



University  
of Glasgow

Asteriti, Alessandra (2016) *Normative conflicts in international investment law: the case of environmental law*. LL.M(R) thesis.

<http://theses.gla.ac.uk/7604/>

Copyright and moral rights for this thesis are retained by the author

A copy can be downloaded for personal non-commercial research or study

This thesis cannot be reproduced or quoted extensively from without first obtaining permission in writing from the Author

The content must not be changed in any way or sold commercially in any format or medium without the formal permission of the Author

When referring to this work, full bibliographic details including the author, title, awarding institution and date of the thesis must be given

Student number: 0601025A

**Normative Conflicts in International Investment Law: the  
Case of Environmental Law**

Submitted for the Degree of LLM

School of Law

University of Glasgow

June 2016

***To Tony***

## Table of Contents

<b>1. Chapter 1 – Introduction .....</b>	<b>7</b>
1.1 Introduction and Scope .....	7
1.2 International Investment Treaties – A Periodisation .....	8
1.3 Normative Conflicts in the Investment Regime .....	12
<b>2. Chapter 2: Interpretation .....</b>	<b>17</b>
2.1 Introduction .....	17
2.2 Interpretation in Investment Law .....	17
2.3 Article 31(3)(c) in Investment Awards .....	27
2.3.1 <i>SD Myers v Canada</i> .....	27
2.3.2 <i>Grand River v United States</i> .....	29
2.3.3 <i>Adel A Hamadi Al Tamimi v Sultanate of Oman</i> .....	30
2.4 Interim Conclusions on Interpretation .....	33
<b>3. Chapter 3: Conflicts in International Law .....</b>	<b>36</b>
3.1 An Introduction .....	36
3.2 Conflicts Classification .....	36
3.3 Conflict Resolution Techniques .....	39
3.3.1 Hierarchy ( <i>Lex Superior</i> ) .....	40
3.3.2 Temporality ( <i>Lex Posterior</i> and <i>Lex Prior</i> ) .....	44
3.3.3 Specificity ( <i>Lex Specialis</i> ) .....	47
3.4 Concluding Remarks .....	49
<b>4. Chapter 4 – Conflicts in IIAs .....</b>	<b>53</b>
4.1 Conflict Clauses .....	53
4.1.1 The NAFTA .....	55
4.1.2 <i>SD Myers v Canada</i> .....	59
4.1.3 <i>Chemtura v Canada</i> .....	63
4.1.4 The DR-CAFTA .....	64
4.1.5 The Energy Charter Treaty .....	66
4.2 ‘Mutual Supportiveness’ and Soft Clauses .....	68
4.3 Conclusive Remarks .....	71
<b>5. Chapter 5: Conclusions .....</b>	<b>74</b>
<b>6. Bibliography .....</b>	<b>76</b>

## **Abstract**

This dissertation investigates the relationship between investment and environmental obligations from the perspective of international investment law. In order to do so, the dissertation will consider how these obligations might enter into conflicts and what tools are available to investment tribunals to solve these normative conflicts. The dissertation analyses in order interpretative techniques, conflict resolution tools available in general international law, as expressed in the Vienna Convention on the Law of Treaties, and finally express clauses in international investment agreements. The dissertation includes the review of some relevant case law arising from investment agreements in investment treaty tribunals, to discover how in practice these conflict resolution tools are applied and to assess their effectiveness. This dissertation places itself squarely within the debate between the unity and the fragmentation of international law; therefore it tackles the issue of normative conflicts resolution in a dispute settlement environment with the view of gauging their value in maintaining the unity of international law and defuse the risk of fragmentation. The dissertation can only conclude that much work remains to be done, including by providing a more comprehensive taxonomy of possible interventions, both on the legal and political sphere.

## TABLE OF CASES

### Investment Arbitrations

- Achmea BV v The Slovak Republic*, UNCITRAL, PCA Case No 2008-13 (formerly *Eureko BV v The Slovak Republic*), Award on Jurisdiction, Arbitrability and Suspension (26 October 2010).
- Adel A Hamadi Al Tamimi v Sultanate of Oman*, ICSID Case No ARB/11/33, Award (3 November 2015).
- AES Summit Generation Limited AES-Tisza Erömi KFT v The Republic of Hungary*, ICSID Case No ARB/07/22, Award (23 September 2010).
- AES Summit Generation Limited v The Republic of Hungary*, ICSID Case ARB/07/22, Expert Opinion of Professor Piet Eeckhout, 30 October 2008.
- Aguas del Tunari SA v Republic of Bolivia*, ICSID Case No ARB/02/3, Decision on Respondent's Objections to Jurisdiction (21 October 2005).
- Archer Daniels Midland Company and Tate & Lyle Ingredients Americas v United Mexican States*, ICSID Case No ARB(AF)/04/05, Award (21 November 2007).
- Asian Agricultural Products Ltd v Democratic Socialist Republic of Sri Lanka*, ICSID Case No ARB/87/3, Award 27 June 1990 (1991).
- Bayindir Insaat Turizm Ticaret Ve Sanayi AS v The Islamic Republic of Pakistan*, ICSID Case No ARB/03/29, Award (27 August 2009).
- Biloune and Marine Drive Complex Ltd v Ghana Investments Centre and the Government of Ghana*, UNCITRAL (1993) 95 ILR 183, 213.
- Chemtura Corporation v Government of Canada*, NAFTA/UNCITRAL, Award (2 August 2010).
- Chevron Corporation and Texaco Petroleum Company v The Republic of Ecuador (Chevron I)*, PCA Case No 34877, Partial Award on the Merits (30 March 2010).
- Corn Products International, Inc v United Mexican States*, ICSID Case No ARB(AF)/04/01, Decision on Responsibility (15 January 2008).
- Eastern Sugar BV (Netherlands) v The Czech Republic*, UNCITRAL *ad hoc* arbitration, SCC no 088/2004, Partial Award (27 March 2007).
- Electrabel SA v The Republic of Hungary*, ICSID Case No ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability (30 November 2012).
- Empresas Lucchetti SA and Lucchetti Peru SA v Republic of Peru*, ICSID Case No ARB/03/4, Annulment Decision (5 September 2007).
- Glamis Gold Ltd v United States of America*, NAFTA/UNCITRAL, Award (8 June 2009).
- Grand River Enterprises Six Nations Ltd et al v United States of America*, NAFTA/UNCITRAL, Award (12 January 2011).
- HICEE BV v Slovakia*, PCA Case No 2009-11, Partial Award (23 May 2011).
- Hochtief AG v Argentine Republic*, ICSID Case No ARB/07/31, Decision on Jurisdiction (24 October 2011).
- Inceysa Vallisoletana SL v Republic of El Salvador*, ICSID Case No ARB/03/26, Award (2 August 2006).
- International Thunderbird Gaming Corp v United Mexican States*, NAFTA/UNCITRAL, Award (26 January 2006).
- Mondev v United States of America*, NAFTA/ICSID Case No ARB(AF)/99/2, Award (11 October 2002).
- Parkerings-Compagniet AS v Republic of Lithuania*, ICSID Case No ARB/05/8, Award (11 September 2007).
- Phoenix Action Ltd v Czech Republic*, ICSID Case No ARB/06/5, Award (15 April 2009).
- Pope & Talbot v Government of Canada*, NAFTA/UNCITRAL, Interim Award on Merits, Phase 2 (10 April 2001).
- Pope & Talbot*, NAFTA/UNCITRAL, Interim Award on Damages (31 May 2002).
- Romak SA v The Republic of Uzbekistan*, UNCITRAL/PCA Case No AA280, Award (26 November 2009).
- RosInvest Co UK Ltd v Russian Federation*, SCC Case No V079/2005, Award on Jurisdiction (October 2007).
- Saluka Investments BV v Czech Republic*, UNCITRAL, Partial Award (17 March 2006).
- SD Myers Inc v Government of Canada*, NAFTA/UNCITRAL, Partial Award (13 November 2000).
- SGS Société Générale de Surveillance SA v Republic of the Philippines*, ICSID Case No ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction (29 January 2004).
- Southern Pacific Properties (Middle East) Ltd v Arab Republic of Egypt*, ICSID Case No ARB/84/3, Award (20 May 1992) (1993) 8(2) ICSID Review – Foreign Investment Law Journal 328.
- Suez, Sociedad General de Aguas de Barcelona, SA and Vivendi Universal, SA v Argentine Republic*, ICSID Case No ARB/03/19 (formerly *Aguas Argentinas, SA, Suez, Sociedad General de Aguas de*

*Barcelona, SA and Vivendi Universal, SA v Argentine Republic*, Decision on Liability (30 July 2010).

*The Czech Republic and European Media Ventures SA*, Judgment on Application to Set Aside Award on Jurisdiction, 2007 EWHC 2851 (Comm).

#### **PCIJ/ICJ**

*Case Concerning the Barcelona Traction, Light and Power Company Ltd (Belgium v Spain) (Second Phase)* ICJ Reports 1970 p 32.

*Case Concerning the Right of Passage over Indian Territory (Preliminary Objections) (Portugal v India)*, ICJ Reports 1957, 142.

*Case concerning the United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)* ICJ Reports 1980 p 41.

*Competence of the General Assembly Regarding Admission to the United Nations*, Advisory Opinion of 3 March 1950, ICJ Reports 1950, p 4.

*Dispute regarding Navigational and Related Rights (Costa Rica v Nicaragua)*, Judgment, ICJ Reports 2009, p 213.

*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Reports 1971, p 31.

*Mavrommatis Palestine Concessions (Jurisdiction)*, PCIJ, Ser A, No 2 (1924).

*Oil Platforms (Islamic Republic of Iran v United States of America)*, Preliminary Objection, Judgment, ICJ Reports 1996, p 803.

*SS Wimbledon Case*, PCIJ, Ser A, No 1 (1923).

#### **ECJ/CJEU and ECtHR**

Case C-118/07 *Commission of the European Communities v Finland*, Judgment of 19 November 2009 [2009] ECR I-1335.

Case C-459/03, *Commission v Ireland*, Judgment of 30 May 2006 [2006] ECR I-4635 (*Mox Plant Case*).

Case T 315/01 *Kadi v Council of the European Union*, Judgment of 3 September 2008 [2008] ECR I-06351.

*Tyrer v United Kingdom*, Merits, App No 5856/72, A/26, [1978] ECHR 2, (1980) 2 EHRR 1, IHRL 17 (ECHR 1978), 25th April 1978.

#### **WTO Panels and Appellate Body**

*In the Matter of Tariffs Applied by Canada to Certain US-Origin Agricultural Products* (Secretariat File No CDA-95-2008-01), Final Report of the Panel, 2 December 1996, 36.

*Southern Bluefin Tuna Case (Australia and New Zealand/Japan)* Award (4 August 2000) (Jurisdiction and Admissibility) (2004) XXIII UNRIIA 23.

*United States – Import Prohibition of Certain Shrimp and Shrimp Products* (12 October 1998) WT/DS58/AB/R, DSR 1998.

*United States – Import Prohibitions of Certain Shrimp and Shrimp Products* WTO Report of Appellate Body AB-1998-4, WT/DS58/AB/R (12 October 1998).

#### **PCA Arbitrations**

*Iron Rhine Arbitration (Belgium/Netherlands)* 2005 PCA.

*Island of Palmas Case (Netherlands v US)* (1928), PCA, sole arbitrator, Judge Huber, 2 RIAA 829.

#### **Municipal Courts**

Frankfurt Court of Appeal, Case no 26 SchH 11/10, 10 May 2012.

*Murray v Schooner Charming Betsy*, 6 US 64, 118 (1804) 6.

*Sierra Club v EPA*, 118 F 3d 1324, 1327 (9<sup>th</sup> Cir 1997).

*The Attorney General of Canada v SD Myers Inc*, 2004 FC 38.

#### **International Criminal Tribunals**

*Prosecutor v Anto Furundžija*, Judgment 10 December 1998, Case No IT-95-17/1, Trial Chamber II, (2002) 121 ILR 260.

# 1. Chapter 1 – Introduction

## 1.1 Introduction and Scope

In the last fifty years international law has undergone a process of differentiation into separate functional regimes, such as trade law, human rights law, investment law, environmental law and so on. The most developed amongst these regimes are characterised by three features: first, the systematisation of their legal rules through multilateral treaties (for example the WTO Agreements or the United Nations Convention on the Law of the Sea or UNCLOS) or a network of bilateral treaties (for example, International Investment Agreements or IIAs); second, treaty bodies or some other form of international institutional presence<sup>1</sup> (for example, the various human rights bodies within the United Nations, or the World Bank’s International Centre for the Settlement of Investment Disputes); and, third, a form of enforceable dispute settlement system (for example, the WTO’s Panels and Appellate Body, or the system of regional human rights courts, or finally, investment tribunals). This process of differentiation and fragmentation has engendered a sustained debate, mostly focussing on the possible negative influence on the coherence and very survival of the ‘idea of international law’.<sup>2</sup>

One of the outcomes of this differentiation is the potential for conflicts to arise between obligations entered into by States in different areas of international law; one of the most controversial and widely known and analysed is the potential for conflicts between trade law and other areas such as environmental and human rights law, but this is by no means neither the only nor the most egregious example.<sup>3</sup>

---

<sup>1</sup> Institutionalisation, certainly the most momentous of developments from the point of view of its consequences, happens on a scale: at the one hand, one can think of examples of accomplished institutionalisation and constitutionalisation such as the European Union; on the other, more inchoate attempts, where an institutional presence coexists with the traditional bilateralism of international law, as is the case for international investment law. The coexistence of contrasting paradigms in this field has been noted before in the investment literature; it would be wrong to dismiss one paradigm on the basis of the other.

<sup>2</sup> The highest level outcome of these debates can certainly be said to be the report of the International Law Commission (ILC), *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*’ Report of the Study Group of the International Law Commission Finalized by Martti Koskenniemi, A/CN.4/L.682, 13 April 2006, 27. Since then, a more integrationist view has come to the fore, which is in itself indicative of the relevance of the phenomenon; see for example Mads Andenas and Eirik Bjorge (eds), *Farewell to Fragmentation – Reassertion and Convergence in International Law* (CUP 2015).

<sup>3</sup> It is not a coincidence that one of the most influential recent studies on normative conflicts in



This dissertation considers the issue of conflicts in their ‘pure’ form, in that it does not engage with conflict resolution tools out-with those traditionally allowed in international law, ie the customary rules as recognised in the Vienna Convention on the Law of Treaties (VCLT)<sup>4</sup> (Chapter 3) and savings clauses in IIAs (Chapter 4); specifically, the dissertation will not consider the use of proportionality analysis to decide conflicts of rights in a judicial context. This is partially a choice dictated by the length limitations of this work, and partially because I believe it is better to suspend judgment on these normative speculations on the work that tribunals ‘ought to’ perform and rather focus on the work that tribunals ‘do’ perform within the legal framework they find themselves in, as proportionality analysis is still used sparingly by arbitration tribunals.<sup>5</sup> This of course is without prejudice, for example, to the status of proportionality as a customary international law standard of review and as such, applicable to the work of tribunals as directed by the applicable law clauses in the relevant instrument.

## 1.2 International Investment Treaties – A Periodisation

International treaties dedicated exclusively or partially to the regulation of international investment are a relatively new phenomenon with significant historical precedents.<sup>6</sup> For the purpose of this work, there will be considered those treaties signed between 1959 and the present day. It was in that year that Germany signed its first bilateral investment treaty with Pakistan, and this is considered the first modern investment treaty.<sup>7</sup>

---

international law is firmly located in the field of international trade law, and in the context of the resolution of conflicts between trade and environmental obligations; see Joost Pauwelyn, *Conflicts of Norms in Public International Law: How WTO Law Relates to other Rules of International Law* (CUP 2009).

<sup>4</sup> 1969 Vienna Convention on the Law of Treaties, 1155 UNTS 331.

<sup>5</sup> The most recent arbitral pronouncement on the issue by the *Al Tamimi* Tribunal, which refrained from taking a position because it considered the actions indicated by the Complainant not attributable to the State or as having taken place after the investment had ceased to exist; see *Adel A Hamadi Al Tamimi v Sultanate of Oman*, ICSID Case No ARB/11/33, Award (3 November 2015) paras 391 ff.

<sup>6</sup> On the early developments of international investment law, see Edwin Borchard, *The Diplomatic Protection of Citizens Abroad* (Banks Law Publishing 1915); a recent review that takes into account the hybrid origins of the regime in Joost Pauwelyn, ‘At the Edge of Chaos? Foreign Investment Law as a Complex Adaptive System, How It Emerged and How It Can Be Reformed’, (2014) 29 ICSID Review – Foreign Investment Law Journal 372.

<sup>7</sup> Treaty for the Promotion and Protection of Investments (with Protocol and exchange of notes), Germany and Pakistan, 25 November 1959, 457 UNTS 24 (entered into force 28 November 1962).

In this work, reference will be made to a chronological periodisation in four phases: the first one from 1959 to 1992; the second one, from 1992 to 2004; the third one, from 2004 to the early 2010s; the fourth period is now in its infancy and for the purpose of this periodisation, it is still difficult to say what will be its defining characteristics. Any such categorisation risks simplifying too much what is a complex area of law; the intention of this exercise is to bring to the fore certain elements of the investment instruments (inevitably to the detriment of other, equally important, characteristics) connected to contemporary developments in environmental protection law. This in itself can point to longer term trends in the parallel developments of these disciplines: how do they interact? Is there a pattern of systemic closure or mutual learning, or one-way influence? Arguably all these questions require a more nuanced answer than this rough categorisation is capable of offering; however, its role here is strictly utilitarian, rather than the springboard to more in-depth analysis, and as such is included in this work. The focus on developments in the US context is organic to the specific interaction of investment and environmental rules in North America, especially following the North America Free Trade Agreement (NAFTA) and the investment arbitrations arising under its Chapter Eleven.<sup>8</sup>

The first period covers the first generation bilateral investment treaties (BITs), mostly ratified between European and developing countries in Africa, Asia and South America. They are ‘pure’ investment treaties, more political tools than legally binding agreements (at least in the intentions of the drafters) with few, general, substantive provisions and, from the late 1960s onwards, mixed arbitration clauses, with or without direct reference to the International Centre for the Settlement of Investment Disputes (ICSID) Convention.<sup>9</sup> Almost none of them contains any language expressly relating to environmental obligations of the State host of the investment, particularly other international environmental obligations. This first generation of treaties is characterised by a focus on investment protection, and has generally been considered as an example of the orthodox approach to investment protection, seen in isolation from its international law framework. But the eminently *political* nature of this generation of

---

<sup>8</sup> North American Free Trade Agreement, US-Canada-Mexico, 17 December 1992, 32 ILM 289 (1993).

<sup>9</sup> 1965 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, 575 UNTS 159.

treaties should not be forgotten;<sup>10</sup> to the extent that their forensic interpretation by tribunals adopts an isolationist approach, that in itself can be construed as a politically motivated interpretation *ex post* of these treaties. No independent investment regime existed at the time the treaties were first concluded. Nonetheless, it remains the case that a *prima facie* claim that first generation treaties do not explicitly incorporate environmental, or other non-investment, obligations remains true.

The second period starts from 1992, the year in which Canada, the United States and Mexico signed the North America Free Trade Agreement (NAFTA);<sup>11</sup> this period is characterised by a series of phenomena including the exponential growth of BITs; the consolidation into the field of investment treaties of the United States, both with BITs and with the regional free trade agreements (FTAs) with an investment chapter, which will be the model for further developments; and the beginnings of the investment arbitration explosion which will define the next phase, with the consolidation of the ISDS system.<sup>12</sup> The second generation of treaties is characterised by the consistent inclusion of the dispute settlement clause; additionally, at the tail-end of the period, the treaties signed by the United States started including a reference to labour and environmental obligations in their preambles. It is the combination of the powerful dispute settlement tool and the relative ambiguity and openness of the language of the treaties to have created the conditions for the interpretative leeway taken by some tribunals in delivering their awards. From the perspective of this study, in this period we also see the first treaties that include non-investment, including especially environmental, obligations in the body of the treaty.

The third period starts with the modification, made by the United States and Canada in 2004, of their model BITs in the direction of a clarification of the language and limitations of the scope of some protections. This, as the other dates chosen, is a somewhat artificial distinction, belieing some longer term trends. Just as the NAFTA heralded a ‘bull’ period for the investment treaty fortunes, the modified BITs by the

---

<sup>10</sup> See for example Joost Pauwelyn, ‘Rational Design or Accidental Evolution? The Emergence of International Investment Law’, in Zachary Douglas, Joost Pauwelyn and Jorge E Viñuales, *The Foundations of International Investment Law* (OUP 2014) 11, 23 ff.

<sup>11</sup> NAFTA (n 8).

<sup>12</sup> The first treaty investment arbitration award was issued in 1990, *Asian Agricultural Products Ltd v Democratic Socialist Republic of Sri Lanka*, ICSID Case No ARB/87/3, Award 27 June 1990 (1991) 6 ICSID Review – Foreign Investment Law Journal 526.

