Treaty Conflicts in Investment Arbitration

by

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1 Introduction

The thesis assesses one of the core problems arising in international investment law, namely, the conflicts that international investment treaties may create with other international agreements. This topic is so important because investment treaties are primarily intended to protect the interests of foreign investors, and do not clarify how they relate to other international agreements protecting interests that may compete with the interests of foreign investors. Tensions exist, *inter alia*, between international investment law and other branches of international law, such as human rights, international environmental, and EU law. These tensions are exacerbated by the fragmented nature of international investment law as a law governed by several thousand bilateral treaties. Ultimately, the multiple problems of fragmentation may put the legitimacy of international investment treaties and investor-state arbitration into question. This summary gives an overview of the approach, methods questions, hypothesis, presentation, and findings of the research, which are elaborated on in the 200 pages of the original thesis.

1. Approach

Differently from several other authors that criticise international investment law fundamentally and advocate for institutional change, I propose as a solution to the fragmentation problem to go back to the principles of general international law relating to international treaties and to the law of sources. My research does not attempt a reconceptualization of international investment obligations, but it elaborates on the implications for states and foreign investors of other international obligations arising from non-investment treaties. The thesis therefore stresses that international investment law cannot be seen in isolation from the rest of international law; that principles of treaty interpretation mandate taking into account other international legal obligations under Article 31(3)(c) of the Vienna Convention on the Law of Treaties; and that investor-state arbitral tribunals should make use of balancing as an interpretative technique to deal with conflicting rights and interests. Accordingly, this requires arbitral tribunals to realign their interpretative methodologies and practice in order to establish the investor-state arbitration as a legitimate system of rights adjudication.

The argument is developed that investment tribunals should make decisions based on a balancing of economic and other values where these are in issue. This is required as such tribunals must apply the rules of treaty interpretation laid down in the Vienna Convention on the Law of Treaties. This includes a duty to interpret international treaties in the light of international law in general. Thus where a case raises issues covered by other international agreements such as environmental protection, health and safety or human rights, the tribunal is bound to take into account the standards contained in these other agreements when determining the scope and meaning of the investment agreement before it.

In my opinion, a global agreement on investment or a complete structural reformation of the investor-state arbitral system is not necessary, although it is also highly improbably, to address the concerns about system's legitimacy. Instead, investor-state arbitral tribunals need to identify and take up the issues of treaty conflicts and develop interpretive and conflict resolution techniques to resolve them. I contend that the VLCT Article 31(3) (c) equips investor-state

arbitral tribunals with the required jurisdiction to take self-initiated cognisance of rights and obligation arising from non-investment treaties that have direct bearing on an investment dispute. Once tribunals have assumed jurisdiction to consider and apply non-investment treaties while interpreting investment treaties, the important questions of normative overlaps and conflicts would arise.

The research discusses the effects of cross-fertilisation of investment and non-investment treaties when their respective norms reciprocate and complement each other, resulting in jurisprudential development through inter-regime transplants. The research explains how such cross-fertilisation of treaties can results in unavoidable normative conflicts in some instances, and also how such conflicts can arise from within the investment treaties regime. After critical assessment of the inter-temporal rules to resolve treaty conflicts that are found within and outside the VCLT, this research assesses the role of value-oriented reasoning which international dispute settlement systems have developed for the resolution of treaty conflicts, and suggests the doctrinal, methodological and practical possibilities for the employment of such reasoning by investor-state tribunals. This would lead to achieving a balance in determining the amount of compensation payable to foreign investors for violations by host states of investment treaty rights when such violations are directly attributable to conflicting non-investment obligations.

Therefore, my research suggests legally and practically plausible paradigms that investor-state arbitral tribunals can use in their adjudicative techniques, interpretive methodologies, and remedial mechanisms to resolve normative conflicts present in investment and non-investment treaties. If investor-state tribunals follow these methodological and adjudicative techniques, they would not only effectively address issues pertaining to the system's legitimacy but also develop concrete substantive rules of international investment law that are coherent with other parallel systems existing within international law.

Undeniably, future investment treaty practice will also play an important role in reconstructing the normative framework of international investment law. However, the focus of this research remains on the present edifice of investment arbitration which thousands of existing investment treaties have created, and where investment treaty norms are being constantly tested and are evolving through the process of treaty interpretation. The question of how future investment treaties should be drafted to ensure that tribunals undertake the balancing of values is, therefore, beyond the scope of this research.

