challenge, see *MTD v. Chile—Decision on Annulment*, above n 318, para 101.

<sup>384</sup> *SPP v. Egypt*, above n 123, para 191. Interestingly, the *SPP v. Egypt* decision also leaves open the possibility of adjusting compensation on the basis of other factors, such as the potential benefits (monetary or other) derived by one of the parties. The existence of such benefits was invoked by the respondent as a mitigation factor but eventually rejected by the tribunal. See *ibid*, paras 245-249.

<sup>385</sup> In assessing other potential mitigating factors, the tribunal in *SPP v. Egypt* made the following comment, which could by analogy illuminate the situation of regulated markets: '[T]he Respondent contends that the project was located in an area where the Claimants should have known there was a risk that antiquities would be discovered. Again, this is a factor that is already reflected in the method used by the Tribunal to value the Claimants' loss, and particularly in the Tribunal's decision and not to base compensation on profits that might have been earned after the Plateau areas were registered with UNESCO', *ibid*, para 251.

<sup>386</sup> We are not aware of a case presenting the particular features of our hypothetical. Tobacco (or tobacco-related) regulation has however been discussed in at least two investment cases: *Marvin Roy Feldman Karpa v. Mexico*, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002; *Grand River Enterprises Six Nations Ltd and others v. United States*, NAFTA (UNCITRAL), Decision on Objections to Jurisdiction, 20 July 2006

such cases, the reasoning of the tribunal in *Tecmed v. Mexico*, which distinguished environmental risks from the socio-political reaction attached to their perception by the population,<sup>387</sup> would be problematic. A risk may indeed exist despite the fact that the affected population is not actively aware of it. Moreover, the perception of the relevant population, irrespective of whether the environmental risk is high or low, is an important factor in assessing the value of an investment, to the extent that such perception affects the current and future demand for an investor's product. An example could be provided by investments relating to genetically modified organisms, which are negatively perceived in some countries, despite the fact that their environmental and health implications are still difficult to determine.

Thus, environmental considerations could indeed affect the reasoning of a tribunal regarding the assessment of compensation. Technically, tribunals have considerable room for manoeuvre in selecting the appropriate standard of compensation and even when they retain the fair-market-value approach, either for expropriation or for other breaches, they still have considerable leeway in deciding which valuation techniques are the most appropriate to calculate such value.<sup>388</sup>

\* \* \*

This analysis of the substantive issues that may arise in environment-related investment proceedings suggests the following conclusions: (1) a distinction may be drawn between normative conflicts—involving two or more international obligations arising respectively from international environmental law and international investment law—and legitimacy conflicts—involving an international and a domestic component—on the basis of the nature of the conflicting norms and of the rules applicable to solve such conflicts; (2) normative conflicts may be handled either (i) through specific conflict rules addressing the relations between investment and environmental protection or (ii) through general approaches, including those relating to the relations between sources (sequential application) as well as between norms (*lex superior*, *lex specialis*, *lex posterior*, systemic integration); (3) legitimacy conflicts may also be addressed through (i) specific conflict rules or (ii) through general approaches, including the rules governing the relations between domestic and international law or between different domestic legal systems, or through the different expressions of a State's regulatory powers (the police powers doctrine, the margin of appreciation doctrine and emergency/necessity clauses); (4) the extent to which environmental considerations may be relevant for the assessment of compensation is not settled in the case-law, with (i) some tribunals depriving such considerations of any relevance for compensation, (ii) other tribunals applying such considerations to limit or even exclude compensation, and (iii) still other tribunals suggesting a middle ground approach.

## V. FUTURE TRENDS

---

(currently pending). See V S Vadi, 'Reconciling Public Health and Investor Rights: The Case of Tobacco' in Dupuy et al, above n 10, 452.

<sup>387</sup> *Tecmed v. Mexico*, above n 18, paras 132-151.

<sup>388</sup> See P-Y Tszhanz, J E Viñuales, 'Compensation for Non-Expropriatory Breaches of International Investment Law. The Contribution of the Argentine Award' (2009) 6 *Journal of International Arbitration* 729; I Marboe, 'Compensation and Damages in International Law. The Limits of "Fair Market Value"' (2006) 7 *Journal of World Investment and Trade* 723.



The purpose of this concluding section is to draw upon the foregoing analysis of the main points of contact between international investment law and international environmental law in order to identify the axis along which the interactions between these two bodies of law will unfold in the future. In conducting this inquiry, one must take into account several trends, as well as the main features of the mechanisms available to manage their potentially conflicting consequences.