United States and Canada are symptomatic of the ‘backlash’ in the fortunes of the BITs and the start of a ‘bear’ period for their market.<sup>13</sup> The period is also characterised by the downward trend in the ratification and conclusion of new BITs, now more often referred to as ‘international investment agreements (IIAs) contextually to the growth of regional and bilateral FTAs, especially in Asia, and the development of what could be called *FTAs plus*, that is, agreements containing investment chapters and side agreements, or chapters, on environmental, labour and human rights obligations, more explicitly pegged to other international treaties. Once again, the United States can be seen as the catalyst for change, as at the beginning of the second period. This is particularly the case with regards to the inclusion of provisions beyond the regulation of trade and investment, as a consequence of the adoption by the US Congress of the 2002 Bipartisan Trade Promotion Authority Act.<sup>14</sup> This Act, which expired in 2007, gave the President the authority to negotiate trade agreements contextually dictating a series of ‘trade negotiating objectives’ to include ‘to ensure that trade and environmental policies are mutually supportive and enhance the international means of doing so’, ‘to promote respect for worker rights and the rights of children consistent with core labor standards of the ILO’ and ‘to strive to ensure that [trade] agreements do not weaken or reduce the protections afforded in domestic environmental and labor laws as an encouragement for trade’.<sup>15</sup>

The fourth, current period, is developing along a further hybridisation of clauses (for our purpose, the presence of environmental clauses), a regionalisation and multilateralisation of agreements and possibly dramatic developments in the dispute settlement facilities, including the proposal for an investment court at EU level<sup>16</sup> and,

---

<sup>13</sup> The trend is continuing, according to the UNCTAD’s *World Investment Report 2013* (United Nations 2013), 101; according to the Report, 2012 saw the lowest number of new BITs being signed in a single years since the late 1980s. The more recent 2015 Report also attests to a trend towards reform, with almost 50 countries and regions undergoing a process of reform of their current IIAs; see UNCTAD, *World Investment Report 2015* (United Nations 2015) xi and 106 ff. Finally, amongst the high-level ‘exits’, Italy announced in January 2015 its intention to withdraw from the Energy Charter Treaty with effect on January 2016; see ‘Italy Withdraws from Energy Charter Treaty’, Global Arbitration News, 6 May 2015, <http://globalarbitrationnews.com/italy-withdraws-from-energy-charter-treaty-20150507/> accessed 17 December 2015.

<sup>14</sup> 19 USC § 3801 (2006).

<sup>15</sup> Sec 2102 (Trade Negotiating Objectives) of the Act.

<sup>16</sup> See ‘Commission proposes new Investment Court System for TTIP and other EU trade and investment negotiations’ European Commission Press Release, 16 September 2015, [http://europa.eu/rapid/press-release\\_IP-15-5651\\_en.htm](http://europa.eu/rapid/press-release_IP-15-5651_en.htm); ‘EU finalises proposal for investment protection and Court System for TTIP’, European Commission Press Release, 12 November 2015, [http://europa.eu/rapid/press-release\\_IP-15-6059\\_en.htm](http://europa.eu/rapid/press-release_IP-15-6059_en.htm) accessed 17 December 2015. A permanent investment tribunal and

less dramatically, the increased occurrence of disputes where investors challenge not environmental measures, but the withdrawal of environmental subsidies,<sup>17</sup> in a re-balancing of the role of the ‘environmental other’ in the investment regime.<sup>18</sup>

The periodisation followed in this dissertation (minus the fourth phase) has been proposed before;<sup>19</sup> the novel element is taking the development of the non-investment aspects, and specifically, the environmental element, as the defining marker for the differentiation between the stages. It is noteworthy that even when taking different markers into account, a similar periodisation emerges, pointing to similar trends within the investment regime, regardless of the indicator into consideration (for example, the relationship between the investment and the human rights, or labour law, regime).

### 1.3 Normative Conflicts in the Investment Regime

Normative conflicts in international law can arise whenever there is a conflict between international obligations or between domestic and international obligations; the focus of this dissertation is on the way in which investment law accommodates environmental law and the possible conflicts between these areas of law. However, the reference to normative conflicts is to be intended to cover at least three different dimensions: at the highest level of generalisation, the tension between the demands of investment and of environmental protection; at the medium level, the specifically legal interaction between the investment and environmental law regimes; at the lowest level, the more restricted field of conflict rules, both as expressed in the VCLT and reflective of customary law and as contained in specific clauses in IIAs.

---

appellate investment tribunal, and the commitment to the establishment of a permanent investment court have been included in the latest version of the Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada; see the Press Release of 29 February 2016 by the EU Commission, [http://europa.eu/rapid/press-release\\_IP-16-399\\_en.htm](http://europa.eu/rapid/press-release_IP-16-399_en.htm) accessed 24 May 2016. Similar provisions are included in the EU-Vietnam FTA; see Press Release by the EU Commission of 1 February 2016, <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1449> accessed 24 May 2016.

<sup>17</sup> See Alessandra Asteriti, ‘Climate Change Policies and Foreign Investment: Some Salient Legal Issues’ in Yulia Levashova, Tineke Lambooy and Ige Dekker (eds), *Bridging the Gap between International Investment Law and the Environment* (Eleven Legal Publishing 2015) 145.

<sup>18</sup> See for example, Steffen Hindelang and Markus Krajewski, *Shifting Paradigms in International Investment Law – More Balanced, Less Isolated, Increasingly Diversified* (OUP forthcoming 2016).

<sup>19</sup> See for example Pauwelyn (n 3) 11; Kenneth J Vandeveld, ‘Model Bilateral Investment Treaties: The Way Forward’ (2011) 18 *South-western Journal of International Law* 307.

Areas of public policy such as those pertaining to the protection of foreign investment and the development of environmental measures have undergone a process of juridification at the international level,<sup>20</sup> whereby they are subject more and more to legal regulation by means of bilateral, regional and multilateral instruments. This legal growth has engendered the already mentioned differentiation – ie, the evolution of discrete sectoral regimes of law dealing with areas of public policy (trade, investment, environment, etc) in an autonomous way – which manifests itself, in the investment regime, as a problem of conflict resolution contextual to investment disputes.

Paradoxically, while international law has undergone a considerable growth, this has not been accompanied by an equally developing system of rules for dealing with the potential conflicts and by the work of international courts and tribunals applying conflict rules to the disputes. On the contrary, it has been noted that ‘There is relatively little – in fact, until recently, astonishingly little – judicial or arbitral practice on normative conflicts.’<sup>21</sup> In other words, the juridification of several areas traditionally associated with international relations and diplomacy or with national policy-making has not been accompanied by a systematic approach to the resolution of the potential normative conflicts, which are still left to be solved politically or diplomatically by inter-State negotiations. In this respect, the investment dispute settlement system provides its own solution, as investors are free to initiate a dispute out-with the control of their home State; political attempts to achieve convergence in an extra-judicial framework, for example through treaty amendments, are potentially in tension with the the dispute settlement system of investment law, where private investors are conferred international standing to vindicate treaty rights. While the investor-State dispute settlement (ISDS) system offers the opportunity to tribunals to provide a judicial resolution to normative conflicts, the political significance of the conflicts often results either in an unwillingness to engage creatively with the conflict or in a default closure towards non-investment issues justified in jurisdictional terms.<sup>22</sup>

---

<sup>20</sup> For juridification as a process, see Jürgen Habermas, *The Theory of Communicative Action* (2 voll, Beacon Press 1987) vol II 359.

<sup>21</sup> ILC (n 2) 27.

<sup>22</sup> The distinction between contractual breaches and treaty breaches, commonly adopted by investment tribunals, serves to maintain this separation, as can the applicable law clauses often contained in IIAs.

The limited judicial practice can be partially explained by the strong presumption against conflicts that underpins international law,<sup>23</sup> according to which States enter into legal obligations without wilfully contradicting or deviating from previous obligations.<sup>24</sup> The practical consequences of this presumption rest with the conditional obligation imposed upon international courts and tribunals to interpret as far as possible the law applicable to a dispute so as not to engender a normative conflict. If more than one interpretation of a norm is warranted,<sup>25</sup> courts are directed to that interpretation that is consistent with the other, potentially conflicting norm and therefore helps to maintain the overall coherence of the system.<sup>26</sup> In the *Rights of Passage* Case, the ICJ stated the following: ‘[...] it is a rule of interpretation that a text emanating from a Government must, in principle, be interpreted as producing and intended to produce effects in accordance with existing law and not in violation of it.’<sup>27</sup> The limits of the obligation rest squarely at the *attempt* to interpret, and there is not in international law a *duty* of harmonious interpretation.<sup>28</sup> The presumption against conflict can be reinforced by

---

<sup>23</sup> ILC (n 2) 25.

<sup>24</sup> See the Arbitration Tribunal in the *Southern Bluefin Tuna Case (Australia and New Zealand/Japan)* Award (4 August 2000) (Jurisdiction and Admissibility) (2004) XXIII UNRIAA 23, para 38(c). Unless of course the new obligation is undertaken in express and conscious contradiction to a previous rule, either treaty based, or as form of *lex specialis* with respect to general international law; see Pauwelyn (n 3) 207.

<sup>25</sup> The proposition that more than one interpretation of a treaty is warranted is in itself contested. See for the assumption that treaties can have only one ‘authentic meaning’, *HICEE BV v Slovakia*, PCA Case No 2009-11, Partial Award (23 May 2011) para 139; against it, the wording of Article 17(6) of the Agreement on Implementation of Article VI of the General Agreements on Tariffs and Trade 1994 (Anti-dumping Agreement); the language of the Article was adopted at the request of the United States, in order to direct WTO panels to adopt the most deferential standard of review (the ‘rational basis’ in US constitutional parlance) to the practice of WTO parties and is therefore ultimately derived from the judicial review approach to interpretation. See also Donald McRae, ‘Treaty Interpretation by the WTO Appellate Body: The Conundrum of Article 17(6) of the WTO Antidumping Agreement’ in Enzo Cannizzaro (ed), *The Law of Treaties Beyond the Vienna Convention* (OUP 2011) 164. How much this should also be the standard adopted in investment law cannot escape from the analogy between the investment regime itself and internationalised forms of judicial review, which has been advocated from several quarters. See for example Stephan Schill (ed), *International Investment Law and Comparative Public Law* (OUP 2010); Anthea Roberts, ‘The Next Battleground: Standards of Review in Investment Treaty Arbitration’ (2011) 16 *ICCA Congress Series* 170.

<sup>26</sup> Article 32(b) of the VCLT allows recourse to supplementary means of interpretation, whenever the interpretation in accordance to Article 31 ‘leads to a result which is manifestly absurd or unreasonable’. If the presumption against normative conflict is a principle applicable to the general rule of interpretation, it is reasonable to assume that any potential normative conflict should direct the court or tribunal to have recourse to Article 32’s supplementary means of interpretation in order to avoid an unreasonable result. It is noteworthy that this Article is seldom mentioned, let alone applied, by investment tribunals.

<sup>27</sup> *Case Concerning the Right of Passage over Indian Territory (Preliminary Objections) (Portugal v India)*, ICJ Reports 1957, 142. The locus classicus for this principle is *Murray v Schooner Charming Betsy*, 6 US 64, 118 (1804) 6.

<sup>28</sup> *Electrabel SA v The Republic of Hungary*, ICSID Case No ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability (30 November 2012) para 4.173. A domestic example of the limits of

conflict-minimising measures. Treaties might contain express conflict clauses regulating the normative relationship between successive treaties or the intra-treaty consistency of norms.<sup>29</sup> Umbrella clauses in investment treaties can function as a sort of conflict norm, by establishing the binding force of the contractual obligations of the host State as a matter of international law, even if their role might be more correctly identified as creating a conflict of international obligations, by elevating the contractual obligation (which would have perished in its encounter with the treaty obligation) to the status of international law.<sup>30</sup> Where the treaty does not contain any express provisions, conflicts are dealt with through the applicable rules in the VCLT<sup>31</sup> and supplementary means of interpretation and conflict resolution derived from domestic and comparative law.<sup>32</sup>

In the periodisation offered above, the incorporation of environmental law within the body of investment treaties is often accompanied by the addition of conflict resolution clauses in different forms and of varying effect. To this extent, this field of law exhibits a certain level of awareness of the potential disruptive nature of normative conflicts for the functioning of the regime, and especially its dispute settlement system. Furthermore, the incorporation of these clauses is often the direct result of some ‘landmark’ tribunal awards where environmental and investment obligations were the subject matter of the dispute. I have already remarked that environmental law has been a

---

interpretation is Section 3(1) of the United Kingdom’s Human Rights Act 1998 ch 42 ‘*So far as it is possible to do so*, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.’ [emphasis added]

<sup>29</sup> For examples of these clauses in IIAs, see Chapter 4.

<sup>30</sup> On umbrella clauses in investment treaties, see Ignaz Seidl-Hohenveldern, *International Economic Law* (Kluwer Law International 1999) 154; James Crawford, ‘Treaty and Contract in Investment Arbitration,’ *The 22<sup>nd</sup> Freshfields Lecture on International Arbitration*, London, 29 November 2007; Katia Yannaca-Small, ‘Interpretation of the Umbrella Clause in Investment Agreements,’ Paper presented at the APEC – UNCTAD Regional Seminar on Investor-State Dispute Settlement, Mexico City, 9-10 October 2006 (OECD Working Papers on International Investment, 2006/3). Umbrella clauses are becoming less popular, and only one of the IIAs reviewed in the 2015 UNCTAD Report contains one: see UNCTAD (n 14) [2015] 112.

<sup>31</sup> Article 27 VCLT regulates conflicts between treaty and domestic law; Article 30 VCLT uses temporality as the governing rule on the applicability of successive treaties having the same subject matter; Articles 53 and 64 VCLT determine the hierarchy between treaties and peremptory norms; Article 59 VCLT regulates the implied termination of a treaty following the conclusion of another treaty on the same subject matter.

<sup>32</sup> The importance of supplementary means of interpretation has been played down in the VCLT, which does not mention them explicitly (except for Article 32), however their practical importance in investment arbitrations has been stressed; see for example Thomas Wälde, ‘Interpreting Investment Treaties: Experiences and Examples’ in Christina Binder and others, *International Investment Law for the 21<sup>st</sup> Century: Essays in Honour of Christoph Schreuer* (OUP 2009) 724, 733. A misuse of the preparatory work in *Inceysa Vallisoletana SL v Republic of El Salvador*, ICSID Case No ARB/03/26, Award (2 August 2006) paras 192 ff, especially 200.



driver for change in investment treaties; yet another manifestation of its effect is the inclusion of conflict clauses in investment treaties as a preventive measure to manage and solve normative conflicts at the different stages of development of the law.

## 2. Chapter 2: Interpretation

### 2.1 Introduction

Treaty interpretation is undertaken by many different actors, at many levels.<sup>33</sup> It is in the first instance an activity undertaken by States in their role as masters of the treaty. So it is the Contracting Parties themselves that act as treaty interpreters in their executive, legislative and judicial practice. This *performative* interpretation – ie, the interpretation by States intrinsic to the performance of the treaty – is other than the *forensic* interpretation by courts and tribunals in the course of disputes arising under that treaty. States also participate in forensic interpretation to the extent that they are parties not only to the treaties, but also to the judicial or arbitral proceedings that might arise from those treaties.<sup>34</sup> States' submissions are part of State practice,<sup>35</sup> contributing to the development of general international law, as one of the elements of customary law formation, and aid the process of interpretation within the meaning attributed to practice by Article 31(3)(b);<sup>36</sup> however, to the extent that they are unilateral, as they are bound to be in an ISDS context, they cannot, on their own, constitute examples of authoritative interpretations.

### 2.2 Interpretation in Investment Law

In the case of investment tribunals, the forensic interpretation is geared towards the resolution of a particular dispute regarding a specified set of parties and is not binding on future tribunals confronted with different parties and acting, most likely, under a different instrument. Nonetheless, and without prejudice to the limitations imposed by Article 31(3)(b) VCLT, the harmonious development of international investment law is said to benefit from due attention being paid to the role of tribunals in the development of a *jurisprudence constante* which can be relied upon by the parties (both to the treaties and to the dispute) to guide their behaviour, and where therefore the forensic interpretation is informed not only by the language of the applicable treaty, but also by

---

<sup>33</sup> See most recently Andrea Bianchi, Daniel Peat and Matthew Windsor (eds), *Interpretation in International Law* (OUP 2015), especially Chapters 2 and 7.

<sup>34</sup> On the double role of States in this regards, see for example the Dissenting Opinion of Sir Franklin Berman in *Empresas Lucchetti SA and Lucchetti Peru SA v Republic of Peru*, ICSID Case No ARB/03/4, Annulment Decision (5 September 2007) paras 9 ff.

<sup>35</sup> Wälde argues that arguments submitted in litigation are evidence of State practice unless contradicted by State's behaviour outside the litigation context; see Wälde (n 32) 767.

<sup>36</sup> See Richard Gardiner, *Treaty Interpretation* (OUP 2008) 225 ff and treatment of the topic *infra*.

the interpretation of similar language provided by previous arbitral panels.<sup>37</sup> As noted by Thomas Wälde in his Separate Opinion in the *Thunderbird Award*:

In international and international economic law – to which investment arbitration properly belongs – there may not be a formal ‘stare decisis’ rule as in common law countries, but precedent plays an important role. Tribunals and courts may disagree and are at full liberty to deviate from specific awards, but it is hard to maintain that they can and should not respect well-established jurisprudence. WTO, ICJ and in particular investment treaty jurisprudence shows the importance to tribunals of not ‘confronting’ established case law by divergent opinion – except if it is possible to clearly distinguish and justify in-depth such divergence.<sup>38</sup>

However, not all tribunals, and not all commentators, agree on the role and function of arbitral awards. For example, in the *Chevron case*, the Tribunal stated that

It is not evident *whether* and if so to what extent arbitral awards are *of relevance* to the Tribunal’s task. It is in any event clear that the decisions of other tribunals are *not binding* on this Tribunal [...] However, this does not preclude the Tribunal from considering arbitral decisions and the arguments of the Parties based upon them, to the extent that it may find they *shed any useful light* on the issues that arise [...].<sup>39</sup> [emphasis added]

Equally, in its Decision on Jurisdiction, the *Quiborax* Tribunal reported contrasting positions within the panel on the relevance of previous decisions or awards to the case:

---

<sup>37</sup> The *Glamis* Tribunal put it clearly at the outset of its Award: ‘A case-specific mandate is not license to ignore systemic implications. To the contrary, it arguably makes it all the more important that each tribunal renders its case-specific decision with sensitivity to the position of future tribunals and an awareness of other systemic implications’; *Glamis Gold Ltd v United States of America*, NAFTA/UNCITRAL, Award (8 June 2009) para 6. The different approaches can also be subsumed under the bilateral v multilateral (and multilateralising) paradigms of the investment regime; see Stephan Schill, ‘Ordering Paradigms in International Investment Law: Bilateralism – Multilateralism – Multilateralization’ in Douglas and others (n 10) 109, 131 ff. See also in general Stephan Schill, *The Multilateralization of International Investment Law* (CUP 2009); the contrary position is consistent with a commercial approach to arbitration. See also Thomas Schultz, ‘Against Consistency in Investment Arbitration’ in Douglas and others (n 10) 297.

<sup>38</sup> *International Thunderbird Gaming Corp v United Mexican States*, NAFTA/UNCITRAL, Award (26 January 2006) Separate Opinion, para 129.

<sup>39</sup> *Chevron Corporation and Texaco Petroleum Company v The Republic of Ecuador (Chevron I)*, PCA Case No 34877, Partial Award on the Merits (30 March 2010) paras 163–64. This long standing dispute between Chevron and Ecuador resulted in two international arbitrations, and several domestic proceedings in the US and in Ecuador.

The Tribunal considers that it is not bound by previous decisions. At the same time, it is of the opinion that it must pay due consideration to earlier decisions of international tribunals. Specifically, it deems that, subject to compelling contrary grounds, it has a duty to adopt solutions established in a series of consistent cases. It further deems that, subject to the specifics of the Treaty and of the circumstances of the actual case, it has *a duty to contribute to the harmonious development of investment law*, with a view to meeting the legitimate expectations of the community of States and investors towards the certainty of the rule of law. Arbitrator Stern does not analyze the arbitrator's role in the same manner, as she considers it her duty to decide each case on its own merits, independently of any apparent jurisprudential trend.<sup>40</sup> [emphasis added]

Sentiments similar to the dissenting opinion expressed by Arbitrator Stern are evident in the approach taken by the *Romak* Tribunal:

With respect to arbitral awards, this Arbitral Tribunal considers that it is not bound to follow or to cite previous arbitral decisions as authority for its reasoning or conclusions. Even presuming that relevant principles could be distilled from prior arbitral awards (which has proven difficult with respect of many of the decisions cited by the Parties in these proceedings), they cannot be deemed to constitute the expression of a general consensus of the international community, and much less a formal source of international law. Arbitral awards remain *mere sources of inspiration, comfort or reference to arbitrators*.<sup>41</sup> [emphasis added]

The general rule in Article 31 VCLT provides a holistic approach to treaty interpretation that subsumes the three main canons, textual, subjective and teleological.<sup>42</sup> As noted by the *Aguas del Tunari* Tribunal,

---

<sup>40</sup> This statement had already been made by the Tribunal in *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v The Islamic Republic of Pakistan*, ICSID Case No ARB/03/29, Award (27 August 2009) para 145, with the difference that no disagreement with this approach had been expressed.

<sup>41</sup> *Romak SA v The Republic of Uzbekistan*, UNCITRAL/PCA Case No AA280, Award (26 November 2009) para 170. See also *RosInvest Co UK Ltd v Russian Federation*, SCC Case No V079/2005, Award on Jurisdiction (October 2007) para 137; *Hochtief AG v Argentine Republic*, ICSID Case No ARB/07/31, Decision on Jurisdiction (24 October 2011) paras 57-8.

<sup>42</sup> Article 31(1): 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose'. See for example Gardiner (n 36), 8 and 33 ff. The use of the singular 'rule' points to the unitary character of the process of interpretation, rather than restricting the number of rules or principles of interpretation.