2. Research Methods

The general research methods employed in this research are doctrinal analysis of evolving jurisprudence of international investment law and investigation of its cross-fertilisation with other systems or regimes of international law, especially with international human rights regime. I have used the rights to health, safety and the environment as an example of human rights because state regulations in these areas are the most common means of domestic implementation of international human rights obligations. However, the analysis in this research possibly extends to all types of human rights.

The primary means of analysis is cases decided by international courts and arbitral tribunals. The analysis is based on the similarities and differences in the interpretive reasoning of such courts and tribunals. There are doctrinal differences between the precedential strength and

value of an arbitral award compared to a decision of an international court. However, the continuously increasing, uncontested and consistent modern jurisprudence of the investor-state arbitral tribunals is likely to become part of the authoritative source of international law similar to other judicial decisions. Modern arbitral jurisprudence may eventually develop into international custom that has a greater legally binding effect, particularly when arbitral jurisprudence defines the general principles of law in a contemporary treaty and factual context. Furthermore, where arbitral tribunals commonly recognise the persuasive value of earlier arbitral awards, there is a tendency to gradually increase the persuasion level to a "duty" to adopt solutions established in a series of consistent cases, which could be discarded only on compelling contrary grounds. This tendency reflects the fact that arbitral tribunals have a deep rooted perception of the unity of international investment law, which would gradually develop the overarching rules applicable to all investment disputes.

I have also discussed issues arising in this research in the light of prevalent ideologies and legal doctrines that eminent scholars of international law have offered on the subject. Additionally, a section of the research presents an empirical analysis of a comprehensive collection of numerical data of bilateral investment treaties of the EU member states.

3. Research questions

As indicated, the primary *modus operandi* of this research has remained the examination of methodologies and reasoning that investor-state arbitral tribunals have used when determining the rights and liabilities of foreign investors and host states. The biggest problem with the investor-state arbitral system is the ambiguity over the extent to which the system allows balancing foreign investors' interests against the broader public interests, especially when the host states are under another international treaty obligation to protect those interests. These increasingly conflicting interests pose a serious challenge to the system's normative framework. The present reluctance of arbitral tribunals to interpret and apply investment treaties in the purview of non-investment treaty obligations by utilising the available interpretive bases, and their failure to balance the conflicting rights and obligations arising from different treaties by utilising the available principles and rules of international law is posing a serious threat to the system's legitimacy. In this context, my research has addressed the following questions:

1. How has the present investor-state arbitral system evolved?

    a. Whether the current investor-state arbitral system developed harmoniously, aligned with the policy objectives and interests of variant international actors including developed and developing states, international institutions and multinational businesses?
    b. How does the present investor-state arbitral system operate?
    c. Have the investor-state arbitral tribunals applied the emerging international investment norms consistently to ensure that the entire system develops such adjudicative principles as subscribe them a legitimate system of rights adjudication?

2. What are different normative functions that can be ascribed to investment treaties?

a. Are the objects and purposes of investment treaties restricted only to the protection of foreign investors' rights, or do they expressly or impliedly extend to the protection of citizens' rights to health, safety and the environment?
b. What legal bases are available to tribunals within parameters of investment treaty regime to reformulate and balance the foreign investors' rights against the rights of citizens?

3. What are the available policy options for investor-state arbitral tribunals to address the system's legitimacy deficit?

    a. What should be the policy dimensions for tribunals to transform international investment arbitration into a collective value system, protecting foreign investors' rights as well as higher development objectives, giving room for and safeguarding greater public policy objectives?
    b. The investor-state arbitral system is broadly premised on the application and interpretation of investment treaties. Are there principles or rules applicable to the interpretation of treaties that tribunals can use to realign their interpretations for addressing the system's legitimacy concerns and to transform the investor-state arbitration into a collective value system?

4. What is the relationship between the investor-state arbitral system and other systems of international law?

    a. Are the rights and obligations that states have acquired under non-investment treaties relevant in the interpretation of investment treaties?
    b. Do investor-state arbitral tribunals need to develop methodologies to integrate this ostensibly autonomous system within the broader normative structures or systems of non-investment treaties, such as human rights and environmental protection treaties? If so, what doctrinal bases are available in the law of treaties to develop such methodologies?
    c. Do tribunals have jurisdiction, competency or power to consider and apply the obligations acquired by states under non-investment treaties when interpreting investment treaties?
    d. How do investment treaties interact with regional economic integration treaties, such as the *Treaty on the Functioning of the European Union* (TFEU)?