Regarding the first aspect of the inquiry, two main trends affecting the relations between foreign investment and environmental protection can be discerned. The first trend concerns the nature of environmental regulation, which is becoming increasingly precise and demanding, with significant consequences for the conduct of business operations abroad. This trend can be observed in the development of environmental regulation both at the international and domestic levels, as well as in the growing number of disputes, brought before investment tribunals or other international judicial or quasi-judicial bodies, involving an environmental component.<sup>389</sup> The second trend concerns the nature of foreign investment, which increasingly flows to developing countries<sup>390</sup> and is in part driven by environment-related concerns or by opportunities in environment-related sectors. This second trend seems to reflect the attractiveness of major emerging economies such as China, India, Brazil and others, as well as the capital exports from these countries to other regions, such as Chinese investments in Africa. Some of these investments concern sectors, such as energy or agriculture, with important consequences for environmental regulation. Moreover, the expected increase in the transfer of resources from developed to developing countries as part of strategies to mitigate and adapt to climate change, the mounting fears over the availability of freshwater resources in many developing countries, and the high costs associated with waste treatment in developed countries, may also channel foreign investment towards developing countries. These two trends combined are likely to place increasing pressure on the legal mechanisms governing the relations between foreign investment and the environment. One may therefore ask how adapted these mechanisms are to manage such pressure.

In order to answer this question, it is necessary to assess the main features of such mechanisms. For the purposes of this inquiry, two features are particularly relevant. The first feature concerns the increasing availability and use of international adjudication mechanisms. Investment arbitration is one major illustration of this trend, with numerous cases brought and decided each year.<sup>391</sup> However, not every area of international law has been equally affected by this trend, and one of the most conspicuous illustrations of this fact is precisely international environmental law. Lacking a specialised body, international environmental adjudication has unfolded in a variety of ‘borrowed forums’, including the International Court of Justice, the International Tribunal on the Law of the Sea, the WTO

---

<sup>389</sup> For a concise overview see T Stephens, *International Courts and Environmental Protection* (Cambridge University Press, Cambridge, 2009); S Maljean-Dubois (ed), *Le droit de l'environnement comme exemple de la mondialisation des concepts juridiques: place et rôle des juridictions internationales et constitutionnelles*, Rapport final de recherche, May 2008, <[http://www.gip-recherche-justice.fr/IMG/pdf/170-RF\\_Maljean-Dubois\\_Droit\\_Environ.pdf](http://www.gip-recherche-justice.fr/IMG/pdf/170-RF_Maljean-Dubois_Droit_Environ.pdf)> (last accessed on 22 February 2010). The most complete collection of domestic and international decisions (although it does not cover investment decisions) remains the series of five volumes published by Cambridge University Press: *International Environmental Law Reports* (vol. 1-3, edited by Cairo A R Robb; vol. 4, edited by Alice Palmer and Cairo A R Robb; vol. 5, edited by Karen Lee).

<sup>390</sup> Foreign investment in developing countries seems to be growing relatively to that in developed countries, see Kekic, above n 14.

<sup>391</sup> See above n 195.

Dispute Settlement Body or the different bodies and courts established to hear human rights cases.<sup>392</sup> This imbalance could be explained by the fact that international adjudication is ill-suited to solve environmental disputes, which would be better handled by other mechanisms, such as the so-called ‘non-compliance procedures’ (NCPs). While there may be some truth in this argument, one cannot overlook the limited results achieved by NCPs so far.<sup>393</sup> Moreover, the lack of an environmental court is not due to the absence of initiatives in this regard.<sup>394</sup> One could therefore wonder whether the environmental dimensions of foreign investment could be adequately taken into account by other adjudication mechanisms, and above all by investment tribunals. This takes us to the second feature, namely the resilience of the investment arbitration regime. Indeed, despite some criticism from both scholars and States, it appears unlikely that the investment arbitration regime will be fundamentally modified in the next few years. As a result, the environmental dimensions of investment disputes that may arise in the next decade will arguable have to be handled with the means currently available to international lawyers. This is partly because, despite attempts at including specific language in investment treaties and free trade agreements, the practical impact of such language remains limited and, in all events, does not modify the foundations of the international investment regime. For this reason, the analysis conducted in this study was aimed at exploring the scope and limits of the existing institutions in accommodating environmental considerations.

The overall conclusion that can be derived from this analysis is rather optimistic. The investment arbitration regime provides several entry points for environmental considerations. This conclusion is suggested by a number of developments, which have been analysed in some detail in the preceding pages, including: (i) the increasing role of environmental protection groups as non-disputing parties in investment proceedings, (ii) the growing part played by environmental arguments in the argumentations of the parties and in the awards, (iii) the relative openness of some tribunals to the use of environmental law either to interpret investment disciplines or to delimitate the boundaries between such disciplines and the State’s regulatory powers, (iv) the increasing incorporation of specific conflict, emergency or necessity clauses in investment treaties and free-trade agreements, and (v) the possibility of introducing environmental components within investment claims. These developments present some interest not only to carve out a role for environmental considerations in foreign investment disputes but also, and perhaps more importantly, to make investors aware of the need to take such considerations seriously in planning and conducting their activities in other countries.

\*  
\*        \*

---

<sup>392</sup> See above n 389.

<sup>393</sup> For an overview of these mechanisms including up-to-date case-studies and comparative analysis see T Treves, L Pineschi, A Tanzi, C Pitea, C Ragni, F Romanin Jacur (eds) *Non-Compliance Procedures and Mechanisms and the Effectiveness of International Environmental Agreements* (T M C Asser Press, The Hague, 2009).

<sup>394</sup> See above nn 129 and 130.