Interpretation under Article 31 of the Vienna Convention is a process of progressive encirclement where the interpreter starts under the general rule with the (1) ordinary meaning of the terms of the treaty, (2) in their context and (3) in light of the treaty's object and purpose, and by cycling through this three step inquiry iteratively closes in upon the proper interpretation.<sup>43</sup>

Against much contemporary discourse on the importance of Article 31(3)(c) for systemic integration of international legal regimes, it is imperative to restate the role of Article 31(1) in the interpretative work of tribunals, including the space given in it to the 'object and purpose' of the treaty in its context. Two preliminary remarks seem apposite:<sup>44</sup> first, the balancing of obligations that is at the basis of systemic integration is implicit in the wording of Article 31(1) already, at least on some reading of the inclusion of the good faith requirement in the interpreting exercise, as done by the WTO Appellate Body in the *United States – Shrimp* Report. In that dispute, that centred on the application of Article XX GATT, the AB clarified that it interpreted the chapeau of that Article as:

[...] one expression of the principle of good faith [...] The task of interpreting and applying the chapeau is, hence, essentially the delicate one of locating and marking out a line of equilibrium between the right of a Member to invoke an exception under Article XX and the rights of the other Members under varying substantive provisions [...] of the GATT 1994 [...].<sup>45</sup>

The AB conflated here the interpretation and application of the provisions of the GATT under the rubric of good faith;<sup>46</sup> nonetheless, its use of this principle contextually to the interpretation of the scope of the chapeau to Article XX is useful to the argument that good faith, and the balancing of rights and obligations of States, is an intrinsic and

---

<sup>43</sup> *Agua del Tunari SA v Republic of Bolivia*, ICSID Case No ARB/02/3, Decision on Respondent's Objections to Jurisdiction (21 October 2005) para 91.

<sup>44</sup> The ILC, in its Commentary on the Draft Articles on Interpretation, put it this way: 'All the various elements, as they were present in any given case, would be thrown into the crucible, and their interaction would give the legally relevant interpretation.' United Nations Conference on the Law of Treaties: Official Records: Documents of the Conference, A/CONF39/11/Add.2 p 39 para 8. Leaving aside the wishful thinking flavour, the metaphor remains a powerful statement of the equal importance attributed by the ILC to the various elements of the interpretative work.

<sup>45</sup> *United States – Import Prohibitions of Certain Shrimp and Shrimp Products* WTO Report of Appellate Body AB-1998-4, WT/DS58/AB/R, 12 October 1998, paras 158-159.

<sup>46</sup> As noted by Gardiner (n 36) 159.

necessary part of the hermeneutic work of tribunals, and comes to life especially where the treaty explicitly allows for an exception to its obligations.

Second, a restrictive interpretation confined to the close textual reading of the language of the treaty is not warranted nor envisaged by an ordinary reading of the terms of Article 3 VCLT. However, it is equally necessary to point out two considerations: first, the textual approach is normally practised, and often defended, by international courts and tribunals of all levels;<sup>47</sup> second, the determination of what constitutes the ‘object and purpose’ of a treaty is inevitably prone to subjectivity and imprecision.<sup>48</sup> It has been convincingly shown that the terms ‘object and purpose’ have to be interpreted in accordance with their meaning in the equally authoritative French version of the Convention, which adopts French public law’s distinction between object (*object*), denoting the substantive content of a treaty, and purpose (*but*), denoting the goal for which those substantive provisions are put in place; however this distinction does not necessarily aid the process of identification of the object and purpose for the contextual and teleological interpretation of the provisions of a treaty.<sup>49</sup> In the last analysis, a careful balance between the textual and purposive interpretation, whereby, I would submit, the textual interpretation constitutes the ‘outer limit’ of the purposive approach. In other words, the textual approach has in the end function as a fetter for unbound purposive interpretation. Therefore, to the crucible metaphor adopted by the ILC it is necessary to add an element of subordination of the purposive to the textual, and within

---

<sup>47</sup> See already the ICJ in *Competence of the General Assembly Regarding Admission to the United Nations*: ‘[T]he first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty, is to endeavour to give effect to them in their natural and ordinary meaning in the context in which they occur. If the relevant words in their natural and ordinary meaning make sense in their context, that is the end of the matter’. (Advisory Opinion of 3 March 1950, ICJ Reports 1950, p 4, 8).

<sup>48</sup> *The Czech Republic and European Media Ventures SA*, Judgment on Application to Set Aside Award on Jurisdiction, 2007 EWHC 2851 (Comm), paras 16-17: ‘It is clear that the proper approach to the interpretation of Treaty wording is to identify what the words mean in their context (the textual method), rather than attempting to identify what may have been the underlying purpose in the use of the words (the teleological method). [...] The search for a common intention is likely to be both elusive and unnecessary. Elusive, because the contracting parties may never have had a common intention: only an agreement as to a form of words. Unnecessary, because the rules for the interpretation of international treaties focus on the words and meaning and not the intention of one or other contracting party, unless that intention can be derived from the object and purpose of the treaty [Art.31 of the Vienna Convention], its context [Art.31.1 and 31.2] or a subsequent agreement as to interpretation [Art.31.3(a)] or practice which establishes an agreement as to its interpretation [Art.31.3(b)]’.

<sup>49</sup> Gardiner (n 36) 191-192.

the purposive approach, of the substantive content (for which again, the correctness of the textual hermeneutic analysis is crucial) to the ultimate goal of the treaty.

Some treaties specify their object and purpose in a separate Article, normally at the very beginning. This is the case with the NAFTA and its Article 102 (Objectives) and the Energy Charter Treaty and its Article 2 (Purpose of the Treaty).<sup>50</sup> More commonly though, the preamble of a treaty is the most common starting point for the identification of its object and purpose;<sup>51</sup> however, recent treaties especially tend to have comprehensive preambles, listing numerous aims, which might well result in tensions and conflict when these are translated from the lofty environment of the preambular statement of purpose to the reality of application of substantive obligations. Conversely, a facile ‘translation’ of the policy-heavy, non binding language of the preamble into binding substantive obligations is an equally controversial exercise. For example, the *SGS/Philippines* Tribunal concluded that:

The BIT is a treaty for the promotion and reciprocal protection of investments. According to the preamble it is intended ‘to create and maintain favourable conditions for investments by investors of one Contracting Party in the territory of the other. *It is legitimate to resolve uncertainties in its interpretation so as to favour the protection of covered investments.*’<sup>52</sup> [emphasis added]

The *SGS* Tribunal used the language of the preamble to resolve a textual ambiguity within the treaty *in favorem* investors. As already noted, while the restrictive interpretation approach expressed by the Latin maxim *in dubio mitius* has been overwhelmingly rejected by international courts and tribunals,<sup>53</sup> nonetheless, a more

---

<sup>50</sup> On the use of Article 102 NAFTA in the interpretation and application of the agreement in a Chapter 20 (interstate) dispute, see *In the Matter of Tariffs Applied by Canada to Certain US-Origin Agricultural Products* (Secretariat File No CDA-95-2008-01), Final Report of the Panel, 2 December 1996, 36.

<sup>51</sup> See *Oil Platforms (Islamic Republic of Iran v United States of America)*, Preliminary Objection, Judgment, ICJ Reports 1996, p 803, para 27. For more examples, see Eric Suy, “Le préambule”, in Emile Yakpo and Tahar Boumedra (eds) *Liber Amicorum Mohammed Bedjaoui* (Kluwer Law International 1999) 253.

<sup>52</sup> *SGS Société Générale de Surveillance SA v Republic of the Philippines*, ICSID Case No ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction (29 January 2004) para 116.

<sup>53</sup> A recent statement of this approach by the ICJ: ‘While it is certainly true that limitations of the sovereignty of a State over its territory are not to be presumed, this does not mean that treaty provisions establishing such limitations, such as those that are in issue in the present case, should for this reason be interpreted a priori in a restrictive way. A treaty provision which has the purpose of limiting the sovereign powers of a State must be interpreted like any other provision of a treaty, i.e.

balanced approach than that taken by the *SGS* Tribunal is preferable, as expressed for example by the *Mondev* Tribunal:<sup>54</sup>

In the Tribunal's view, there is no principle either of extensive or restrictive interpretation of jurisdictional provisions in treaties. In the end the question is what the relevant provisions mean, interpreted in accordance with the applicable rules of interpretation of treaties. These are set out in Articles 31-33 of the Vienna Convention on the Law of Treaties, which for this purpose can be taken to reflect the position under customary international law.

A second criticism can be moved to the *SGS* Tribunal, to the effect that it too easily conflated object and purpose of the treaty and then made a logical leap between the stated purpose and the means necessary to accomplish it. As to the first point, the object of an investment agreement is the promotion and protection of investments, meaning that its substantive content and the rights and obligations expressed therein have to do with the promotion and protection of investments; it might follow that this is at least one of the purposes of the treaty as well, but not that, in order for this purpose to be furthered, any textual ambiguity has to be resolved as to favour investors, because the favourable treatment granted to that individual investor might non further the ultimate goal of the promotion and protection of investments in general. It could even be argued that an over-protective stance might in the long run damage the interests of the investors, as one might surmise from the 'backlash' towards investment arbitration and the spate of redrafting, renegotiations and renunciations of investment agreements.<sup>55</sup>

For the purpose of the harmonisation and de-fragmentation of diverse sub-systems of law, which are more directly relevant to the encounter between investment and environmental obligations, Article 31(3)(c), directing the courts and tribunals to '[take] into account, together with the context: (c) any relevant rules of international law applicable in the relations between the parties', has been singled out as having the

---

in accordance with the intentions of its authors as reflected by the text of the treaty and the other relevant factors in terms of interpretation.' *Dispute regarding Navigational and Related Rights (Costa Rica v Nicaragua)*, Judgment, ICJ Reports 2009, p 213, para 48.

<sup>54</sup> *Mondev v United States of America*, NAFTA/ICSID Case No ARB(AF)/99/2, Award (11 October 2002) para 43.

<sup>55</sup> As recognised by the Tribunal in *Saluka Investments BV v Czech Republic*, UNCITRAL, Partial Award (17 March 2006) para 300.



strongest potential to allow for cross-fertilisation and integration of norms,<sup>56</sup> embodying a general ‘principle of systemic integration’.<sup>57</sup>

Additionally, Article 31(3)(c) is tasked to deal with issues of inter-temporal law,<sup>58</sup> including the interpretation of the language of the treaty at the time of conclusion or at the time of application,<sup>59</sup> and the relationship between the treaty being interpreted and general international law, where the treaty can be pegged to the CIL at the time of conclusion, or respond to the developments in CIL.<sup>60</sup> The inter-temporal and the subject matter integrative components of Article 31(3)(c) are encapsulated in the language ‘*relevant* rules of international law *applicable* in the relations between the parties’.<sup>61</sup> By way of example, in approaching their interpretative work, tribunals have to consider if

---

<sup>56</sup> In *United States – Import Prohibition of Certain Shrimp and Shrimp Products* (12 October 1998) WT/DS58/AB/R, DSR 1998, the Appellate Body referred to Article 31(3)(c) directly, para 158 and n 157. See ILC (n 2) 206 ff. The clause was included originally to deal with the issue of inter-temporal application of treaties; see Gardiner (n 36) 250 ff. For an application of the principle in a case involving environmental policy, see *Iron Rhine Arbitration (Belgium/Netherlands)* 2005 PCA, paras 58 ff.

<sup>57</sup> Philippe Sands, ‘Treaty, Custom and Cross-Fertilization of International Law’ (1998) 1 *Yale Human Rights and Development Law Journal* 95.

<sup>58</sup> For the issue in historical context, see *Island of Palmas Case (Netherlands v US)* (1928), PCA, sole arbitrator, Judge Huber, 2 RIAA 829; Jan Klabbers, ‘Reluctant Grundnormen: Articles 31(3)(c) and 42 of the Vienna Convention on the Law of Treaties and the Fragmentation of International Law’, in Matthew Craven, Malgosia Fitzmaurice and Maria Vogiatzi (eds), *Time, History and International Law* (Brill 2007) 141; Humphrey Waldock, ‘Third report on the law of treaties’, (1964) II *Yearbook of the International Law Commission*.

<sup>59</sup> *Costa Rica v Nicaragua* (n 53). But already in *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Reports 1971, p 31, para 53. For a recent review of how the PCIJ and the ICJ have dealt with the issue of textual interpretation, see Bruno Simma and Theodore Kill, ‘Harmonizing Investment Protection and International Human Rights: First Steps Towards a Methodology’, in Binder and others (n 32) 678, 683 ff.

<sup>60</sup> Wälde (n 32) 769 ff, rightly points to the ‘Janus-faced’ character of Article 31(3)(c), allowing for a ‘conservative’ interpretation of treaty law in the context of general international law at the time of the agreement, or a ‘progressive’ interpretation of treaties as ‘living instruments.’ See also Joost Pauwelyn and Manfred Elsig, ‘The Politics of Treaty Interpretation: Variations and Explanations across International Tribunals’ in Jeffrey L Dunoff and Mark A Pollack (eds) *Interdisciplinary Perspectives on International Law and International Relations* (CUP 2012) 445, 452 ff. The relationship between treaty language and general international law is well illustrated by the controversy on the scope of protection under Article 1105 NAFTA, which followed the interpretation of the single arbitrator Lord Dervaird in *Pope & Talbot v Government of Canada*, NAFTA/UNCITRAL, Interim Award on Merits, Phase 2 (10 April 2001) para 111 and *Pope & Talbot*, NAFTA/UNCITRAL, Interim Award on Damages (31 May 2002) paras 49 ff.

<sup>61</sup> See Gardiner (n 36) 260. It is accepted that the rules of international law comprise not only general international law, ie custom, but treaty rules as well or, better, all sources of international law as listed by Article 38 of the Statute of the International Court of Justice. The inclusion of ‘soft law’ remains disputed, see *Iron Rhine* (n 56) para 58. On the other hand, the limitative function of the ‘applicable in the relations between the parties’ – ie if the parties are to the treaty object of the dispute, or to the dispute itself, or to the treaty being ‘interpreted into’ the applicable treaty – is less clear. For a taxonomy of possible interpretations, see Campbell McLachlan, ‘Investment Treaties and General International Law’, (2008) 57 *ICLQ* 279, 314 ff.

the meaning of ‘development’ should be intended as it was at the time of conclusion of the investment instrument, or if it should take into account the current use of the term as ‘sustainable development’ therefore adopting an evolutive approach to inter-temporal interpretation. In turn, the status of the obligation for States to engage only in sustainable development will have a bearing on the onus put on the tribunal to interpret this meaning into the language of the investment treaty.<sup>62</sup> Several recent IIAs include sustainable development as one of their policy goals in the preamble;<sup>63</sup> however, it remains within the interpretative competence of the individual tribunals if, in considering the object and purpose of a treaty where the terminology is not explicitly adopted, they prefer to consider any reference to ‘development’ to include the ‘sustainable’ obligations, adopting a progressive interpretation of the treaty text as a ‘living instrument’.<sup>64</sup>

The inter-temporal aspect of Article 31(3)(c) was comprehensively dealt with in a recent arbitration that included an environmental element, the *Iron Rhine Award*.<sup>65</sup> In it, the Tribunal accepted that international environmental law principles (which it held to be part of general international law) have a role to play in ‘the interpretation of those treaties in which the answers to the Questions may primarily be sought.’<sup>66</sup> More specifically, in discussing the application of Article 31(3)(c), the Tribunal added that:

[...] international environmental law has relevance to the relations between the Parties. There is considerable debate as to what, within the field of environmental law, constitutes ‘rules’ or ‘principles’; what is ‘soft law’; and which environmental treaty law or principles have contributed to the development of customary international law. [...] Environmental law and the law on development stand not as alternatives but as mutually reinforcing, integral concepts, which require that where development may cause significant harm to the environment there is a duty to prevent, or at least mitigate,

---

<sup>62</sup> Some argue that the principle of sustainable development has entered the corpus of customary international law; see Philippe Sands, *Principles of International Environmental Law* (2<sup>nd</sup> ed, CUP 2003) 254.

<sup>63</sup> The first FTA to do so was the NAFTA; the first BIT, the 1999 Agreement on Encouragement and Reciprocal Protection of Investments between the Republic of Costa Rica and the Kingdom of the Netherlands, 2238 UNTS 9818.

<sup>64</sup> This was done in the *Iron Rhine* arbitration (n 56).

<sup>65</sup> *ibid.*

<sup>66</sup> *ibid.*, para 60.

such harm. This duty, in the opinion of the Tribunal, has now become a principle of general international law.<sup>67</sup>

This integrative and progressive approach brought the Tribunal to apply the relevant 1839 Treaty between the parties taking into account that ‘economic development is to be reconciled with the protection of the environment, and, in so doing, new norms have to be taken into consideration, including when activities begun in the past are now expanded and upgraded.’<sup>68</sup>

In the investment regime, some instruments contain specific applicable law and conflict provisions that direct tribunals in their interpretative work; furthermore, references to ‘mutual supportiveness’ in the treaty text direct the tribunals to adopt an hermeneutic approach consistent with the integrative thrust of Article 31(3)(c). More specific examples of this are the ‘mutual supportiveness clauses’ contained in many new generation IIAs; these are still just directed to the contracting parties, imposing a (soft) obligation on them with regards to their policy decision-making; more explicitly targeted at tribunals and their interpretative work is Article 5(E) (National Treatment) of the IISD Model Investment Agreement for Sustainable Development:<sup>69</sup>

For greater certainty, the concept of ‘in like circumstances’ requires an overall examination, on a case by-case basis, of all the circumstances of an investment, including, *inter alia*:

- a) its effects on third persons and the local community;
- b) its effects upon the local, regional or national environment, or the global commons;<sup>70</sup>
- c) the sector the investor is in;
- d) the aim of a measure of concern;
- e) the regulatory process generally applied in relation to a measure of concern; and
- f) other factors directly relating to the investment or investor in relation to the measure of concern.

The examination shall not be limited to or biased toward any one factor.

---

<sup>67</sup> *ibid*, paras 58-59.

<sup>68</sup> *ibid*, para 221.

<sup>69</sup> Applicable also, *mutatis mutandis* as per text, to Article 6 [Most-Favoured-Nation]. Text of the Model Agreement available at <<http://www.iisd.org/investment/capacity/model.aspx>>.

<sup>70</sup> This is accompanied by the following note (7 in the text): ‘The Parties understand that such considerations can include the cumulative impacts of all investments within a jurisdiction, for example in the natural resources harvesting sectors or in relation to setting of ambient or specific pollution loads. Many jurisdictions do not allow new investments that will cause applicable environmental or human health tolerances to be exceeded.’

This measure is clearly directing tribunals to a ‘systemic’ interpretation of the National Treatment and MFN standard provisions, including not only the factual circumstances, but also the regulatory and legislative background of the investment.<sup>71</sup>

### 2.3 Article 31(3)(c) in Investment Awards

Investment tribunals often refer to the VCLT in their awards, not always as a prelude to a meaningful engagement with its provisions. However, it is not as often that they more or less explicitly utilise Article 31(3)(c) as part of their interpretative exercise. The following are the most representative examples.

#### 2.3.1 *SD Myers v Canada*

In the *SD Myers Case*, one of the first NAFTA arbitrations, the Tribunal had to deal with a defence based on conflicting environmental obligations.<sup>72</sup> The Tribunal, in its interpretative exercise did not make explicit reference to the environmental language contained in the treaty, and approached the relationship between environmental and investment obligations of the Defendant by reference to the ‘general principles that emerge from that context [NAFTA Environmental Side Agreement NAAEC and the Rio Declaration].’<sup>73</sup> The Tribunal explicitly referred to the VCLT, but only to Article 31(1) and its textual rule. However, when applying Article 1102 of the NAFTA (National Treatment), the Tribunal stated the following:

The Tribunal considers that the legal context of Article 1102 includes the 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:

---

<sup>71</sup> An example in practice of this approach is the analysis of the MFN provision conducted by the Tribunal in *Parkerings-Compagniet AS v Republic of Lithuania*, ICSID Case No ARB/05/8, Award (11 September 2007) para 392, where ‘in like circumstances’ was interpreted by reference to the archaeological and cultural value of the area (and its UNESCO status), which rendered it ‘not similar’ to the comparator. See also OECD, *International Investment and Multinational Enterprises: National Treatment of Foreign Controlled Enterprises* (OECD 1985) 17.

<sup>72</sup> *SD Myers Inc v Government of Canada*, NAFTA/UNCITRAL, Partial Award (13 November 2000).

<sup>73</sup> *ibid*, para 247.

- 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>74</sup>

And shortly thereafter it added:

The Tribunal considers that the interpretation of the phrase ‘like circumstances’ in Article 102 must take into account the general principles that emerge from the legal context of the NAFTA, including both its concern with the environment and the need to avoid trade distortions that are not justified by environmental concerns. The assessment of ‘like circumstances’ must also take into account circumstances that would justify governmental regulations that treat them differently in order to protect the public interest.<sup>75</sup>

The Tribunal left therefore open an interpretation of Article 1102 that took into account the principles stated in the environmental agreements applicable in the relations between the parties. It is also noteworthy that the Tribunal approached the analysis on the breach of Article 1105 (Minimum Standard of Treatment) by reference to the content of the international minimum standard in general international law, and also in concert to what it defined ‘similar provisions’ in BITs (fair and equitable treatment standard); the Tribunal stated the following:

The Tribunal considers that a breach of Article 1105 occurs only when it is shown that an investor has been treated in such an unjust or arbitrary manner that the treatment rises to the level that is unacceptable from the international perspective. That determination must be made in the light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders. The determination must also take into account any specific rules of international law that are applicable to the case.<sup>76</sup>

---

<sup>74</sup> *ibid.*

<sup>75</sup> *ibid.*, para 250.

<sup>76</sup> *ibid.*, para 263.