5. Is there a hierarchy of conflicting treaty norms?

    a. How do investment treaty obligations potentially conflict with obligations arising from non-investment treaties?
    b. How would or should tribunals resolve the potential conflicts between investment treaties and non-investment treaties?
    c. How should tribunals resolve the system's internal conflicts arising from different objects and purposes of a combination of two or more investment treaties that are relevant and applicable to the subject matter of a dispute?
    d. How should tribunals choose between two mutually inconsistent and conflicting provisions within an investment treaty?

e. Are the general international law principles and rules of priority between conflicting treaties workable in the investor-state arbitral system or the system should devise its indigenous rules of priority, while benefiting from the general principles and rules?

All of these questions share some degree of overlap and meet at different levels of enquiry in this research. The questions address the serious challenges facing investor-state arbitration to develop as a legitimate, coherent, reliable and useful system of rights adjudication based on collective values for both developed and developing countries as well as their citizens.

4. Hypothesis

The primary hypothesis is that investor-state arbitral tribunals need to develop a pragmatic approach in their interpretive methods with a view to achieving the system's integration into the normative framework of international law. This integration would result from:

1. Clarifications of the nature, content and scope of the principles and rules of international investment law;
2. Refinement of the adjudicative methodologies to assure that tribunals take cognisance of the norms, rights and obligations arising from non-investment treaties that conflict with investment treaties; and
3. Developing the normative framework to resolve these conflicts by balancing and prioritising conflicting obligations.

The theme of this research is that the entire corpus of the investor-state arbitral system needs to develop a new approach to the ways tribunals determine rights and duties of states and foreign investors, and how they interpret and implement investment treaties. In order to address the broader human rights and public interest concerns, all stakeholders should be able to draw on the investor-state arbitral system effectively and efficiently. The normative evolution of the investment principles and rules is progressing on the bases of the investor-state arbitral system's own particular philosophy and unique characteristics, which would result in the formulation of distinct rules of international investment law. However, investor-state arbitral tribunals must be conscious that this normative formulation remains collaborative and develops within the parameters of other branches of international law, and of established international norms that require promotion of collective good and protection of universal values.

As investor-state arbitral tribunals are the formative place of international investment law, they must assume the adjudicative duty of constructing the system as a distinct but internally and externally coherent legal regime which takes account of the rights and obligations of every stake-holder when determining the rights and obligations under investment treaties. This would develop the investor-state arbitral system as a system of collective values having the capacity to resolve frictions arising from increasingly overlapping and incompatible obligations that states have acquired in investment and non-investment treaties. This would also re-establish the role of treaties as a means for orderly and peaceful settlement of international disputes by providing pragmatic explanation for states to continue benefiting from the multifaceted and multipurpose utilisation of treaties in their international dealings.

The investor-state arbitral system's phenomenal but incoherent evolution, divergent views of its success, and the increasing normative interaction with other systems of international law suggest that the system is now poised at a critical crossroads. The system is facing grave concerns about its legitimacy but simultaneously has an opportunity to address these concerns by realigning and readjusting its adjudicative methodologies.

5. Beneficiaries and stakeholders

The primary audiences for this research are international investment arbitrators, arbitration centres and international lawyers. The primary beneficiaries are individuals who do not always have the opportunity or even the legal capacity to protect their rights and interests in the decentralised and state-focused system of international law. Human and environmental rights activists, groups, organisations, and lawyers will also greatly benefit from this research. Other beneficiaries include states that have concluded investment treaties, and foreign investors who are subjects of those treaties, since sustainable development is a value shared by all. The research is applicable to existing and future investor-state disputes, and will also help foreign investment strategists and policy makers. At the time of writing, there are a total 227 concluded and 141 pending cases at the International Centre for the Settlement of Investment Disputes (ICSID) alone.

6. Structure and presentation of research

The thesis consists of the following five previously published articles. Short abstracts of the articles are provided here.

1. **The evolution of bilateral investment treaties, investment treaty arbitration and international investment law, *International Arbitration Law Review*, Vol. 14, No. 6, pages 189-204, December 2011.**

This article explores the evolution of the current regime involving foreign direct investment, bilateral investment treaties and investment treaty arbitration. It considers why a harmonised multilateral investment agreement has never been adopted. It reflects on past attempts to harmonise the customary foreign direct investment regime, the resolution of investment disputes over the past century, and the establishment of arbitration centres across the world. It looks at how investor-state arbitral system works and how its substantive norms can potentially conflict with obligations arising from international trade agreements.