The controversy regarding the content of Article 1105 NAFTA is well known and does not bear rehearsing; on the relationship between the standard and general international law, the Tribunal did not clarify if pegging the treatment ‘in accordance with international law’ included the inter-temporal element of treaty interpretation. Several other tribunals have explicitly relied on a *progressive* interpretation of customary international law in applying the Article; most recently the *Chemtura* Tribunal declared that: ‘[...] the Tribunal will take account of the evolution of international customary law in ascertaining the content of the international minimum standard’.<sup>77</sup>

### 2.3.2 *Grand River v United States*

In another more recent NAFTA arbitration, the *Grand River* Tribunal had to deal with a Claimant’s request to interpret human rights obligations into the language of NAFTA’s Chapter 11.<sup>78</sup> In its reply, and dealing with the application of Article 31(3)(c) the Tribunal relied on a rigid distinction between jurisdiction, applicable law and interpretative powers, stating that:

The Tribunal understands the obligation to ‘take into account’ other rules of international law to require it to respect the Vienna Convention’s rules governing treaty interpretation. However, the Tribunal does not understand this obligation to provide a license to import into NAFTA legal elements from other treaties, or to allow alteration of an interpretation established through the normal interpretative processes of the Vienna Convention. This is a Tribunal of limited jurisdiction; it has no mandate to decide claims based on treaties other than the NAFTA [...] The Tribunal is particularly mindful in this regard of the Free Trade Commission’s directive that a violation of an obligation under another treaty does not give rise to a breach of Article 1105.<sup>79</sup>

The Claimant had raised the issue of conflicting obligations (the NAFTA v Article III of the 1794 Jay Treaty), which concerned their application, and not simply interpretation; this was disregarded by the Tribunal. The Tribunal invoked the Free Trade

---

<sup>77</sup> *Chemtura Corporation v Government of Canada*, NAFTA/UNCITRAL, Award (2 August 2010) para 122.

<sup>78</sup> *Grand River Enterprises Six Nations Ltd et al v United States of America*, NAFTA/UNCITRAL, Award (12 January 2011) para 63.

<sup>79</sup> *ibid*, para 71.

Commission's binding interpretation of Article 1105,<sup>80</sup> ignoring the issues, raised by the application, of the rules on interpretation. One is left to wonder what is left of the *effet utile* of Article 31(3)(c) after the very restrictive interpretation of it given by the Tribunal.<sup>81</sup>

### 2.3.3 *Adel A Hamadi Al Tamimi v Sultanate of Oman*

This award, delivered by the Tribunal in November 2015, concerned a claim by a US investor of a breach by Oman of the US-Oman FTA's expropriation, international minimum standard (IMS) and national treatment provisions in relation to the termination of a contract for the quarrying of limestone, and the following arrest of Mr Al Tamimi.<sup>82</sup> The defendant State alleged in its defence serious violations of Omani company law and environmental law by the investor. The jurisdictional phase was complex and involved several challenges on the jurisdiction of the Tribunal, some of which were successful. On the merits, the Tribunal was tasked to interpret an instrument containing new style expropriation and minimum standard clauses, in which the US had incorporated respectively the Annex to expropriation included in the 2004 Model BIT and the clarification on the relationship between IMS and FET resulting from the already mentioned Interpretative Note on Article 1105 NAFTA. The expropriation claim failed as the Tribunal did not accept that the events rose beyond a contractual dispute to be solved, in accordance to the compromissory clause in the contract, in the local courts.

On the IMS, Article 10.5 of the US-Oman FTA includes the following language:

For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investors. The concepts of 'fair and equitable treatment' and 'full protection

---

<sup>80</sup> North American Free Trade Agreement, Notes of Interpretation of Certain Chapter 11 Provisions, NAFTA Free Trade Commission, July 31, 2001.

<sup>81</sup> See also Jorge E Viñuales, *Foreign Investment and the Environment in International Law* (CUP 2012) 155. An equally restrictive approach, but taken with regards to the applicability of the necessity defense, was taken by the Tribunal in *Suez, Sociedad General de Aguas de Barcelona, SA and Vivendi Universal, SA v Argentine Republic*, ICSID Case No ARB/03/19 (formerly *Aguas Argentinas, SA, Suez, Sociedad General de Aguas de Barcelona, SA and Vivendi Universal, SA v Argentine Republic*), Decision on Liability (30 July 2010) para 262.

<sup>82</sup> *Al Tamimi v Oman* (n 5).

and security' do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights.<sup>83</sup>

The Tribunal, in assessing the actions of the government in respect to the alleged environmental breaches, presented by the Claimant as a breach of the treaty, took into consideration also Article 10.10 of the FTA:

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.

There are two levels of contextualisation the Tribunals needed to address: first, the relationship between the IMF standard as included in the FTA, the customary law standard and the independently developing higher standard in other IIAs; second, its relationship with other, non-investment obligations as contained within the treaty and in international law, considered relevant as a matter of treaty interpretation under Article 31(3)(c). As for the first issue, the Tribunal followed the interpretation adopted already by the *Glamis* Tribunal, ie a minimalist reading of the standard in line with the *Neer dictum*.<sup>84</sup>

On the second and, for the purpose of this study, more relevant issue, the Tribunal clearly adopted a reading of the IMF obligation contextual to environmental obligations as contained in the above-mentioned Article 10.10, in Chapter 17 of the FTA (the Environment Chapter) and in general international law, thereby applying, without explicitly referring to it, Article 31 VCLT *in toto*. The brief discussion of the Tribunal is worth reporting in full:

[...] the US – Oman FTA places a high premium on environmental protection. It is uncontroversial that general principles of customary international law must be applied

---

<sup>83</sup> The language is further clarified in Annex 10-A: 'The parties confirm their shared understanding that 'customary international law' generally and as specifically referenced in Article 10.5 and Annex 10-B results from a general and consistent practice of States that they follow from a sense of legal obligation. With regard to Article 10.5, the customary international law minimum standard of treatment of aliens refers to all customary international law principles that protect economic rights and interests of aliens.'

<sup>84</sup> *Al Tamimi v Oman* (n 5) para 383.



in the context of the express provisions of the Treaty. In the present case, Article 10.10 expressly qualifies the construction of the other provisions of Chapter 10, including Article 10.5. The wording of Article 10.10 provides a forceful protection of the right of either State Party to adopt, maintain or enforce any measure to ensure that investment is ‘undertaken in a manner sensitive to environmental concerns’, provided it is not otherwise inconsistent with the express provisions of Chapter 10. Moreover, Chapter 17 of the US – Oman FTA entitled ‘Environment’, although it does not fall directly within the Tribunal’s jurisdiction, provides further relevant context in which the provisions of Chapter 10 must be interpreted. Article 17.2.1, for instance, records the Parties’ understanding that:

(a) Neither Party shall fail to effectively enforce its environmental laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the Parties, after the date of entry into force of this Agreement.

(b) The Parties recognize that each Party retains the right to exercise discretion with respect to investigatory, prosecutorial, regulatory, and compliance matters and to make decisions regarding the allocation of resources to enforcement with respect to other environmental matters determined to have higher priority. Accordingly, the Parties understand that a Party is in compliance with subparagraph (a) where a course of action or inaction reflects a reasonable exercise of such discretion, or results from a bona fide decision regarding the allocation of resources.

The very existence of Chapter 17 exemplifies the importance attached by the US and Oman to the enforcement of their respective environmental laws. It is clear that the State Parties intended to reserve a significant margin of discretion to themselves in the application and enforcement of their respective environmental laws – indeed, Article 17.2.1 compels each State to ensure the effective enforcement of environmental laws. Article 17.2.1(b), moreover, acknowledges that environmental law enforcement is not inherently consistent in its application. The Tribunal in *SD Myers v Canada* acknowledged that tribunals “do not have an open-ended mandate to second-guess government decision-making”, and this must particularly be the case in light of the express terms of the present Treaty relating to environmental enforcement. When it comes to determining any breach of the minimum standard of treatment under Article 10.5, the Tribunal must be guided by the forceful defence of environmental regulation and protection provided in the express language of the Treaty.

While the Tribunal is clear on its jurisdictional limitations, establishing the existence of a breach of Article 10.15 and nothing more, it is equally forceful in its determination to adopt the correct, contextual interpretative approach to the task at hand.

#### 2.4 Interim Conclusions on Interpretation

In the first investment treaty award of 1990, the Tribunal included the following statement:

It should be noted that the Bilateral Investment Treaty is not a self-contained closed legal system limited to provide for substantial material rules of direct applicability, but it has to be envisaged within a wider juridical context in which rules from other sources are integrated through implied incorporation methods, or by direct reference to certain supplementary rules, whether of international law character or of domestic law nature.<sup>85</sup>

Contextual interpretation of the treaty is recognised as the correct approach by the Tribunal, and in keeping with both the language of the applicable treaty and the general rules of treaty interpretation. This is important because the first generation of treaties did not in general contain any explicit reference to other international obligations of the treaty parties, not because they were not relevant, but because they were implicitly accepted as binding upon the parties to the extent that they applied to their relationship. In fact, those same treaties contain numerous references to international law, sovereignty and domestic law. It is a consequence of the expansive interpretations by investment tribunals of the vague provisions of the treaties that more explicit limitations and clarifications have been inserted, *ex abundante cautela*, in order to steer the interpretative work of the tribunals towards a more holistic and systemic approach.

The argument for a progressive and evolutionary<sup>86</sup> interpretation of international law seems particularly apposite for regimes, such as environmental law, that are rapidly developing in response to changed technological and scientific knowledge and the demands posed on the environment by economic development and population growth. Its relevance in investment arbitrations will still be decided on a case-by-case basis,

---

<sup>85</sup> *AAPL v Sri Lanka* (n 12) para 21. President of the Tribunal was Professor of International Law Ahmed El Kosheri.

<sup>86</sup> In the sense explored for example in the *Iron-Rhine* Award (n 56).

depending on the attitude of tribunals to interpretation, the law applicable to the dispute, the presence or not of conventional (treaty) norms of an environmental character that have to be considered by the tribunal as part of its interpretative work as per Article 31(3)(c) and the applicability of savings or conflict clauses. It is important however not to overstate its role, and not to view it ‘as a sort of master key enabling the systemic integration of otherwise disparate legal regimes’.<sup>87</sup> Interpretation is indeed symbiotically dependent to conflict resolution, but this dependency should not be confused with inter-changeability. A tribunal tasked with interpreting an IIA together with the relevant (and applicable in the relation between the parties) rules of international law is not empowered to modify the treaty rules, but simply to have, as its *telos*, the application of the treaty rules so that the presumption of compliance is respected.<sup>88</sup> IIAs often contain applicable law clauses directing tribunals to the application of international law in addition to the treaty and/or to domestic law, as expressed for example in Article 10(4) of the Syria – Cyprus BIT, which directs the tribunal to ‘settle the dispute in accordance with the provisions of this Agreement, applied laws of the hosting country and the applicable rules and principles of international law’.<sup>89</sup> To this extent, investment tribunals are under a stronger obligation, as far as concerns the *application* of other norms of international law not contained in the treaty than that encapsulated in Article 31(3)(c), which instructs courts merely to ‘take [them] into account’ in their interpretative work. In other words, Article 31 contains the rule on *interpretation*, not *application*. In consequence, investment tribunals are under an obligation to apply the VCLT in their interpretative work, and are at the same time limited by the applicable law clause of the relevant IIA, directing them to apply any relevant rules and principles of international law to decide the dispute. Therefore, non-investment rules have two potential entry points: the first, aiding the tribunal in its interpretative work of the IIA; and the second, remaining applicable to the dispute in the means accorded by the IIA or, as the case may be, by the ICSID

---

<sup>87</sup> As rightly noted by Simma and Kill (n 59) 694.

<sup>88</sup> See also *RosInvest v Russia* (n 41) para 39: “‘Applicable in the relations between the parties’” must be taken as a reference to rules of international law that condition the performance of the specific rights and obligations stipulated in the treaty – or else it would amount to a general licence to override the treaty terms that would be quite incompatible with the general spirit of the Vienna Convention as a whole.’

<sup>89</sup> Agreement between the Government of the Republic of Cyprus and the Government of the Syrian Arab Republic on the promotion and reciprocal protection of investments, 44952 UNTS 1, 37. For disputes under the institutional umbrella of the ICSID Convention, if there is no applicable law clause in the IIA, Article 42 of the Convention applies.

Convention or the investment contract. It bears restating the crucial nature of this distinction, also in light of a potential challenge to the award under Article 52(1)(a) of the ICSID Convention, whereby a disputing party can demand annulment of the award if the tribunal ‘manifestly exceeded its powers’, namely by deciding the dispute by applying a legal rule it was not empowered to apply (or conversely by not applying a legal rule it was under duty to apply) under the relevant applicable law clause in the treaty or the fallback rules under the ICSID Convention in case of lack of agreement between the parties.<sup>90</sup> It is self-evident that the distinction between not applying a legal rule, which is a ground for annulment, and applying it incorrectly, which is not, is not always easily drawn and it is heavily dependent on the correct interpretation both of the applicable law clause, and of the substantive rule.

However, arguments in support of systemic integration as the default tool in treaty interpretation might jar with the function of treaties as *lex specialis* engendering expectations of stability. In other words, if amongst the functions of treaties is that of derogating from general international law, *a fortiori* the more the latter departs from the former, the more the former should be read in its original context.<sup>91</sup> An excessive reliance on the willingness of tribunals to approach hermeneutics with ‘systemic integration’ as their ultimate goal fails to account for alternative interpretative techniques legitimately undertaken by tribunals, less receptive to the need to harmonise treaty provisions beyond the jurisdictional limits of the investment regime.

---

<sup>90</sup> Article 25 of the ICSID Convention.

<sup>91</sup> See also Wälde, note 37, 769 ff.

### 3. Chapter 3: Conflicts in International Law

#### 3.1 An Introduction

In this chapter I consider how tribunals deal with conflicts in investment arbitrations. The potentially problematic interaction between substantive regimes of law can be approached from several avenues, and in the conclusion of this chapter I provide a short overview of coping strategies, including a taxonomy of actions, by both States and tribunals, dealing with conflicts at the different stages of norm production and application. However, the rest of the chapter is devoted to a review of literature on conflicts and their conceptualisation, and specifically the tools provided by the VCLT for dealing with normative conflicts. The VCLT is a *meta-treaty* on the law of treaty making, and therefore it provides only a set of secondary rules, applicable universally whenever issues of treaty law arise, regardless of the substance of the rules involved, unless specifically contracted out from. It is important to remember this as investment treaty disputes rest squarely in the field of public international law and tribunals dealing with conflicts of international obligations are required to have recourse to the established rules of treaty interpretation and normative conflicts resolution as presented in Article 30 VCLT. Therefore, quite a part from the potential of substantive systemic integration *via* application of Article 31(3)(c), which was discussed in the previous chapter, international law integrative thrust also manifests itself in the procedural obligation to respect secondary rules of treaty law which applies universally. This without prejudice to the adoption, for example, of a certain approach to treaty interpretation in some regimes,<sup>92</sup> which in any event, is always within the limits of what is allowed by the VCLT. This reminder, of the public law character of the procedural aspects of the investment regime, is necessary in view of the fact that the hybrid nature of investment law rests upon the dichotomy of the public ‘soul’ of the substantive provisions and the private ‘soul’ of its procedural framework.

#### 3.2 Conflicts Classification

---

<sup>92</sup> See for example the evolutionary interpretation of the European Convention of Human Rights by its Court in *Tyrer v United Kingdom*, Merits, App No 5856/72, A/26, [1978] ECHR 2, (1980) 2 EHRR 1, IHRL 17 (ECHR 1978), 25th April 1978.

The definition of a normative conflict is contested, as reflected in the drafting history and preparatory work of Article 30 VCLT.<sup>93</sup> A first distinction can be made between the source of the obligations: there can be conflicts of international obligations, conflicts of domestic obligations,<sup>94</sup> – which are outwith the scope of this work – and mixed conflicts of international and domestic obligations; given the jurisdictional restrictions of the investment regime, these conflicts will normally involve a domestic environmental measure conflicting with an international investment rule; the space given in this dissertation to mixed conflicts is warranted by the recognition of domestic environmental obligations – often ultimately derived by an over-arching international environmental commitment – *via* the normative space granted to them in IIAs in the form of balancing clauses. The two main categories, pure international conflicts and mixed international-domestic conflicts, will be treated separately in this dissertation, as conflicts between international and domestic norms are regulated differently than conflicts between international norms. Specifically, while pure international conflicts are dealt with via savings clauses, mixed conflicts are more often resolved via balancing clauses.<sup>95</sup>

Their differentiated treatment is also reflective of the status of international obligations *vis-à-vis* domestic law, as expressed in Article 27 VCLT. However, the relationship between the two kinds of conflicts is more problematic than the straightforward application of Article 27 might imply. There are issues relating to the conflict rules governing the relationship between norms belonging to different planes (international v domestic), the direct enforceability of international norms in monist systems versus the legal architecture of dualist systems and finally, the peculiarity of the investment regime, conferring *locus standi* to investors to vindicate a breach of an international

---

<sup>93</sup> See International Law Commission, YILC (1964) Vol I, 127, 131; United Nations Conference on the Law of Treaties, Vienna 9 April 1969, Official Records (UN Doc A/CONF 39/11/1/Add 1) 253; Bert EW Vierdag, ‘The Time of the “Conclusion” of a Multilateral Treaty: Article 30 of the Vienna Convention on the Law of Treaties and Related Provisions’ (1988) 59 BYBIL 92.

<sup>94</sup> These conflicts are normally resolved by hierarchical norms specific to the domestic system involved, including constitutional level norms.

<sup>95</sup> Viñuales (n 81) 28 ff, adopts the nomenclature of ‘normative’ and ‘legitimacy’ conflicts to distinguish between the two. I find this terminology somewhat misleading, and I prefer to refer to all conflicts as normative, with the difference between purely international (conflicts of international obligations) and mixed (international v domestic).

treaty, with the difficulties posed by the classification of the investors as possessing rights or simply privileges.<sup>96</sup>

Conflicts of international obligations are identified by objective and subjective criteria: as for the objective element, conflicts require an overlap *ratione materiae, personae* and *temporis*, ie for one actor to be bound by two equally valid rules.<sup>97</sup> The subjective criterion element does not meet with the same degree of consensus; according to Jenks, ‘Conflict in the strict sense of direct incompatibility arises only where a party to the two treaties cannot simultaneously comply with its obligations under both treaties’.<sup>98</sup> Pauwelyn, in his work on conflict of norms in the WTO regime,<sup>99</sup> adopted a broader, purposive definition, according to which: ‘[...] two norms are [...] in a relationship of conflict if one constitutes, has led to, or may lead to, a breach of the other.’<sup>100</sup>

So, in the strictest view, if norms in two different treaties are both legal and valid, yet they cannot be applied at the same time without incurring in a breach – if, in other words, they require the State to perform both ‘A’ and ‘non-A’ one can speak of a normative conflict. In the laxer interpretation, potential, not actual, clashes of obligation can already be conceptualised as a ‘relationship of conflict’.

Let us assume that a dispute arises for a breach of investment treaty ‘X’ and State ‘A’ (defendant) claims the environmental treaty ‘Y’ required the conduct resulting in the breach of instrument ‘X’. If the tribunal establishes that instrument ‘X’ prevails, it will find in favour of the investor; if the tribunal finds that instrument ‘Y’ prevails, there will be no breach for the purposes of the dispute, without prejudice to the responsibility for the breach of the other instrument resting with State A and involving either the home State of the investor (State ‘B’) or a third State ‘C’. If both norms are valid and

---

<sup>96</sup> See latterly for a discussion of the issue, summarising the contrasting positions, Martins Paparinskis, ‘Analogies and Other Regimes of International Law, in Douglas and Others (n 10) 73, 79 ff.

<sup>97</sup> On the *ratione materiae* requirement, see Pauwelyn (n 3) 364-65: ‘[...] if there is a genuine conflict between two treaty norms, the two treaty norms must necessarily deal with the same subject matter. If not, there would be no conflict in the first place since there would be no overlap *ratione materiae*’. See also ILC (n 2) 18.

<sup>98</sup> Wilfred Jenks, ‘Conflict of law-making treaties’ (1953) 30 BYBIL 401, 426.

<sup>99</sup> See Pauwelyn (n 3) especially 169 ff.

<sup>100</sup> *ibid*, 175-176. Hans Kelsen had adopted a similar approach in ‘Derogation’, in Hans Klecatsky, René Marcic and Herbert Schambeck (eds), *Die Wiener Rechtstheoretische Schule* (Europa 1968), ii 1429: ‘[a] conflict between two norms occurs if in obeying or applying one norm, the other one is necessarily or possibly violated.’

applicable to the respective parties, and there is no priority rule, then, according to Pauwelyn: ‘It is then up to A to make a political choice as to whether it will comply with the AB norm or with the AC norm. The law of treaties does not direct A either way.’<sup>101</sup>

The ILC in its Fragmentation Report adopted a ‘wide notion of conflict as a situation where two rules or principles suggest different ways of dealing with a problem’, uncoupling the decision-making process of courts and tribunals from the strictures of legal reasoning in the abstract.<sup>102</sup> The scope of this dissertation does not allow delving into the more theoretical aspects of normative conflicts nor on their political implications.<sup>103</sup> For the purposes of the practical resolution of conflicts in a dispute settlement environment, a conflict can be said to exist when the simultaneous application of two norms will result in a breach of an international obligation.

### 3.3 Conflict Resolution Techniques

While the interpretative work of court and tribunals can help defuse apparent conflicts, the encounter between distinct legal regimes can engender problems of legal interaction that are impervious to interpretation.<sup>104</sup> To this extent, interpretation has the dual function of solving apparent conflicts and identifying ‘genuine’ conflicts, ie conflicts that cannot be disposed of through an exercise in systemic interpretation and identification of a compatible meaning of the clause under examination.

A necessary or inherent conflict in Pauwelyn’s classification – ie, a conflict occurring in the application of at least two obligations – will always result in a breach.<sup>105</sup> Such a conflict can be dealt with by application of the relevant conflict rule, in order to determine which rule has priority of application. An informal rule of precedence assigns

---

<sup>101</sup> Pauwelyn (n 3) 427. Or, as Wolfram Karl put it: ‘With the law stepping back, a principle of political decision takes its place whereby it is left to the party to the conflicting obligations to decide which treaty it prefers to fulfil.’ ‘Conflicts between treaties’, in R Bernhardt (ed), *Encyclopaedia of Public International Law*, (North-Holland, 1984), VII, 468, 470-01.

<sup>102</sup> ILC (n 2) 19.

<sup>103</sup> A useful summary of the negotiating history of Article 30 and of the legal difficulties of conflict recognition and resolution by Jan Klabbers, ‘Beyond the Vienna Convention: Conflicting Treaty Provisions’ in Cannizzaro (n 25) 192. See also Surabhi Ranganathan, *Strategically Created Treaty Conflicts and the Politics of International Law* (CUP 2014).

<sup>104</sup> ‘Rules appear to be compatible or in conflict as a result of interpretation’ ILC (n 2) 207.

<sup>105</sup> Pauwelyn (n 3) 272-3.



priority of application to the main sources of international law as listed in Article 38 of the Statute of the International Court of Justice as the rules applicable by the Court in the exercise of its functions.<sup>106</sup> In case of conflict between a treaty rule derived from an investment treaty and a rule of international environmental law, be it customary or treaty based, in the first case priority of application cannot be simply given to the investment treaty rule – without prejudice to the jurisdictional restrictions and to application of any specific savings or conflict clause contained in the treaty – and tribunals will have to analyse the relationship under the three main tools available in international law for the resolution of normative conflicts: 1) hierarchy (*lex superior*); 2) temporality (*lex prior* or *lex posterior*); and 3) specificity (*lex specialis*).<sup>107</sup> Equally, in the case of conflict between two treaty-based rules, the tribunal will be directed to the general international law rules on conflict resolution and any available rules in the applicable treaty/ies.

### 3.3.1 Hierarchy (*Lex Superior*)

The absence of a rigid structure ordering the international legal system does not mean that it is completely devoid of some form of recognition of a hierarchical order between rules.<sup>108</sup> Examples of hierarchical rules are Article 103 of the Charter of the United Nations, dictating that obligations under the Charter prevail over obligations under other international agreements – therefore establishing a rule of priority between conventional sources;<sup>109</sup> Articles 53 and 64 VCLT – establishing criteria for the validity of treaty law against the development of customary norms of a peremptory character, such as the prohibition of torture;<sup>110</sup> and finally norms applicable *erga omnes* – norms whose

<sup>106</sup> 1945 Statute of the International Court of Justice, 33 UNTS 993.

<sup>107</sup> ILC (n 2) para 412. If specific savings clauses are included in the applicable treaty, tribunals can have recourse to those.

<sup>108</sup> On norms classification for the purpose of hierarchical order, see Dinah Shelton, 'Normative Hierarchy in International Law', (2006) 100 AJIL 291; Prosper Weil, 'Towards a Relative Normativity in International Law?' (1983) 77 AJIL 413. Specifically on *jus cogens*, the ILC has established a working group on the topic, see ILC< Report on the Work of the Sixty-sixth Session (2014), Annex 'Jus cogens', <<http://legal.un.org/docs/?path=../ilc/reports/2014/english/annex.pdf&lang=EFSSAC>> accessed 5 June 2016. The debate on the constitutionalisation of international law in this sense is only tangentially relevant, and it will therefore be avoided; for it, see Jan Klabbers, Anne Peters and Geir Ulfstein, *The Constitutionalization of International Law* (OUP 2009); Gunther Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (OUP 2012).

<sup>109</sup> 1945 Charter of the United Nations, 1 UNTS XVI; Rudolph Bernhardt, 'Article 103', Bruno Simma (ed), *The Charter of the United Nations: A Commentary* (OUP 2002) 1293.

<sup>110</sup> The literature on peremptory norms, or *jus cogens*, is considerable; see ILC (n 2) 182 ff; Alexander

breach allows *all* States to invoke responsibility.<sup>111</sup> The hierarchical relationship between these categories is a contested issue: there are instances of imperfect overlap (between peremptory norms and *erga omnes* obligations), lack of ordering between peremptory norms, debates on the relationship between Article 103's priority rule and peremptory norms' validity.<sup>112</sup>

It is unlikely that *erga omnes* obligations will ever have a role in investment law given its *lex specialis* status with respect to the rules on responsibility, the character of investment treaties as reciprocal synallagmatic instruments and the limited hierarchical value of *erga omnes* rules.<sup>113</sup> On the other hand, it is conceivable that an 'Article 103' defence could be raised by a State in the instance of a conflict between obligations stemming from a human rights treaty and an investment treaty, to the extent that human rights obligations can be put under the 'umbrella' of the Charter under its Article 1(3). Equally, one can envisage a situation where a State might have to abide by its obligations under a Chapter VII resolution of the Security Council by prohibiting an investment in its territory or preventing its investors from investing in a particular country, therefore breaching its obligations under the investment treaty: in this case, Article 103 establishes the rule of priority for the State. The decision on the application of the 'correct' treaty rule does not determine or resolve any potential issues of State responsibility, for which due consideration has to be given to the special regime of invocation of responsibility enjoyed by the investment dispute settlement system, as recognised by the ILC Draft Articles on State Responsibility in Article 33.<sup>114</sup>

---

Orakhelashvili, *Peremptory Norms in International Law* (OUP 2006). In the case law, see for example *Prosecutor v Anto Furundžija*, Judgment 10 December 1998, Case No IT-95-17/1, Trial Chamber II, (2002) 121 ILR 260 para 153.

<sup>111</sup> See *Case Concerning the Barcelona Traction, Light and Power Company Ltd (Belgium v Spain) (Second Phase)* ICJ Reports 1970 p 32; Christian Tams, *Enforcing Obligations Erga Omnes in International Law* (2<sup>nd</sup> ed, CUP 2010).

<sup>112</sup> For which see mainly Case T 315/01 *Kadi v Council of the European Union*, Judgment of 3 September 2008 [2008] ECR I-06351.

<sup>113</sup> Parts Two and Three of the International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries (ILC Draft Articles), Yearbook of the International Law Commission, 2001, vol II, Part Two; see also Tams (n 111) 263-264.

<sup>114</sup> On the application of the customary secondary norms on State responsibility, including countermeasures, and their effect on third party beneficiaries (investors) in the context of the NAFTA, see *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas v United Mexican States*, ICSID Case No ARB(AF)/04/05, Award (21 November 2007) paras 110 ff. See also James Crawford, 'International Protection of Foreign Direct Investments: Between Clinical Isolation and Systemic Integration', in Rainer Hoffman and Christian J Tams (eds), *International Investment Law and General International Law – From Clinical Isolation to Systemic Integration?* (Nomos 2011) 17, 25; Martins Paparinskis, 'Investment Arbitration and the Law of Countermeasures' (2008)

It is not likely that investment protection norms will ever acquire the customary status of peremptory norms; therefore, the third kind of hierarchical ordering, based on the peremptory character of one of the conflicting norms, has been raised as a possibility only in the inverse relationship, of a peremptory norm conflicting with an investment provision. However, it is not impossible to imagine an instance where the treatment of a foreign investor would involve torture, the rule against which has undisputedly been granted peremptory status. In this case, it will be the tribunal to decide if its jurisdiction extends to enforcing human rights obligations, an avenue which is unlikely considering the jurisdictional limitations preventing a tribunal from considering a human rights claim as an independent cause of action.<sup>115</sup> In fact, the *Biloune* Tribunal refused to entertain the allegation of the investor that the treatment by Ghana constituted a violation of his human rights as an independent cause of action, justifying its position in the following manner:

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.<sup>116</sup>

Alternatively, the alleged torture could be read as a grave breach of the FET standard clause of the applicable investment treaty. From the point of view of the investor, 'packaging' the claim as a breach of the investment treaty rather than as a human rights violation has the advantage of a better enforcement system guaranteeing higher level of compensation.<sup>117</sup> In this event, there would be no normative conflict to be solved by way of hierarchical ordering but rather, convergence of the human rights and investment protection regimes.

---

79(1) BYBIL 264.

<sup>115</sup> As Articles 53 and 64 VCLT deal with validity and termination of treaties respectively, the tribunal would have to decline jurisdiction in the event (unlikely, as explained below) of an IIA conflicting with a peremptory customary norm.

<sup>116</sup> *Biloune and Marine Drive Complex Ltd v Ghana Investments Centre and the Government of Ghana*, UNCITRAL (1993) 95 *ILR* 183, 213. This was a contractual dispute, therefore there were no issues of application of treaty law; however, the jurisdictional limitations of Ghanaian law are analogous to jurisdiction clauses in IIAs or the ICSID Convention, if a little stricter.

<sup>117</sup> On the overlap between the FET treatment and human rights law, see also International Law Commission, *2011 Report*, Annex D 'The Fair and Equitable Treatment Standard in International Investment Law' (A/66/10) para 11.

So far, normative hierarchy has not been raised explicitly in an investment dispute by either claimants or defendants; however, the *Phoenix* Tribunal, dealing with a jurisdictional objection centring on the meaning of ‘investment’, added the following *obiter dictum*:

[...] the ICSID Convention’s jurisdictional requirements – as well as those of the BIT – cannot be read and interpreted in isolation from public international law, and its general principles. To take an extreme example, nobody would suggest that ICSID protection should be granted to investments made in violation of the most fundamental rules of protection of human rights, like investments made in pursuance of torture or genocide or in support of slavery or trafficking of human organs.<sup>118</sup>

This statement raises interesting questions with respect to the status of certain fundamental norms of international environmental law, which pertain to the greater debate on the criteria for identification of peremptory norms. The proposal has been advanced that some environmental norms do enjoy *jus cogens* status, but this can be considered only speculative at this stage and has not received acceptance beyond the academic community;<sup>119</sup> in any event, the *Phoenix* Tribunal was rather more concerned, in its *dictum*, with the issue of denying the protection of the treaty to an investment made in violation of a peremptory norm: this approach is not too different from a normal jurisdictional objection with respect to investments made in violation to the host State’s domestic law, in analogy to *ordre public* or public policy arguments.<sup>120</sup> A *jus cogens* exception to the validity of a treaty does not concern the behaviour of a particular investor – for example, the use of slave labour in a mine – or the interpretation of the treaty language to cover a particular investment – as noted by the *Phoenix* Tribunal – but more fundamentally, raises issues of validity or termination of the investment treaty against the existence or the emergence of a peremptory norm. It is submitted that this eventuality is even less likely to occur than the possibility that the

---

<sup>118</sup> *Phoenix Action Ltd v Czech Republic*, ICSID Case No ARB/06/5, Award (15 April 2009) para 78.

<sup>119</sup> Eva M Kornicker Uhlmann, ‘State Community Interests, *Jus Cogens* and the Protection of the Global Environment: Developing Criteria for Peremptory Norms’ (1998-1999) 11 *Georgetown International Environmental Law Review* 101. The ILC, in its Draft Articles, lists, as norms ‘clearly accepted and recognized’ as of peremptory character, ‘prohibitions of aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the right to self-determination’ (n 113) 283-284.

<sup>120</sup> The opposability of these norms directly on the investors is a different matter, unless they are also translated into domestic legislation.

behaviour of the investor might be in violation of a peremptory norm of international law, depriving him of the protection of the investment treaty, whose validity would not be in question. In other words, it would be quite difficult to envisage an investment treaty including a provision conflicting with a peremptory norm or concluded with the purpose of violating such a norm which would raise issues of normative conflicts under the law of treaties.

### 3.3.2 Temporality (*Lex Posterior* and *Lex Prior*)

In order to establish priority of applicability of two valid norms, their temporal relationship can be taken into consideration, according to the maxim *lex posterior derogat [legi] priori*. Article 30 VCLT reflects some elements of this maxim, establishing, at paragraph 3, a presumption of priority of the later agreement, which can be rebutted if it can be established that the intent of the parties did not match the presumption.<sup>121</sup> The priority rules expressed in Article 30 are as follows:

1. If there is an express savings clause in the successive treaty establishing a rule of precedence between the two (either by the *lex posterior* or the *lex prior* rule), this shall apply and the treaty given precedence will prevail in the relationship between the parties (*lex specialis* rule, Article 30 paragraph 2);
2. if there is complete coincidence *ratione personae*, then the *lex posterior* rule applies, and the earlier treaty remains applicable only to the extent of its consistency to the later treaty (Article 30 paragraph 3);
3. if there is no complete coincidence *ratione personae*, paragraph 3 applies only to parties to both treaties, while the treaty common to both parties governs their relationship;

---

<sup>121</sup> A rebutted presumption based on the clear intent of the parties is different from the application of the opposite maxim (*lex prior*) based on the respect of the fundamental principle of *pacta sunt servanda*. See also ILC (n 2) 122 ff. It might be the case that a contractual law approach to IIAs might militate in favour of the application of the *lex prior* rule, while a public law paradigm will point to the *lex posterior* as the correct gauge of States' intent. This has interesting repercussions in the meta-conflict between conflict rules, to the extent that IIAs tend to belong to the contractual type of treaty more than environmental treaties, normally of a multilateral type and belonging more clearly to a public law paradigm.

4. paragraph 5 of Article 30 clarifies that these rules are without prejudice to any question of state responsibility arising from the conclusion or application of a treaty incompatible with a previous obligation, as already noted above.

Clearly, the overlap between treaties relating to different subject matters, between different parties, concluded over time and containing no conflict resolution clauses, or conflicting or ambiguous ones, remains a distinct possibility. Inter-regime conflicts, or conflicts between treaties amongst different parties,<sup>122</sup> cannot easily be tackled by a technical rule such as the *lex posterior*; rather the rule becomes subordinated to other criteria, such as the distinction between ‘integral’ and ‘reciprocal’ obligations, where typically, in an inter-regime conflict such as the one between environmental and investment obligations, the environmental obligations will be contained in a multilateral treaty of the integral kind, the investment obligations in a bilateral treaty of the reciprocal kind.<sup>123</sup> Already in 1966, the International Law Commission acknowledged that integral treaty obligations are better dealt as a matter of the law of State responsibility.<sup>124</sup> The more recent *FTAs plus*, combining investment, trade and social goals (such as sustainable development, environmental protection and labour rights) are more likely to contain express conflict clauses, as the NAFTA on which they are modeled. If there are no express provisions, the issue of compatibility is dealt with provision-by-provision as per Article 30(1); this might be relevant for the application of the ‘subject matter’ criterion, whereby the provisions, rather than the treaty as a whole, have to share the same subject matter.

In an older contract-based investment arbitration, the Tribunal took into consideration the temporal dimension of the applicable law.<sup>125</sup> The dispute concerned the development of an hotel complex in Egypt, which was blocked by the Egyptian government on account of several irregularities, and justified under the 1975 UNESCO

---

<sup>122</sup> It is likely that successive treaties between different parties are also straggling between different regimes.

<sup>123</sup> Third Report on the Law of Treaties by Gerald Fitzmaurice, UN doc A/CN.4/115, YILC Vol II, 20, 27, Article 18, para 2.

<sup>124</sup> Report of the ILC to the General Assembly on its 18<sup>th</sup> Session, A/6309/Rev I (1966) Vol II YILC 169, 217 para 13; see also Olivier Corten and Pierre Klein, *The Vienna Conventions on the Law of Treaties – A Commentary* (OUP 2011) 772; Jan Klabbers, ‘Beyond the Vienna Convention: Conflicting Treaty Provisions’, in Cannizzaro (n 25) 192, 195.

<sup>125</sup> *Southern Pacific Properties (Middle East) Ltd v Arab Republic of Egypt*, ICSID Case No ARB/84/3, Award (20 May 1992) (1993) 8(2) ICSID Review – Foreign Investment Law Journal 328.

Convention for the Protection of the World Cultural and Natural Heritage which imposed, according to Egypt, an international obligation to prevent the development on the sites of the Pyramids, registered as sites protected under the Convention (at Article 11) as of 1979. The Tribunal partially accepted the submission by the Respondent that the cancellation of the project was obligatory under the UNESCO Convention, and therefore it used the date, 1979, in which the site was registered – and therefore, in its reasoning, the obligation became binding on the Respondent – in order to calculate the *lucrum cessans*, using the temporal dimension of the obligation in the assessment of the *quantum*. The Tribunal therefore derived some consequences from the application of the UNESCO Convention and used temporality as the criterion to establish when the Convention became binding and superseded the obligation to compensate the investor for the *lucrum cessans*.

In another recent arbitration, the Respondent raised a jurisdictional objection based on its accession to the EU, which, it argued, terminated the applicable BIT (as per Article 59 VCLT) or rendered its arbitration clause inapplicable (as per Article 30(3) VCLT).<sup>126</sup> The debate on the relationship between the EU and the investment treaty regime is beyond the scope of this dissertation, as well as the discussion on the termination of the BIT under Article 59 VCLT (an objection that the Tribunal rejected).<sup>127</sup> The objection raised under Article 30(3) by the Defendant was disposed of summarily by the Tribunal, as it did not agree that EU law precluded the recourse to international arbitration where one of the parties is not a State and in any event, it ruled that issues of incompatibility were to be dealt with at the merits stage and did not deprive the Tribunal of jurisdiction (unless the arbitrability clause itself were to be found to be incompatible with EU law, which it found not to be the case).<sup>128</sup>

---

<sup>126</sup> *Achmea BV v The Slovak Republic*, UNCITRAL, PCA Case No 2008-13 (formerly *Eureko BV v The Slovak Republic*), Award on Jurisdiction, Arbitrability and Suspension (26 October 2010).

<sup>127</sup> *ibid*, paras 233 ff. The Tribunal argued that the test of compatibility is both broader and stricter under Article 59 – requiring an overall incompatibility between treaties, rather than between individual provisions, but also that a weak incompatibility will not suffice, the test being that no possible simultaneous application is possible – than under Article 30; therefore, the failure of the incompatibility test under Article 59 did not prejudice the potential narrower incompatibility under Article 30 (para 241).

<sup>128</sup> So that the ruling of the CJEU in Case C-459/03, *Commission v Ireland*, Judgment of 30 May 2006, [2006] ECR I-4635 (*Mox Plant Case*) did not apply. The award was confirmed by the Frankfurt Court of Appeal, Case no 26 SchH 11/10, 10 May 2012.

### 3.3.3 Specificity (*Lex Specialis*)

The VCLT does not contain a specific provision on *lex specialis*, which constitutes the other major criterion for the resolution on normative conflicts based on the principle of specificity (as between general law and an interpretation or exception to it, or between two special provisions).<sup>129</sup>

While it is more likely for a special rule to develop and be agreed after a general rule, it does not necessarily follow that the *lex specialis* rule is never applicable or it is subject to the *lex posterior* rule.<sup>130</sup> However, while the *lex specialis* rule allows to establish an ‘informal hierarchy’<sup>131</sup> in which the rule that is dis-applied in the particular instance remains in the background, in the case of the temporality rule, the ‘losing’ rule loses its validity altogether, at least as concerns the relation between the parties to both rules, and it is not simply dis-applied in the specific dispute. Furthermore, the relational character of the general/special distinction<sup>132</sup> does not allow, it seems, for an application of *lex specialis* as a discrete self-standing criterion for the resolution of a potential conflict, but points to its usefulness rather as an interpretative principle than as a conflict rule. The ILC goes as far as to say that this principle ‘cannot be meaningfully codified.’<sup>133</sup> This is especially so as long as one attributes to the rule the double function of distinguishing between general and particular in a cumulative as well as in an exclusionary way, ie both in order to select a more specific rule against a more general one within the same field of application, or to isolate one specific regime from its more general normative environment. As an example one can look at the codification by the ILC in the Draft Articles on State Responsibility, at Article 55 (*Lex Specialis*): ‘These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a state are governed by special rules of international law’.<sup>134</sup>

---

<sup>129</sup> See ILC (n 2) paras 47 ff.

<sup>130</sup> This is particularly relevant if the *lex specialis* is also *lex prior*: see Pauwelyn (n 3) 405 ff.

<sup>131</sup> ILC (n 2) para 85.

<sup>132</sup> *ibid*, para 112.

<sup>133</sup> *ibid*, para 119.

<sup>134</sup> ILC, *Report on the Work of its Fifty-third Session, Official Records of the General Assembly, Fifty-Sixth Session, Supplement No 10 (A/56/10)* 58. See also Vera Gowlland-Debbas, ‘The Role of the International Court of Justice in the Development of the Contemporary Law of Treaties’, in Christian J Tams and James Sloan, *The Development of International Law by the International Court of Justice* (OUP 2015) 25, 47, where the author laments that ‘it is unfortunate that in this Opinion



The most straightforward application of the rule is in the context of two related treaties, one of which is of a more general nature and the other more specific: for example, a treaty implementing the obligations set out in the ‘framework’ treaty or a treaty that sets out in more detail the general terms of a previous agreement,<sup>135</sup> or more generally, when considering the obligations contained in a treaty in the context of international law, as stated by the ICJ in the *Gabčíkovo-Nagymaros Case*:<sup>136</sup>

It is of cardinal importance that the Court has found that the 1977 Treaty is still in force and consequently governs the relationship between the Parties. That relationship is also determined by the rules of other relevant conventions to which the two States are party, by the rules of general international law and, in this particular case, by the rules of State responsibility; but it is governed, above all, by the applicable rules of the 1977 Treaty as a *lex specialis*.

The *lex specialis* criterion has been especially relevant in the context of the attribution and invocation of State responsibility and, in the investment treaty arbitration context, in dealing with countermeasures.<sup>137</sup> This application of the criterion is germane to the acceptance of a heightened *lex specialis* form establishing ‘self-contained regimes’ with their own independent rules of State responsibility.<sup>138</sup> It is self-evident that the investment regime, with its own system of dispute settlement and, at least in its ICSID guise, the exclusion of the recourse to diplomatic protection, seems to qualify as one such regime.<sup>139</sup> Nonetheless, the permanence of general rules of international law, including its rules of State responsibility, as fall-back rules, seems equally uncontentious.<sup>140</sup>

---

[*Nuclear Weapons*] the Court utilized the concept of *lex specialis* in an exclusionary fashion in order to dismiss the relevance to human rights law altogether with regard to the legality of nuclear weapons [...].