2. **Investment treaty arbitration and the development of international investment law as a 'Collective Value System': A synopsis of a new synthesis, *Journal of World Investment and Trade*, Volume 10, Number 6, pages 921-936, December 2009.**

This article provides a critical account of the development of investor-state arbitration and ensuing substantive rules of international investment law. It examines the emerging design of international investment law as a distinct substantive regime within international law. This is followed by an analysis of the views of known scholars on the determination of substantive rules of international investment law, highlighting the controversies and problems within the investor-state arbitral system. After illuminating the problems arising from conflicting arbitral awards and the complicated nexus of international obligations that states have acquired, the article argues that solution to the investor-state arbitral system's problems is in finding new foundations for the system based on solid substantive rules and the realisation and affirmation

of collective values. The article sets out a road map for the accomplishment of this collective value system.

3. **Positing for balancing: Investment treaty rights and the rights of citizens, *Contemporary Asia Arbitration Journal*, Volume 4, Number 1, pages 95-119, May 2011.**

Substantive bilateral investment treaty rules have the potential to undermine the rights to health, safety and the environment of the citizens of host states if stricter state regulations to protect these rights amount to regulatory expropriation or breach other investment treaty rights. This article argues that bilateral investment treaty rules are comparable with, and stand parallel to, the domestic laws of host states and investor-state arbitral tribunals should balance these rights when they conflict with each other. Tribunals act as *de facto* courts since they enforce rights that are assertable against the public at large and not against the host state alone. Similar to the bilateral investment treaty "rules", an analysis of the legal nature of "rights" created by BITs also reveals that these rights are comparable with the domestic law rights. The article articulates three legal arguments founded on substantive bilateral investment treaty clauses, human rights, and property rights on the basis of which, three specific rights, i.e., the rights to health, safety and the environment of citizens of host states may stand parallel to the rights that bilateral investment treaties create for foreign investors. These arguments, both individually and taken together, call for balancing these citizens' rights with the rights of foreign investors in the event of their conflict.

4. **Determining hierarchy between conflicting treaties: Are there vertical rules in the horizontal system? *Asian Journal of International Law*, Vol. 2, Issue 2, June 2012.**

This article addresses the general issues of treaty conflicts and their resolution in international law. Treaties are contractual instruments that may provide special rules of priority in case they conflict with other treaties. When a treaty does not provide such rules, however, priority is determined by the rules of the VCLT and/or general principles of law. This article argues that both the VCLT and general principles of law do not provide an adequate solution to treaty conflicts. It suggests that the solution to treaty conflicts rests in a value-oriented reading of international law and treaty norms. Norms represent values and values represent interests or benefits for which the international society requires protection. Conflicts of treaty norms are, therefore, conflicts of values that courts and dispute settlement bodies resolve by ordering a hierarchy of competing interests, and by protecting the most important interests in a given context.

5. **Resolving incompatibilities of bilateral investment treaties of the EU Member States with the EC Treaty: Individual and collective options, *European Law Journal*, Volume 16, Issue 6, pages 806–830, November 2010.**

Bilateral investment treaties concluded by the Member States of the European Union contain substantially similar clauses, including free movement of capital and dispute resolution through investor-state arbitration. Article 307 EC Treaty (present Article 351 TFEU) provides for the primacy of pre-accession treaties over the EC Treaty and simultaneously requires the Member States to eliminate their mutual incompatibilities. The European Court of Justice has declared that the free movement of capital clauses of Austrian and Swedish pre-accession extra-EU BITs are incompatible with the EC Treaty as they will impede future restrictions on the movement of

capital imposed by Community legislation. A similar "free movement of capital" clause is present in all extra-EU BITs of the Member States, whether pre- or post-accession. Article 307, however, does not apply to the post-accession treaties, which are equally capable of achieving the same results of impeding the application of the EC Treaty. In addition, the application of intra-EU BITs gives investors from BIT party states access to the investor-state arbitration, which is not available to the investors from those Member States that do not have BITs with other Member States. This is discrimination and may distort the principle of equal treatment within the EU. Furthermore, the newly acceding EU Member States are facing extensive arbitral claims for carrying out the BIT-EU conflicting obligations within their respective territories. There is a need to identify and explain rules for the resolution of these conflicts.