<sup>135</sup> As in *Mavrommatis Palestine Concessions* (Jurisdiction), PCIJ, *Ser A, No 2* (1924), 30, 31.

<sup>136</sup> *ICJ Reports* 1997, para 132.

<sup>137</sup> See ILC (n 2) 38 ff and especially 74 ff; Paparinskis (n 114) 264.

<sup>138</sup> In the sense suggested by the Commentary to Article 55 of the ILC Draft Articles (n 113) 358-359.

<sup>139</sup> Opposite positions on the nature of the investment regime in this regard have been taken by Zachary Douglas, ‘The Hybrid Foundations of Investment Treaty Arbitration’ (2003) 74 *BYBIL* 151, and Charles Leben, ‘La Responsabilité Internationale de l’État sur le Fondement des traités de Promotion et de Protection de l’Investissements’ (2004) 50 *Annuaire Français de Droit International* 683. Equally, two NAFTA tribunals came to conflicting conclusions with regards to the availability of countermeasures to NAFTA Parties; see *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas Inc v United Mexican States*, ICSID Case No ARB(AF)/04/5, Award (21 November 2007); and *Corn Products International, Inc v United Mexican States*, ICSID Case No ARB(AF)/04/01, Decision on Responsibility (15 January 2008).

<sup>140</sup> However, the scope of applicability of fall-back rules, and specifically, what qualifies as ‘regime

Under a less demanding reading of the *lex specialis* rule, as an ‘interlinked series of primary and secondary rules,’ devoid of any strict ‘self-contained’ character, these regimes share an ‘ethos’ but remain open to interpretation under general international law.<sup>141</sup> The uncontested assertion that IIAs constitute *lex specialis* with respect to general international law – as illustrated most forcefully by the debate on the relationship between the treaty and customary standard of treatment for investors – does not take us very far in solving a conflict where compliance with a treaty norm in the IIA results in a breach of an environmental treaty, or *vice-versa*; this leaves unresolved the issue of conflict resolution by application of the *lex specialis* rule, as these regimes cannot be considered closed legal circuits to the extent that are impervious to other legal obligations, even if they have been treated as such by several tribunals. Only a combination of the *lex specialis* and *lex superior* criteria, whereby a special regime arrogates for itself superior status with reference with another potentially conflicting regime as a matter of jurisdictional reach – much like the Court of Justice of the EU (CJEU) is wont to do – might guarantee the legal, if not political, resolution of any conflict between regimes.<sup>142</sup>

### 3.4 Concluding Remarks

Two main approaches can be identified for the resolution of normative conflicts: *avoidance* – with the tools of inter-State negotiations, treaty drafting and diplomatic

---

failure’ in order for such fall-back mechanism to come into action has not been meaningfully explored.

<sup>141</sup> ILC (n 2) 88 ff. The term ‘self-contained’ with reference to legal provisions is attributed to the PCIJ in the *SS Wimbledon Case*, PCIJ, *Ser A, No 1*, 23 (importantly, in this case the PCIJ does not make reference to a ‘regime’). See also the ICJ in *Case concerning the United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)* ICJ Reports 1980 p 41, para 86. The ILC suggested to replace the use of the misleading term ‘self-contained regime’ with the more appropriate ‘special regime,’ with reference either to a special system of secondary rules or to a more integrated system of primary and secondary rules. A third, even wider definition, of such a regime as equivalent to ‘branches’ of international law such as trade, environment, etc, is not advisable either. On self-contained regimes and the rules on State responsibility, see also Bruno Simma and Daniel Pulkowski, ‘Of Planets and the Universe: Self-contained Regimes in International Law’ (2006) 17 EJIL 483.

<sup>142</sup> See the reading of Article 307EC by the then ECJ especially in relation to conflicting BITs, for example in *Commission of the European Communities v Finland*, Case C-118/07; on the investment side, the first dispute to address this relationship was *Eastern Sugar BV (Netherlands) v The Czech Republic*, UNCITRAL *ad hoc* arbitration, SCC no 088/2004, Partial Award (27 March 2007). See Michele Potestá, ‘Bilateral Investment Treaties and the European Union – Recent Developments in Arbitration and Before the ECJ’, (2009) 8 *The Law and Practice of International Courts and Tribunals* 225. See more recently *AES Summit Generation Limited AES-Tisza Erömu KFT v The Republic of Hungary*, ICSID Case No ARB/07/22, Award (23 September 2010) Section 7.2.

settlement – and *management* – with the tools available in investor-State arbitrations, ie interpretation and conflict resolution. The *avoidance* route is heavily dependent on State intervention, at the political level of policy-making, at the diplomatic level of inter-State relations, or finally, at the legal level of treaty-drafting and legislative action. It suffers from the downsides of State intervention, in that it is slow and risks damaging investors in the process, as direct third party beneficiary of the rights granted in the treaties.<sup>143</sup> It is also State-driven and based on public international law principles such as sovereign equality and good faith. The political will of States is necessary in order to initiate investment treaties’ amendments, facilitating compliance with non-investment obligations and creating the policy space necessary for the implementation of environmental measures. It is, by and large, the approach favoured in North America and in the NAFTA zone specifically; this is evidenced by the amendments by the United States and Canada of their model BITs in order to clarify the extent of certain provisions and the relationship between treaty and custom with respect to standards of treatment of foreign investors.<sup>144</sup> There is very little empirical research on the effect of the avoidance route on normative conflicts and more work needs to be done in this area.<sup>145</sup>

The *management* route is less dependent on States, as it is contextual to investment arbitration, where the tribunals, as agents,<sup>146</sup> are to a large part in control of the process and therefore of the outcome. While the avoidance route suffers from the downsides of the State-centred approach, the management route suffers from the downsides of a diffused, non-hierarchical approach out-with the direct control of the States: lack of consistency in the jurisprudence, absence of a clear democratic mandate for the tribunals and of clear division of competences. In fact, a more heuristically fruitful way

---

<sup>143</sup> Raising issues of legitimate expectations and detrimental reliance; see also Wälde (n 32) 765.

<sup>144</sup> 2004 US Model BIT, <http://www.state.gov/documents/organization/117601.pdf>; 2004 Canada Model FIPA, <http://www.italaw.com/documents/Canadian2004-FIPA-model-en.pdf>.

<sup>145</sup> Partially because it is a comparatively recent development in investment law; a notable example is Article 1.2(3) of the 2015 Australia-China FTA: ‘In the event of any inconsistency between this Agreement and any other multilateral or bilateral agreement to which both Parties are party, the Parties shall immediately consult with a view to finding a mutually satisfactory solution’. This contrasts with similar previous clauses, such as Article 103 of the NAFTA, which gave primacy to the NAFTA in the event of inconsistency.

<sup>146</sup> Alec Stone Sweet, ‘Arbitration and Judicialization’ (2011) 1(9) *Oñati Socio-Legal Series*; Alec Stone Sweet and Florian Grisel, ‘Transnational Investment Arbitration: From Delegation to Constitutionalization?’ in Pierre-Marie Dupuy, Ernst-Ulrich Petersmann, and Francesco Francioni, *Human Rights in International Investment Law and Arbitration* (OUP 2009) 118; Anne van Aaken, ‘Control Mechanisms in International Investment Law’, in Douglas and others (n 10) 409.

to consider normative conflicts is to envisage them as conflicts of jurisdiction and competence between judicial bodies, international courts and tribunals. To the extent that this work takes the internal point of view in this respect, and considers the way in which investment tribunals deal with normative conflicts, it eschews the jurisdictional question; its relevance, however, should not be underestimated.<sup>147</sup>

In this dissertation the focus is unequally distributed, with an overall concentration on the management route (the work of tribunals); a heightened focus again on the management route in the first part, to the extent that interpretation and conflict resolutions with the tools available in the VCLT are activities undertaken by tribunals; and a slightly higher focus on avoidance in the last part, as the inclusion of conflict clauses in the treaties is due to the drafting efforts of States, but the application in a dispute context is again the task of tribunals.

The table in the following page summarises the forms of action that can be taken by States and by tribunals in order to address the challenges raised by normative conflicts and it constitutes a useful summary of the avoidance and management routes. In bold in the table the actions undertaken by tribunals, and underlined the topics that are covered in this work, as a reminder of the further avenues for research in the direction of the construction of a complete taxonomy in the study of normative conflicts.

---

<sup>147</sup> See for example the acute remarks by James Crawford, 'Continuity and Discontinuity in International Dispute Settlement: An Inaugural Lecture' (2009) 1(1) *Journal of International Dispute Settlement* 1, 19.

PREVENTIVE (TREATY DRAFTING)		CONTEXTUAL (IN DISPUTE)	REMEDIAL (POST-DISPUTE)
<b><u>Amendment</u></b>	Preamble	Authoritative statements	<i>Ad hoc</i>
	Substantive clauses		Institutional (eg NAFTA)
	<u>Conflict clauses</u>		Unilateral
	ISDS clauses		
<b>Termination</b>		Consultation on draft award	<b>Comments to award</b>
<b><u>Model IIAs</u></b>		Intervention by non-disputing parties <sup>148</sup>	<b>Appeal system</b>
<b><u>Protocols and Annexes</u></b>		<b>Renvoi by tribunals</b>	
<b>Non-binding instruments</b>		<b><u>Recourse to <i>travaux préparatoires</i></u></b>	
<b>Side agreements</b>		Intervention by negotiators	
		<b><u>Forensic interpretation</u></b>	
		<u>Conflict resolution techniques</u>	

The following chapter is dedicated to a review of the conflicts clauses in IIAs, one of the main tools available to States to avoid and manage successfully normative conflicts.

<sup>148</sup> For example as provided for expressly in Article 9.16(2) of the 2015 Australia-China FTA: ‘The non-disputing Party may make oral and written submissions to the tribunal regarding the interpretation of this Chapter’. This clause was already available in NAFTA, as Article 1128, but was subordinated to written notice to the disputing parties.

## 4. Chapter 4 – Conflicts in IIAs

### 4.1 Conflict Clauses

Chapter 3 contained a review of the available techniques for conflict resolution that can be adopted by tribunals faced with a pure normative conflict, ie, a conflict of international obligations. One of the conclusions reached from that examination was that the most efficient way to deal with these conflicts, and one freer from ambiguities and therefore providing a higher degree of predictability, consists in the insertion of conflict rules in the applicable IIA. These conflict clauses can be designed to deal with pre-existing treaties, future treaties or even regulate conflicts within the same treaty. Additionally, they can directly refer to conflicting environmental (or other, especially trade) obligations, or generally establish a hierarchy between treaties (by reference to technical conflict rules such as *lex specialis* or *lex posterior*). Their success is highly dependent from the clarity of their language, as they are subject to the interpretation of tribunals and therefore open to the usual interpretative issues.

IIAs contain two kinds of conflict clauses: the first one is a conflict clause proper, establishing a hierarchy of application between international obligations; the second kind does not aim at solving normative conflicts by way of exclusion, but rather has the more limited function of enhancing the mutual supportiveness of international obligations through soft law clauses – ie not establishing binding obligations for the States, but promoting or supporting a certain behaviour with respect to substantive regimes external to the investment regime.<sup>149</sup> To this extent, these clauses are similar to the balancing clauses also contained in IIA at least since the NAFTA.<sup>150</sup> The difference

---

<sup>149</sup> The importance of mutual supportiveness, underpinning the basic presumption against conflict, has been recognised widely. Additionally, the residual character of Article 30 VCLT, whereby specific provisions on compatibility in the applicable treaty would prevail, was recognised by the United Nations Conference on the Law of Treaties, *Official Records, Second Session, 91<sup>st</sup> Meeting* (Waldock).

<sup>150</sup> See for example Article 1114 (Environmental Measures) NAFTA: ‘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.’

between ‘mutual supportiveness clauses’ and ‘balancing clauses’ rests in the fact that the first are aimed at international non-investment obligations, while balancing clauses are directed at domestic policy measures. Conversely, the pure conflict clauses find their correspondent in the ‘police powers’ exception clauses (or other forms of carve-out and/or exception clauses as those allowing environmental performance requirements, which are normally prohibited) at the domestic level. Given the different hierarchical position of international and domestic law, reflected in Article 27 VCLT, domestic law can be internationalised via the police powers doctrine, whereby certain sovereign acts on the domestic plane are granted, by way of exception, the status of a customary international principle, allowing the linkage at the international level between the treaty obligation and the impugned governmental measure. However, a too strict categorisation of the clauses around this taxonomy does not reflect the reality of treaty drafting, as there are examples of mixed clauses – supportiveness and balancing, or international and domestic – neither does it reflect the reality of arbitral practice, whereby what is constructed as an argument around normative conflict by the respondent, might be reframed as decision based on mutual supportiveness by the tribunal. Another observable phenomenon is the tendency of respondent States to employ police powers arguments rather than normative conflicts arguments as defences.<sup>151</sup> The following table provides a possible categorisation of IIAs clauses dealing with mixed domestic-international conflicts and purely international conflicts.

	<b>Mixed conflicts</b>	<b>Pure international conflicts</b>
<b>Hard law</b>	Police powers/exceptions/carve-outs/ performance requirements	Conflicts clauses
<b>Soft law</b>	Balancing clauses	Mutual supportiveness clauses/ soft law clauses

Generic conflict clauses of the first kind, establishing a clear hierarchy, but without expressly including environmental treaties in their purview, are often included, but are constrained, implicitly or explicitly, by the limitations of Article 30 VCLT on subject-matter. For example, Article 80 (Obligations under Other International, Regional or Bilateral Agreements) of the 2000 Singapore-New Zealand FTA provides:

<sup>151</sup> For example in *Suez v Argentina* (n 81) para 102.

Nothing in this Agreement shall be regarded as exempting either Party to this Agreement from its obligations under any international, regional or bilateral agreements to which it is a party and any inconsistency with the provisions of this Agreement shall be resolved in accordance with the general principles of international law.<sup>152</sup>

More clearly worded savings clauses were introduced with the NAFTA and are incorporated into more recent FTAs that follow its model.

#### 4.1.1 The NAFTA

Treaty practice in drafting conflict clauses of the first kind and dealing with different subject matters is particularly rare and does not move much beyond the North American area, starting with the most influential FTA of the second period, the NAFTA.<sup>153</sup> At the top of the attention of the NAFTA drafters was the relationship between the NAFTA and the WTO Agreement, which was being negotiated at the same time.<sup>154</sup> This is reflected in the insertion of Article 103: Relation to Other Agreements, which provides:

1. The Parties affirm their existing rights and obligations with respect to each other under the *General Agreement on Tariffs and Trade* and other agreements to which such Parties are party.
2. In the event of any inconsistency between this Agreement and such other agreements, this Agreement shall prevail to the extent of the inconsistency, except as otherwise provided in this Agreement.<sup>155</sup>

---

<sup>152</sup> Singapore-New Zealand Closer Partnership Agreement, 14 November 2000, 2203 UNTS 129. See also Article 1.3 of the 2005 Singapore-Korea FTA and Article 16.5 of the 2006 Singapore-India FTA.

<sup>153</sup> Priority rules for the 'more favourable treaty' are more common, including for treaties of the first period.

<sup>154</sup> The issue of regionalism with respect of the WTO Agreements has attracted a lot of attention; see by way of introduction the information on the WTO webpage, at [http://www.wto.org/english/tratop\\_e/region\\_e/region\\_e.htm](http://www.wto.org/english/tratop_e/region_e/region_e.htm), accessed 16 December 2015. The WTO General Council established a Committee on Regional Trade Agreements in 1996; See also Lorand Bartels and Federico Ortino (eds), *Regional Trade Agreements and the WTO Legal System* (OUP 2006).

<sup>155</sup> According to Article 30(3) VCLT, the WTO Agreement, which entered into force on 1 January 1995, should take precedence over the NAFTA, which had entered into force a year earlier. However, Article 103 NAFTA provides for a special regime of precedence, without expressly stating if this includes also later agreements. Article 301(1) NAFTA defines the relationship between the relevant chapter of the NAFTA and the GATT and other *successor* agreements; it is arguable *e contrario* that Article 103 does not establish any rule of precedence with respect to successive agreements. Furthermore, the WTO Agreements incorporate GATT 1947 without amendments; therefore, it can be considered *lex prior* within the meaning of Article 303(3) VCLT. In any event, there remains a certain amount of uncertainty over the relationship between the NAFTA and the totality of the WTO Agreements.



The difficulty in applying Article 103(2), as noted in the footnote, might go some way in explaining why the 2014 Consolidated Text of the EU-Canada Comprehensive Economic and Trade Agreement (CETA) still leaves the language of the corresponding article to be determining in the conclusive phase of negotiations.<sup>156</sup>

Article 104: Relation to Environmental and Conservation Agreements, sets up specific conflict rules for environmental instruments and creates an exception from the general rule established in Article 103:

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

(a) Convention on the International Trade in Endangered Species of Wild Fauna and Flora, done at Washington, March 3, 1973;

(b) the Montreal Protocol on Substances that Deplete the Ozone Layer, done at Montreal, September 16, 1987, as amended June 29, 1990;

(c) Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, done at Basel, March 22, 1989, upon its entry into force for Canada, Mexico and the United States; or

(d) the agreements set out in Annex 104.1,<sup>157</sup>

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 the agreements listed in paragraph 1, and any other environmental or conservation agreement.

In Chapter Eleven, Article 1112: Relationship to Other Chapters, regulates possible conflicts within the NAFTA at paragraph (1): ‘In the event of any inconsistency

---

<sup>156</sup> See Article X.04(2) of the Consolidated CETA Text, published 26 September 2014, [http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc\\_152806.pdf](http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf).

<sup>157</sup> The Annex includes The Agreement Between the Government of Canada and the Government of the United States of America Concerning the Transboundary Movement of Hazardous Waste, signed at Ottawa, October 28, 1986 and The Agreement Between the United States of America and the United Mexican States on Cooperation for the Protection and Improvement of the Environment in the Border Area, signed at La Paz, Baja California Sur, August 14, 1983.

between a provision of this Chapter and a provision of another Chapter, the provision of the other Chapter shall prevail to the extent of the inconsistency.’

NAFTA’s Articles 103 and 104 are conflict rules designed to establish normative priority and as such they are supposed to direct States in their performance of the treaties obligations; further, they might be applied in case of inter-States disputes under Chapter 20 (Institutional Arrangements and Dispute Settlement Procedures). Article 2001 established the Free Trade Commission, whose interpretations are binding on investment tribunals in accordance with Article 1131(2). Article 2005 confers a certain degree of discretionality to disputing parties as to the choice of forum, be it either the NAFTA or the GATT 1947/GATT 1994, with some exceptions, including for actions subject to Article 104, where NAFTA is the only forum available. The scope of the dispute settlement facilities under Chapter 11 and their relationship with the Agreement are set out in Article 1115: Purpose, which provides:

Without prejudice to the rights and obligations of the Parties under Chapter Twenty (Institutional Arrangements and Dispute Settlement Procedures), this Section establishes a mechanism for the settlement of investment disputes that assures both equal treatment among investors of the Parties in accordance with the principle of international reciprocity and due process before an impartial tribunal.

According to Article 1131: Governing Law, the NAFTA itself and applicable rules of international law govern disputes arising under the Agreement.<sup>158</sup> The direct applicability of Article 104 to disputes arising under Chapter 11 has to take into account that the Article deals with ‘specific trade obligations’ in a list of environmental agreements prevailing over the NAFTA (‘this Agreement’); this is a classic case of *lex specialis*, whereby specific trade clauses in environmental agreements will prevail over general trade clauses in the NAFTA. The article raises interesting questions as to the applicability of the *lex specialis* rules across regimes – whereby environmental trade rules constitute *lex specialis* with respect to general trade rules,<sup>159</sup> allowing

---

<sup>158</sup> The jurisdiction of NAFTA tribunals is limited to breaches of Section A of Chapter 11 and Articles 1503(2) and 1502(3)(a) of Chapter 15, as established at Article 1116.

<sup>159</sup> One could think, for example, of the emission trading regime under Kyoto, as a form of *lex specialis*, covering environmental trade. See also Marie-Claire Cordonnier Segger and Markus Gerhing, ‘Trade and Investment Implications of Carbon Trading for Sustainable Development,’ in David Freestone and Charlotte Streck, *Legal Aspects of Carbon Trading* (OUP 2009) 77, 86.

environmental obligations to enter the trade regime – but at the same time seems of difficult application in a conflict between an investment obligation and a trade obligation in the prevailing environmental treaty, unless one argues that by ‘specific trade obligations’ the NAFTA drafters intended ‘specific trade and investment obligations’ in environmental treaties or that a purposive interpretation of the environmental treaty will include investment practices that might have an effect on the environment of the kind prohibited by the environmental treaty.

The North American Agreement on Environmental Cooperation is the environmental side agreement to the NAFTA and also came into force on 1 January 1994.<sup>160</sup> Amongst its objectives, listed in Article 1, is: ‘[to] support the environmental goals and objectives of the NAFTA,’ reaffirming the presumption of mutual supportiveness intrinsic to international law. Its Article 40: Relation to Other Environmental Agreements, regulates the relationship between this ancillary agreement to the NAFTA, subjecting it to other environmental agreements to which the NAFTA states might be parties: ‘Nothing in this Agreement shall be construed to affect the existing rights and obligations of the Parties under other international environmental agreements, including conservation agreements, to which such Parties are party.’ There are several other provisions in the NAAEC that function as coordinating measures between the NAFTA and the NAAEC, introduced in response to the demands and concerns of environmental organisations, and they belong to the second typology, of mutual supportiveness.<sup>161</sup> For example Article 10(3) on the functions of the Council (one of the three bodies comprising the Commission for Environmental Cooperation, or CEC) provides:

3. The Council shall strengthen cooperation on the development and continuing improvement of environmental laws and regulations, including by:
  - a. promoting the exchange of information on criteria and methodologies used in establishing domestic environmental standards; and

---

<sup>160</sup> The negotiating history of the NAFTA reveals the impact of environmental concerns and explains the resort to environmental and labour side-agreements as a strategic choice to guarantee the success of the NAFTA, advanced most successfully by the then presidential candidate Bill Clinton. Amongst the considerable literature reflecting on this relationship, see Gary C Hufbauer and Others, *NAFTA and the Environment: Seven Years Later* (Institute for International Economics 2000); Carolyn L Deere and Daniel C Esty (eds), *Greening the Americas: NAFTA's Lessons for Hemispheric Trade* (MIT Press 2002); David L Markell and John H Knox, *Greening NAFTA: The North American Commission for Environmental Cooperation* (Stanford University Press 2003).

<sup>161</sup> See Markell and Knox, above, 9 ff.

b. without reducing levels of environmental protection, establishing a process for developing recommendations on greater compatibility of environmental technical regulations, standards and conformity assessment procedures in a manner consistent with the NAFTA.

Article 10(6) explicitly links the international obligation of mutual supportiveness with the balancing between domestic measures and international obligations allowed in Article 1114 NAFTA:

6. The Council shall cooperate with the NAFTA Free Trade Commission to achieve the environmental goals and objectives of the NAFTA by:

- a. acting as a point of inquiry and receipt for comments from non-governmental organizations and persons concerning those goals and objectives;
- b. providing assistance in consultations under Article 1114 of the NAFTA where a Party considers that another Party is waiving or derogating from, or offering to waive or otherwise derogate from, an environmental measure as an encouragement to establish, acquire, expand or retain an investment of an investor, with a view to avoiding any such encouragement;
- c. contributing to the prevention or resolution of environment-related trade disputes by:
  - a. seeking to avoid disputes between the Parties,
  - b. making recommendations to the Free Trade Commission with respect to the avoidance of such disputes, and
  - c. identifying experts able to provide information or technical advice to NAFTA committees, working groups and other NAFTA bodies;
  - d. considering on an ongoing basis the environmental effects of the NAFTA; and
  - e. otherwise assisting the Free Trade Commission in environment-related matters.

The following section contains a selection of cases arising under the NAFTA that presented an environmental element. As noted at the beginning of this work, it is within the NAFTA framework that the tension between these substantive regimes first acquired relevance. It is therefore appropriate to analyse the reaction of tribunals when faced with issues of normative conflicts in this area.

#### 4.1.2 *SD Myers v Canada*

On the first cases that arose from the NAFTA's Chapter 11 is the *SD Myers* case.<sup>162</sup> SD Myers Inc (SDMI) is an American company based in Ohio, involved in the remediation of polychlorinated biphenyl (PCB) from oil and related equipment. PCB is a highly toxic material, and its treatment and cross-border transport is strictly regulated both internationally and domestically, including via a prohibition on transport between the US and Canada. In the 1990s, as its market share in the US diminished, SDMI decided to expand its activities in the Canadian market, importing PCB waste from Canada for treatment in its US facilities. The NAFTA claim was initiated because of a temporary ban on the export of the PCB issued by the Canadian government in 1995. SDMI had lobbied both in the US and Canada to lift import restrictions on PBA and had obtained an 'enforcement discretion' from the US Environmental Protection Agency (EPA) allowing it to export the PCB from Canada.<sup>163</sup> The enforcement discretion was replaced with an Import for Disposal Rule on 18 March 1996. The EPA had acted without consulting with the Canadian authorities, which responded with the export ban. SDMI claimed the real reason for the ban was the desire of the Canadian government to protect its domestic PCB-disposal industry. The border was opened again for export of PCB into the US in February 1997, and then closed permanently in July of the same year, following a decision of the US Ninth Circuit Court of Appeal overturning the EPA's Import for Disposal Rule.

The case raised several issues of conflicting international obligations. In 1989 Canada had ratified the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes (the Convention); however the United States had not it ratified yet, so Article 104 NAFTA, which is applicable when all NAFTA parties have ratified the Convention, was not applicable in the relation between the parties.<sup>164</sup> Article 4(5) of the

---

<sup>162</sup> *SD Myers v Canada* (n 72); for commentaries on the case, see John De Pencier, 'Investment, Environment and Dispute Settlement: Arbitration under NAFTA Chapter Eleven, (1999-2000) 23 *Hastings International & Comparative Law Review* 409; Brian Trevor Hodges, 'Where the Grass is Always Greener: Foreign Investors' Actions Against Environmental Regulations Under NAFTA's Chapter 11, *S.D. Myers Inc. v. Canada*' (2001) XIV *Georgetown International Environmental Law Review* 367; David Schneiderman, *Constitutionalizing Economic Globalization* (CUP 2008) 86 ff.

<sup>163</sup> As explained by the Tribunal: 'The term "enforcement discretion" is not defined in U.S. law, but apparently means that the US EPA would not to enforce the U.S. regulations banning importation of PCBs against SDMI, provided that SDMI met the detailed conditions that were attached to the US EPA's October 26, 1995 letter (which included "no landfilling"). The import ban itself would remain in place and any imports to the USA technically would be contrary to U.S. law'. *SD Myers v Canada* (n 72) para 119.

<sup>164</sup> Arguably, Article 18 VCLT would enjoin the US to refrain from acts that would defeat the object and purpose of the treaty, but the limit of this obligations are not clear cut; see for example Paolo

Convention prohibits the export and import of hazardous wastes from and to States that are not party to it.<sup>165</sup> Since the United States had not ratified the Convention, Article 4(5) identified it as a non-Party, and should have prevented the export of PCB into its territory. However, the Convention allows, at Article 11(1), for the Parties to enter into arrangements with other Parties or non-Parties for the transboundary movement of hazardous waste, provided these arrangements do not derogate from the standards set by the Convention. One such arrangement, the Transboundary Agreement, had been entered into by the US and Canada in 1986;<sup>166</sup> its Article 2 (General Obligation) allows for the transboundary import, export and transit of hazardous waste pursuant to domestic law, regulations and administrative practices.<sup>167</sup> Canada argued that this agreement did not cover PCB because it was not classified as ‘hazardous waste’ in the US;<sup>168</sup> therefore, Canada’s position was that the prohibition at Article 4(5) of the Convention remained applicable.

As noted, US legislation prohibited the trans-border transportation of PCB<sup>169</sup> and the 1995 Canadian Interim Order, confirmed later in the year by a Final Order, banned the export of PCB. The EPA’s Enforcement Discretion and Import Disposal Rule were subject to judicial review proceedings, with the US Ninth Circuit Court of Appeals overturning them for being *ultra vires*, following a petition by the environmental NGO Sierra Club in which SDMI participated as an intervener.<sup>170</sup> At the time SDMI served its

---

Palchetti, ‘Article 18 of the 1969 Vienna Convention: A Vague and Ineffective Obligation or a Useful Means of Strengthening Legal Cooperation?’, in Cannizzaro (n 25) 25; Oliver Dörr and Kirsten Schmalenbach, *Vienna Convention on the Law of Treaties – A Commentary* (Springer 2011) 219.

<sup>165</sup> See *SD Myers v Canada* (n 72) para 106. Article 11 of the Basel Convention allows for shipment of hazardous waste to non-parties if there are bilateral, multilateral or regional agreements not less stringent than the Basel convention (such as the Transboundary Agreement).

<sup>166</sup> *SD Myers v Canada* (n 72) para 103. Article 2 of the Agreement allows the export, import and transit of hazardous waste across the border.

<sup>167</sup> In addition, Article 11 specifically subjects the Agreement to the applicable laws and regulations of the Parties.

<sup>168</sup> Article 1(Definitions) of the Agreement provides: ‘**Hazardous Waste** means with respect to Canada, hazardous waste, and with respect to the United States, hazardous waste subject to a manifest requirement in the United States, as defined by their respective national legislations and implementing regulations.’ The US clarified that PCBs were hazardous waste within the meaning of the Agreement via diplomatic note to the Canadian government on 24 January 1996 (para 103).

<sup>169</sup> Chiefly, for the purposes of this case, the US 1976 Toxic Substances Control Act, USC §§ 2601-2692, which contains a categorical ban on the production and import of PCB, with very limited exceptions, and which was overridden, without authority, as established by judicial review, see *infra*, by the EPA through its enforcement discretion. In Canada, the government had added PCBs in 1977 to the list of toxic substances in the *Environmental Contaminants Act* (now superseded by the *Canadian Environmental Protection Act* or CEPA), supplemented by the PCB Waste Export Regulations 1990.

<sup>170</sup> *Sierra Club v EPA*, 118 F 3d 1324, 1327 (9<sup>th</sup> Cir 1997).

Notice of Intent, it could not, as a matter of US law, have imported PCB in the United States for treatment.<sup>171</sup> Effectively, the Tribunal penalised Canada for having enforced a ban that was consistent with US law, and not at variance with it. While Article 27 would have prevented Canada for using the provisions of its own domestic laws to justify the breach of an international commitment under the NAFTA, *ordre public* and comity could be construed as a legitimate excuse for its enforcement action; it is partially on these grounds that Canada challenged the Partial Award in its Federal Court under Article 34(2)(b)(ii) of its *Commercial Arbitration Code*.<sup>172</sup> The Court dismissed the application for lack of jurisdiction and in any event stated that ‘[it] could not conclude that any aspect of the Tribunal’s decision conflicted with Canadian public policy.’<sup>173</sup>

On the substance of the normative conflict claim raised by Canada, which argued that its obligations under the Basel Convention relieved it of its duties towards SDMI to the extent that they existed at all,<sup>174</sup> the Tribunal considered that the Transboundary Agreement was an agreement within the meaning of Article 11 of the Convention and therefore Article 4(5) did not apply;<sup>175</sup> that, in any event, Article 104 NAFTA was not applicable; and finally, to the extent that Article 104 incorporated the Transboundary Agreement in Article 104 Annex, that, in order to comply with Article 104(1), Canada

---

<sup>171</sup> In its Memorial on the Merits of 20 July 1999, at 15, SDMI claimed that ‘the Court’s decision did not affect the ability of the EPA to grant individual enforcement discretions to companies such as S.D. Myers, Inc.’ This is technically true, but the 9<sup>th</sup> Circuit Court made it clear that the EPA only had the power to grant exemptions to the import ban of no more than one year, and given the ruling of the Court, it seemed clear that this would not be renewable (At section III: Thus the absolute ban on manufacturing PCBs includes an absolute ban on their import, and EPA may not promulgate a rule governing the disposal of PCBs that would violate this categorical ban. There is, however, a lone exception to TSCA’s broad ban on the manufacture and import of PCBs. TSCA § 6(e)(3)(B)(i) provides that the EPA Administrator may grant an exemption if the Administrator determines that “an unreasonable risk of injury to health or environment would not result. Such exemption may not last for more than one year.” EPA, therefore, may not promulgate-as it did here-a rule to dispose of PCBs which allows parties to “continue importing [PCBs] indefinitely without interruption.” The point is also forcefully made by the Canadian Alliance on Trade and Environment in its *amicus* submission to the Tribunal.

<sup>172</sup> Federal Court – Trial Division, Notice of Application T-225-01, 8 February 2001. Canada challenged the award under the code for being ‘in conflict with the public policy of Canada.’

<sup>173</sup> *The Attorney General of Canada v SD Myers Inc*, 2004 FC 38.

<sup>174</sup> Canada raised a jurisdictional objection to the effect that SDMI was not an investor and that there was no covered investment, and that its Interim Order affected trade and not investment, so that Chapter 3 of the NAFTA was applicable, and, in case of conflict between Chapter Eleven and another Chapter of the NAFTA, the other chapter prevailed to the extent of the inconsistency.

<sup>175</sup> The Tribunal quotes to this effect the Report issued by the NAFTA Commission for Environmental Cooperation on the Status of PCB Management in North America; *SD Myers v Canada* (n 72) para 213, n 36.

would have to have chosen the measures that are ‘*most consistent with open trade*’, which it had failed to do;<sup>176</sup> and finally that,

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 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>177</sup> [emphasis added].

While the Tribunal did engage with the international responsibilities of the defendant arising from its international obligation, and referred approvingly to the principle of mutual supportiveness between environmental protection and economic development, ultimately the attempt of the claimant to link its domestic measures with its international obligations was unsuccessful.<sup>178</sup> Beyond the controversy around the application of trade law standards of review, it remains one of the few investment law arbitrations to meaningfully engage with issues of environmental regulation and sustainable development derived from international obligations.<sup>179</sup>

#### 4.1.3 *Chemtura v Canada*

In the *Chemtura* Arbitration, the Respondent State, Canada, successfully argued for the legitimacy of its domestic measures resulting in the banning of the product *Lindane* because of the underlying international environmental obligations under Annex II of the Aarhus Protocol.<sup>180</sup> The Claimant’s argument on the breach of the FET standard was structured around six specific measures that were challenged under that heading; the first measure was the review of the product requested by Canada. Contextually to the main claim that the review was vitiated by due process breaches, the Claimant alleged

---

<sup>176</sup> *ibid*, para 221.

<sup>177</sup> *ibid*, para 215.

<sup>178</sup> *ibid*, para 220. See also Viñuales (n 81) 250.

<sup>179</sup> Riccardo Pavoni, ‘Environmental Rights, Sustainable Development, and Investor-State Case Law: A Critical Appraisal’, Dupuy and others (n 146) 525, 531.

<sup>180</sup> *Chemtura v Canada* (n 77).



that '[...] the scientific basis for the outcome of the Special Review was insufficient.'<sup>181</sup> Canada appealed to its international undertakings under the Aarhus Protocol in order to argue the legitimacy and legality of the measures, an argument that was accepted by the Tribunal partially on the basis of the ambiguous position taken by the Claimant with respect of the safety of the product, and partially because, '[...] the Tribunal cannot ignore the fact that lindane has raised increasingly serious concerns both in other countries and at the international level since the 1970s [...]'.<sup>182</sup> Following the factual analysis, the Tribunal confidently concluded that the evidence showed that Canada acted in good faith and in pursuance of its international obligations, where those obligations themselves were used in order to establish the absence of bad faith as part of the evidentiary discovery.

#### 4.1.4 The DR-CAFTA

The DR-CAFTA is the second major FTA signed in the American continent and the first between the United States and several other smaller States. The Agreement contains a general savings clause in Article 1.3: Relation to Other Agreements:

The Parties affirm their existing rights and obligations with respect to each other under the WTO Agreement and other agreements to which such Parties are party.

For greater certainty, nothing in this Agreement shall prevent the Central American Parties from maintaining their existing legal instruments of Central American integration, adopting new legal instruments of integration, or adopting measures to strengthen and deepen these instruments, provided that such instruments and measures are not inconsistent with this Agreement.

The conflict clause in Paragraph 2 is not as strongly worded as the corresponding clause in the NAFTA, and is of more limited scope, dealing only with Central American Integration Agreements. The clause contained in the first paragraph has been adopted in many recent FTAs, normally in the following form: 'The Parties affirm their existing rights and obligations with respect to each other under the WTO Agreement and other agreements to which both Parties are party.'<sup>183</sup>

---

<sup>181</sup> *ibid*, para 127.

<sup>182</sup> *ibid*, para 135 (follows list of States practice restricting or banning the use of lindane).

<sup>183</sup> Article 1.3 of the United States-Chile FTA; Article 1.2 of the United States-Colombia FTA; Article 1.2

Chapter Ten of the CAFTA is the investment chapter and at Article 10.2: Relation to Other Chapters, regulates the relationship between the investment chapter and the other chapters of the CAFTA:

1. In the event of any inconsistency between this Chapter and another Chapter, the other Chapter shall prevail to the extent of the inconsistency.
2. A requirement by a Party that a service supplier of another Party post a bond or other form of financial security as a condition of the cross-border supply of a service does not of itself make this Chapter applicable to measures adopted or maintained by the Party relating to such cross-border supply of the service. This Chapter applies to measures adopted or maintained by the Party relating to the posted bond or financial security, to the extent that such bond or financial security is a covered investment.
3. This Chapter does not apply to measures adopted or maintained by a Party to the extent that they are covered by Chapter Twelve (Financial Services).

The article is obviously modelled on the NAFTA, but this time the scope of the article is wider, whereby the conflict is between chapters generally, rather than provision by provision as it was in the NAFTA. Finally, Article 17.12 [Relationship to Environmental Agreements] contained in the Environment Chapter is similar to Article 104 of the NAFTA, in that it deals with specific conflicts with environmental agreements; however the article is not a conflict clause proper, establishing a clear hierarchy of rules, relying instead on the soft law language of cooperation and consultation, in keeping with the mutual supportiveness model. The article provides:

1. The Parties recognize 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 recognize that this Chapter and the ECA can contribute to realizing the goals of those agreements.

---

of the United States-Australia FTA; Article 1.2.1 of the United States-Bahrain FTA; Article 1.2.1 of the United States-Korea FTA; Article 1.2.1 of the United States-Morocco FTA (with slightly different language, to accommodate the relationship between the FTA and the BIT); Article 1.2.1 of the United States-Oman FTA; Article 1.3.1 of the United States-Panama TPA; Article 1.2 of the United States-Peru TPA; Article 1.1.2 of the United States- Singapore FTA; Article 1.3 of the 2001 Canada/Costa Rica FTA; Article 4 of the 2002 EFTA/Singapore FTA; Article 1.5 of the 2005 EFTA/Korea FTA; Article 108 of the Japan/Mexico FTA (relationship with the GATS and the OECD Code of Liberalisation of Capital Movements); Article 11 of the 2006 Japan/Philippines EPA; Article 1.2 of the 2008 Australia/Chile FTA.

Accordingly, the Parties shall continue to seek means to enhance the mutual supportiveness of multilateral environmental agreements to which they are all party and trade agreements to which they are all party.

2. The Parties may consult, as appropriate, with respect to ongoing negotiations in the WTO regarding multilateral environmental agreements.

Article 104 of the NAFTA is also the model for Article 1-06 (Relation to Environmental and Conservation Agreements) of the 1998 Chile-Mexico FTA, for Article 1.04 (Relation with Other International Agreements) of the 2002 FTA between the Governments of Central America and Chile and for Article 1.03 (Relation with Other International Agreements) of the 2007 Taiwan, El Salvador and Honduras FTA, as further proof of the normative pull exercised by the NAFTA in treaty practice in the Americas and beyond.<sup>184</sup>

#### 4.1.5 The Energy Charter Treaty

The Energy Charter Treaty (ECT) provides, as stated on the website of the Charter, ‘a multilateral framework for energy cooperation that is unique under international law. It is designed to promote energy security through the operation of more open and competitive energy markets, while respecting the principles of sustainable development and sovereignty over energy resources.’<sup>185</sup> The ECT contains a complex system of conflict rules regulating both intra-treaty and extra-treaty conflicts, with particular reference to its relationship with the GATT and the WTO Agreements. The first of these rules is contained in Article 4 (Non-derogation from GATT and Related Instruments]: ‘Nothing in this Treaty shall derogate, as between particular Contracting Parties which are parties to the GATT, from the provisions of the GATT and Related Instruments as they are applied between those Contracting Parties.’ Article 5 deals with trade-related investment measures and their consistency with GATT obligations:

(1) A Contracting Party shall not apply any trade-related investment measure that is inconsistent with the provisions of article III or XI of the GATT; this shall be without

---

<sup>184</sup> Other instruments containing the clause include the 2001 Canada-Costa Rica FTA (Article 1.4)

<sup>185</sup> Energy Charter Homepage, at < <http://www.encharter.org/index.php?id=28>> accessed 17 December 2015.

prejudice to the Contracting Party's rights and obligations under the GATT and Related Instruments and Article 29.

(2) Such measures include any investment measure which is mandatory or enforceable under domestic law or under any administrative ruling, or compliance with which is necessary to obtain an advantage, and which requires [follows list of performance requirements].

The article contains both a pure conflict clause and a performance requirement prohibition based on the implementation of domestic measures inconsistent with the ECT's obligations. Both Articles 4 and 5 subject the ECT's obligations to the parties' obligations under the GATT, contrary to the equivalent NAFTA provisions considered above.<sup>186</sup> Article 16 [Relation to Other Agreements] of Part III [Investments] provides:

Where two or more Contracting Parties have entered into a prior international agreement, or enter into a subsequent international agreement, whose terms in either case concern the subject matter of Part III or V [Dispute Settlement] of this Treaty,

(1) nothing in Part III or V of this Treaty shall be construed to derogate from any provision of such terms of the other agreement or from any right to dispute resolution with respect thereto under that agreement; and

(2) nothing in such terms of the other agreement shall be construed to derogate from any provision of Part III or V of this Treaty or from any right to dispute resolution with respect thereto under this Treaty, where any such provision is more favourable to the Investor or Investment.

The article establishes that in case of overlap with other investment agreements, the more favourable one shall apply, and it is therefore not applicable to international agreements not sharing the same subject matter.<sup>187</sup> The Energy Charter Treaty is also accompanied by a side environmental agreement, the Energy Charter Protocol on Energy Efficiency and Related Environmental Aspects (PEEREA); its Article 13(1)

---

<sup>186</sup> Additionally, Article 29 (Interim Provisions on Trade-related Matters) makes the substantive GATT rules related to the energy trade applicable between the ECT Parties, regardless of their ratification status as a GATT Party ('GATT by reference', see *The Energy Charter Treaty – A Reader's Guide*, 12). On 24 April 1998, the 'Trade Amendment' adopted by the International Conference of the Parties to the Energy Charter replaced the GATT provisions with the WTO provisions.

<sup>187</sup> See also *AES Summit Generation Limited v The Republic of Hungary*, ICSID Case ARB/07/22, Expert Opinion of Professor Piet Eeckhout, 30 October 2008. The Defendant had argued that in case of conflict with between EU law and the ECT, EU law should prevail. The Tribunal concluded that there was no conflict and therefore Article 16 ECT was not applicable. See *AES v Hungary*, Award (23 September 2010) para 7.6.8.

(Relation to the Energy Charter Treaty) establishes the relationship between the two instruments whereby: ‘In the event of inconsistency between the provisions of this Protocol and the provisions of the Energy Charter Treaty, the provisions of the Energy Charter Treaty shall, to the extent of the inconsistency, prevail.’

The European experience of economic and political integration of Eastern Europe post-1989 is also evidenced by the 1997 Agreement on Partnership and Co-operation between the European Communities and the Russian Federation.<sup>188</sup> The main thrust of the Agreement is the inclusion of the former Soviet Union into the legal framework expressing the liberal consensus on market economy, rule of law and human rights, inclusive of environmental rights. As a programmatic instrument, the Agreement contains many references to other international legal instruments, both in the Preamble (including the ECT, the GATT and the WTO Agreements) and in dedicated Articles throughout the text. An important objective of the Agreement is the harmonisation (referred to as approximation in the text) of legislation between the Parties:<sup>189</sup> this sort of ‘vertical harmonisation,’ which in reality is an exercise involving only Russia, does not necessarily deal with issues of ‘horizontal conflicts’ across legal regimes; Article 69 of the Agreement (Environment) tackles the issue of cooperation on environmental protection, and singles out the Espoo Convention on Environmental Impact Assessment, inviting its implementation by the Parties. Article 58 (Investment Promotion and Protection) on the other hand, aims at the conclusion of BITs between the Member States and Russia, returning to the bilateralism typical of the investment regime. There is no other attempt at co-ordination between the potentially conflicting fields of intervention, but the entire Agreement is inspired by this integrative thrust and approximation effort.

#### 4.2 ‘Mutual Supportiveness’ and Soft Clauses

---

<sup>188</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, OJ L327, 28/11/1997, p 3.

<sup>189</sup> See Article 55: ‘1. The Parties recognize that an important condition for strengthening the economic links between Russia and the Community is the approximation of legislation. Russia shall endeavour to ensure that its legislation will be gradually made compatible with that of the Community. 2. The approximation of laws shall extend to the following areas in particular: company law, banking law, company accounts and taxes, protection of workers at the workplace, financial services, rules on competition, public procurement, protection of health and life of humans, animals and plants, the environment, consumer protection, indirect taxation, customs law, technical rules and standards, nuclear laws and regulations, transport.’

‘Mutual supportiveness clauses’ are quite common in the third and fourth periods’ FTAs and PTAs. These clauses obviously share more of the ‘soft law’ nature than their stricter relations, the pure conflict clauses. Further down on the scale of bindingness are the clauses that encourage the integration not of international environmental binding obligations, but of soft-law, corporate social responsibility (CSR) standards and recommendations. For example, the 2013 Canada-Benin BIT provides at Article 16 (Corporate Social Responsibility):

Each Contracting Party should encourage enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate internationally recognized standards of corporate social responsibility in their practices and internal policies, such as statements of principle that have been endorsed or are supported by the Contracting Parties. These principles address issues such as labour, the environment, human rights, community relations and anti-corruption.

The article reflects the thrust towards the incorporation of investors’ duties in the IIAs, but equally, strives to link the investment obligations of the State with the CSR obligations of the investors, themselves based on international, rather than domestic, standards. However, given the non-binding character of the standards, these clauses replace the hierarchical structure of the international/domestic relationship with the similarly hierarchical hard law/soft law distinction between investment and CSR obligations, while placing them both on the international plane. Along the lines of the mutual supportiveness clauses is Article 4 of the 1999 United States-Turkey FTA, part of an early group of FTAs signed by the United States with several African and Asian countries. The Article provides:

For the purpose of further developing bilateral trade and providing for a steady increase in the exchange of products and services, the Parties shall consider whether further agreements relating to trade, taxation, intellectual property, investment, labor and environmental issues and to any other matters agreed upon by the Parties would be desirable.

The article does not serve as a conflict clause of either kind, as it refers to yet-to-be drafted instruments, but it underpins and prefigures a mutual supportiveness approach to

the international agreements mentioned. Of a similar nature is the more recent Article 44 in the 2008 ‘Stepping Stone’ EPA between the EU and the Côte d’Ivoire:

On the basis of the Cotonou Agreement, the Parties shall take all necessary measures and cooperate in order to encourage the negotiation and earliest possible conclusion of a global EPA in accordance with the relevant WTO provisions between the EC Party and West Africa as a whole, in the following areas:

(b) investments;

(g) sustainable development;

The Parties shall adopt all appropriate measures with a view to encouraging the conclusion of a global EPA between the EC Party and West Africa before the end of 2008.<sup>190</sup>

The article is interesting in that it endeavours to establish a linkage between the Cotonou Agreement, the WTO Agreement and the EPA to be negotiated in the areas of investment and sustainable development, exemplifying once again the integrative thrust of this kind of provisions.<sup>191</sup> This Agreement also contains a complex set of rules on the negotiation of other FTAs providing more favourable treatment, including a conflict rule on the application of technical barriers to trade, sanitary and phytosanitary measures (Article 36 of Chapter 4 (Multilateral Obligations)) which is applicable to the trade in goods provisions. Similar provisions are contained in the 2009 Interim Agreement signed in preparation for a comprehensive EPA between the EU and Central African States, including a specific article on sustainable development that establishes, amongst its objectives the negotiations of specific international agreements. The Article provides:

1. The Parties recognise that sustainable development is an overall objective of the EPA. They therefore agree to ensure that sustainability considerations are reflected in all titles of the EPA and to draft specific chapters covering environmental and social issues.

---

<sup>190</sup> Negotiations for this EPA concluded in February 2014; full text of the agreement available at <http://ec.europa.eu/trade/creating-opportunities/bilateral-relations/regions/west-africa/>, accessed 17 December 2015.

<sup>191</sup> The Cotonou Agreement, as well as the UN Millennium Development goals, is also mentioned in the Preamble.

2. To achieve this objective, the Parties shall conclude negotiations by 1 January 2009 on a set of potential commitments on sustainable development, which shall include in particular the following:

- (a) level of protection and right to regulate;
- (b) regional integration in Central Africa, use of international environmental standards and of the International Labour Organisation and promotion of decent work;
- (c) upholding levels of protection;
- (d) consultation and monitoring procedures.

3. In conducting the negotiations, the EC Party shall take into account the development needs of the signatory Central African States, which may take the form of provisions on cooperation in this field.<sup>192</sup>

Finally, recent instruments also see the incorporation of clauses designed to encourage the resolution of potential normative conflicts by way of diplomatic means. For example, Article 1906 (Consultations on Inconsistencies with Other Agreements) of the 2004 Thailand-Australia FTA provides:

If either Party considers there is any inconsistency between this Agreement and any other agreement to which both Parties are parties, the Parties shall consult each other with a view to finding a mutually satisfactory solution.<sup>193</sup>

#### 4.3 Conclusive Remarks

The incorporation of conflict clauses in IIAs follows some general trends:

- 1) The clauses are more likely to be incorporated in FTAs than in BITs;
- 2) Conflicts between pure FTAs and the WTO Agreements are more extensively covered than conflicts between BITs/FTAs and the WTO Agreements;
- 3) Intra-treaty trade/investment conflicts are more likely to be solved by way of express conflict provisions, while inter-treaty investment/environment conflicts are often dealt

---

<sup>192</sup> The Agreement is not in force yet; text available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/238357/7949.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/238357/7949.pdf) accessed 17 December 2015.

<sup>193</sup> Thailand-Australia Free Trade Agreement, signed 5 July 2004 [2005] ATS 2.



with by way of mutual supportiveness clauses, with or without a linkage to domestic legislative powers;<sup>194</sup>

4) Newer instruments reflect the already recognised trend towards greater diversification and sophistication of clauses.

Additionally, as recent FTAs contain their own side environmental agreements, this engenders the need to establish conflict rules between them and the ‘mother’ agreement. This limiting trend, whereby one of the two agreements is subordinated to the other (often by means of the ‘least restrictive’ clause) is accompanied by a more progressive comprehensive trend, whereby the environmental side agreements reaffirm the parties’ commitments under other environmental multilateral agreements, either in the Preamble or in specific clauses. This trend, exemplified for example by the Revised 2012 US Model BIT, sidesteps the legal issue of normative conflict resolution, even if it adds the international dimension to the environmental commitments. This is evident from the most recent version of the US Model, where the reference to ‘domestic environmental laws’ in the 2004 Model is replaced with the following clause: ‘The Parties recognize that their respective environmental laws and policies, and multilateral environmental agreements to which they are both party, play an important role in protecting the environment’.<sup>195</sup>

In its Conclusions on the Fragmentation of International Law, the Study Group of the International Law Commission gave the following guidelines on the adoption of specific 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 and purpose of the treaty;

---

<sup>194</sup> See for example Article 5(3) of the Belgium Model BIT: ‘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;’ Article 18.8 of the United States-Singapore FTA.

<sup>195</sup> Article 12.1.

(c) They should, as appropriate, be linked with means of dispute settlement.<sup>196</sup>

I have considered already the difficulties intrinsic to the resolution of normative conflicts, with or without the inclusions of specific conflict clauses, and when these are applicable, with or without the above criteria suggested by the ILC. A few conclusive remarks are apposite. The first is a reminder of the coordination challenges between the law of treaties and the law of international responsibility of States. A commonly accepted outcome of this challenge is the resort to the ‘political decision solution’ by States facing the choice between conflicting obligations, since their international responsibility for the breach of an obligation is potentially unaffected by the application of the law of treaties. A less immediately obvious consequence is that the ‘all or nothing’ approach of Article 30 VCLT inevitably will present the States with the stark choice of respecting one obligation at the risk of incurring the full responsibility for the breach of the conflicting obligation. It is at this juncture that the enforcement divide between investment law and environmental law can exert its maximum influence, whereby political expedience will be flanked by economic calculus in dictating the choice of compliance: there is at present no enforcement mechanism in environmental law guaranteeing the level of compensation commonly available for breaches of investment obligations, and it is understandable that short-term economic calculations might convince States to breach their international environmental obligations in order to honour their investment undertakings. Express conflict clauses can only partially remedy this problem, unless they are drafted quite carefully and comply with all the criteria listed by the ILC.

Mutual supportiveness clauses do away with the problem of the ‘all or nothing’ approach of Article 30 VCLT but replace it with the interpretative conundrums already noted, and do not guarantee any certainty of outcome. In fact, they are not relied upon by States in any significant manner, and they mostly leave the enforcement divide unaffected.

---

<sup>196</sup> ILC (n 2) para 251.

## 5. Chapter 5: Conclusions

In this dissertation I have considered some of the legal tools available to tribunals to avoid or harmonise conflicts, maintaining the ‘unity of international law,’ when applying IIAs both containing and lacking specific provisions to deal with those conflicts. Less attention has been devoted, for reasons of space, to the consequences of normative conflicts.<sup>197</sup> In this regard, is important to not use a tunnel vision and disregard the economic and political framework, as well as the legal one. In particular, the very occurrence of a conflict is ultimately the result of choices made by the State: internationally, to enter into agreements that might have as a consequence of their implementation (or even of their ratification) the occurrence of a normative conflicts with other agreements covering other substantive areas of law. Domestically, to transpose into domestic law these international obligations, or to implement certain measures that might be challenged by investors on the basis of an IIA.

To this effect, and taking as the discriminating factor the behaviour of the State (its choices), the following scheme might be proposed:

Choices	Legal consequences		Economic consequences	
	For States	For investors	For States	For investors
No regulation	Possible breach of international treaty	Liable to tort action if complicit in violation of international law	Mitigation costs for environmental or other damages	Higher profits, but risk of damage payments if tort action successful
Regulation + compensation	No consequences	No consequences	Payment of compensation can be beyond means of host State	Lower profits, but compensated
Regulation/no compensation	Possible arbitration	Recourse to arbitration	Arbitration costs + damages if claim successful	Lower profits, but possibility of damage payments if claim successful

As with the other table offered in Chapter Two, the table puts into focus the work that remains to be done in the field of normative conflicts, especially for what concerns the

<sup>197</sup> To the extent that the conflict results in a breach, its consequences are to be dealt with through the application of the rules on State responsibility, either as included in the applicable treaty, or as part of customary law.

measures taken by States both in view of a political and diplomatic solution, and also for a more specifically legal approach.

## 6. Bibliography

### Books

- Andenas, M and Bjorge, E (eds), *Farewell to Fragmentation – Reassertion and Convergence in International Law* (CUP 2015).
- Bartels, L and Ortino, F (eds), *Regional Trade Agreements and the WTO Legal System* (OUP 2006).
- Bernhardt, R (ed), *Encyclopaedia of Public International Law*, (North-Holland, 1984).
- Bianchi, A, Peat, D and Windsor, M (eds), *Interpretation in International Law* (OUP 2015).
- Binder, C and others, *International Investment Law for the 21<sup>st</sup> Century: Essays in Honour of Christoph Schreuer* (OUP 2009).
- Borchard, E, *The Diplomatic Protection of Citizens Abroad* (Banks Law Publishing 1915).
- Cannizzaro, E (ed), *The Law of Treaties Beyond the Vienna Convention* (OUP 2011).
- Corten, O and Klein, P, *The Vienna Conventions on the Law of Treaties – A Commentary* (OUP 2011).
- Craven, M, Fitzmaurice, M and Vogiatzi, M (eds), *Time, History and International Law* (Brill 2007).
- Deere, CL and Esty, DC (eds), *Greening the Americas: NAFTA's Lessons for Hemispheric Trade* (MIT Press 2002).
- Dörr, O and Schmalenbach, K, *Vienna Convention on the Law of Treaties – A Commentary* (Springer 2011).
- Douglas, Z, Pauwelyn, J and Viñuales, JE, *The Foundations of International Investment Law* (OUP 2014).
- Dunoff, JL and Pollack, MA (eds) *Interdisciplinary Perspectives on International Law and International Relations* (CUP 2012).
- Dupuy, P-M, Petersmann, E-U and Francioni, F, *Human Rights in International Investment Law and Arbitration* (OUP 2009).
- Freestone, D and Streck, C, *Legal Aspects of Carbon Trading* (OUP 2009).
- Gardiner, R, *Treaty Interpretation* (OUP 2008).
- Habermas, J, *The Theory of Communicative Action* (2 voll, Beacon Press 1987).
- Hindelang, S and Krajewski, M, *Shifting Paradigms in International Investment Law – More Balanced, Less Isolated, Increasingly Diversified* (OUP forthcoming 2016).
- Hoffman, R and Tams, CJ (eds), *International Investment Law and General International Law – From Clinical Isolation to Systemic Integration?* (Nomos 2011).
- Hufbauer, GC and others, *NAFTA and the Environment: Seven Years Later* (Institute for International Economics 2000).
- Klabbers, J, Peters, A and Ulfstein, G, *The Constitutionalization of International Law* (OUP 2009).
- Klecatsky, H, Marcic, R and Schambeck, H (eds), *Die Wiener Rechtstheoretische Schule* (Europa 1968).
- Levashova, Y, Lambooy, T and Dekker, I (eds), *Bridging the Gap between International Investment Law and the Environment* (Eleven Legal Publishing 2015).
- Markell, DL and Knox, JH, *Greening NAFTA: The North American Commission for Environmental Cooperation* (Stanford University Press 2003).
- Orakhelashvili, A, *Peremptory Norms in International Law* (OUP 2006).
- Pauwelyn, J, *Conflicts of Norms in Public International Law: How WTO Law Relates to other Rules of International Law* (CUP 2009).

- Ranganathan, S, *Strategically Created Treaty Conflicts and the Politics of International Law* (CUP 2014).
- Sands, P, *Principles of International Environmental Law* (2<sup>nd</sup> ed, CUP 2003).
- Schill, S (ed), *International Investment Law and Comparative Public Law* (OUP 2010).
- Schill, S, *The Multilateralization of International Investment Law* (CUP 2009).
- Schneiderman, D, *Constitutionalizing Economic Globalization* (CUP 2008).
- Seidl-Hohenveldern, I, *International Economic Law* (Kluwer Law International 1999).
- Simma, B (ed), *The Charter of the United Nations: A Commentary* (OUP 2002).
- Tams, CJ and Sloan, J, *The Development of International Law by the International Court of Justice* (OUP 2015).
- Tams, CJ, *Enforcing Obligations Erga Omnes in International Law* (2<sup>nd</sup> ed, CUP 2010).
- Teubner, G, *Constitutional Fragments: Societal Constitutionalism and Globalization* (OUP 2012).
- Viñuales, JE, *Foreign Investment and the Environment in International Law* (CUP 2012).
- Yakpo, E and Boumedra, T (eds) *Liber Amicorum Mohammed Bedjaoui* (Kluwer Law International 1999).

### Articles and Papers

- Crawford, J, 'Continuity and Discontinuity in International Dispute Settlement: An Inaugural Lecture' (2009) 1(1) *Journal of International Dispute Settlement* 1
- Crawford, J, 'Treaty and Contract in Investment Arbitration,' *The 22<sup>nd</sup> Freshfields Lecture on International Arbitration*, London, 29 November 2007
- De Pencier, J, 'Investment, Environment and Dispute Settlement: Arbitration under NAFTA Chapter Eleven, (1999-2000) 23 *Hastings International & Comparative Law Review* 409
- Douglas, Z, 'The Hybrid Foundations of Investment Treaty Arbitration' (2003) 74 *BYBIL* 151
- Hodges, BT, 'Where the Grass is Always Greener: Foreign Investors' Actions Against Environmental Regulations Under NAFTA's Chapter 11, *S.D. Myers Inc. v. Canada*' (2001) XIV *Georgetown International Environmental Law Review* 367
- Jenks, W, 'Conflict of law-making treaties' (1953) 30 *BYBIL* 401, 426.
- Kornicker Uhlmann, E, 'State Community Interests, *Jus Cogens* and the Protection of the Global Environment: Developing Criteria for Peremptory Norms' (1998-1999) 11 *Georgetown International Environmental Law Review* 101.
- Leben, C, 'La Responsabilité Internationale de l'État sur le Fondement des traits de Promotion et de Protection de l'Investissements' (2004) 50 *Annuaire Français de Droit International* 683.
- McLachlan, C, 'Investment Treaties and General International Law', (2008) 57 *ICLQ* 279
- Paparinskis, M, 'Investment Arbitration and the Law of Countermeasures' (2008) 79(1) *BYBIL* 264.
- Pauwelyn, J, 'At the Edge of Chaos? Foreign Investment Law as a Complex Adaptive System, How It Emerged and How It Can Be Reformed', (2014) 29 *ICSID Review – Foreign Investment Law Journal* 372.
- Potestá, M, 'Bilateral Investment Treaties and the European Union – Recent Developments in Arbitration and Before the ECJ', (2009) 8 *The Law and Practice of International Courts and Tribunals* 225.
- Roberts, A, 'The Next Battleground: Standards of Review in Investment Treaty Arbitration' (2011) 16 *ICCA Congress Series* 170.

- Sands, P, 'Treaty, Custom and Cross-Fertilization of International Law' (1998) 1 Yale Human Rights and Development Law Journal 95.
- Shelton, D, 'Normative Hierarchy in International Law', (2006) 100 AJIL 291
- Simma, B and Pulkowski, D, 'Of Planets and the Universe: Self-contained Regimes in International Law' (2006) 17 EJIL 483.
- Stone Sweet, A, 'Arbitration and Judicialization' (2011) 1(9) Oñati Socio-Legal Series
- Vandevelde, KJ, 'Model Bilateral Investment Treaties: The Way Forward' (2011) 18 South-western Journal of International Law 307.
- Vierdag, B, 'The Time of the "Conclusion" of a Multilateral Treaty: Article 30 of the Vienna Convention on the Law of Treaties and Related Provisions' (1988) 59 BYBIL 92.
- Weil, P, 'Towards a Relative Normativity in International Law?' (1983) 77 AJIL 413
- Yannaca-Small, K, 'Interpretation of the Umbrella Clause in Investment Agreements,' Paper presented at the APEC – UNCTAD Regional Seminar on Investor-State Dispute Settlement, Mexico City, 9-10 October 2006 (OECD Working Papers on International Investment, 2006/3).

### **Reports**

- International Law Commission, 'Third report on the law of treaties', (1964) II Yearbook of the International Law Commission [Humphrey Waldock].
- International Law Commission, *2011 Report*, Annex D 'The Fair and Equitable Treatment Standard in International Investment Law' (A/66/10).
- International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries (ILC Draft Articles), Yearbook of the International Law Commission, 2001, vol II, Part Two.
- International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law* Report of the Study Group of the International Law Commission Finalized by Martti Koskenniemi, A/CN.4/L.682, 13 April 2006
- International Law Commission, *Report on the Work of its Fifty-third Session, Official Records of the General Assembly, Fifty-Sixth Session, Supplement No 10* (A/56/10)
- International Law Commission, YILC (1964) Vol I, 127, 131; United Nations Conference on the Law of Treaties, Vienna 9 April 1969, Official Records (UN Doc A/CONF 39/11/1/Add 1)
- Report of the ILC to the General Assembly on its 18<sup>th</sup> Session, A/6309/Rev I (1966) Vol II YILC 169.
- Third Report on the Law of Treaties by Gerald Fitzmaurice, UN doc A/CN.4/115, YILC Vol II.
- UNCTAD, *World Investment Report 2015* (United Nations 2015)
- UNCTAD's *World Investment Report 2013* (United Nations 2013)
- United Nations Conference on the Law of Treaties, *Official Records, Second Session, 91<sup>st</sup> Meeting* (Waldock).
- United Nations Conference on the Law of Treaties: Official Records: Documents of the Conference, A/CONF39/11/Add.2.