7. Findings

The normative framework of customary international law for foreign direct investment has remained disputed among developed and developing countries throughout modern history. On one hand, developed countries insisted on full protection and security for their citizens' assets abroad, and payment of prompt, adequate and effective compensation for any expropriations. On the other hand, developing countries have traditionally asserted their right to expropriate and payment of compensation in accordance with their domestic standards. The customary rules of diplomatic protection of citizens' assets abroad also remained problematic and inadequate. The UN General Assembly, the OECD, and several other forums made unsuccessful efforts to bring the international community to an agreement on the substantive norms governing foreign direct investment. The normative paradigm of foreign direct investment has now shifted from the customary international law to investment treaties. With several thousand bilateral investment treaties and chapters on investment in free trade agreements, we now have an extensive and complex network of treaties providing substantive and procedural protections to foreign investors. Most of the near 400 known decided and pending investor-state disputes before international investment tribunals applied and would apply the rules and principles of international investment law that essentially emerge from investment treaties.

The decisions of investor-state tribunals determine rights that are assertable against the entire world and not merely against the defending states. Awards of these tribunals not only decide the matters in dispute between a foreign investor and a host state, these awards have implications for other treaty regimes and for the overall development of international law. Investor-state arbitral tribunals are under enormous pressure by legal scholars, human rights groups and non-governmental organisations to take cognisance of applicable public interests when deciding investment disputes. The entire structure of the investor-state arbitral system revolves around the interpretation of investment treaties and this research has demonstrated that a wide variety of sources of international law, as well as international investment law, provide that investment treaties do not operate in isolation from other non-investment treaties that states parties to an investment treaty have concluded. The principle of systemic integration of treaties, the minimum requirements of justice, considerations of domestic and international public policy, and the overall normative environment: all support the relevance and application of party states' other treaties when interpreting investment treaties.

Where the relevance and application of non-investment treaties for the interpretation of investment treaties is clearly established, non-investment treaties cross-fertilise or interact with

investment treaties in two important ways. First, a non-investment treaty may provide jurisprudential explanation for the substantive rules and principles that are common in both types of treaties. Secondly, a non-investment treaty may provide rules or principles that are incompatible with an investment treaty and play a supervisory or overriding role in investor-state arbitration. The practice of investor-state arbitral tribunals reveals somewhat inconsistent and disguised presence of both these types of treaty interactions. However, tribunals have not clearly established normative bases and doctrinal justifications for the supervisory interactions, and have not fully materialised the functional outcomes and potential benefits that can be realised from such interactions.

This research showed how in particular settings various investment and non-investment treaty interactions may result in serious treaty conflicts. Investor-state tribunals as treaty interpreters are obligated by the requirements of justice prescribed by the UN Charter and the VCLT and by the principle of systemic integration provided by the VCLT Article 31(3) (c) to take cognisance of treaty conflicts emerging from cross-fertilisation of treaties and to effectively resolve these conflicts in order to satisfy the ends of justice and to develop the investor-state arbitral system as a legitimate system of rights adjudication. Investor-state tribunals have a timely and perfect opportunity to clarify that the application of non-investment treaties on investor-state disputes is required by the VCLT Article 31(3) (c). Such direct application of non-investment treaties on investor-state disputes is necessary not only to align the development of investment norms within the broader normative framework of public international law but also to strengthen the system's integrity, to bring consistency and interpretive balance pivotal for value judgements, and to disprove the allegations of undermining public interests levelled against the system.

This research has also revealed that the normative conflicts in investment treaty arbitration do not always emerge from their interaction with non-investment treaties. In some cases, the distinct investment and non-investment objects and purposes contained within investment treaties may also result in conflict with each other. Similar conflicts also arise from the combined application of the ICSID Convention and BITs, again based on their variant economic and non-economic objects and purposes. To resolve all these conflicts, whether between two investment treaties or within an investment treaty, tribunals need to balance between competing treaty norms. Where the conflicting norms are so far incompatible with each other that they cannot be simultaneously applied, tribunals need to determine hierarchy between conflicting treaty norms. Additionally, when BIT rules, which are primarily commercial and private in nature, collide with the public in nature and internationally valued rules present in domestic laws, tribunals need to balance these colliding rules to achieve a just settlement of disputes.

Further on the need for balancing, and from a different perspective, analysis of the BITs' substantive "rules" reveals that these rules are also potentially discriminatory against the citizens of host states because they create more favourable procedural and substantive rights for foreign investors. A similar "rights" based analysis of BITs highlights that the rights of foreign investors under BITs can be divided into private and public rights. They are private to the extent of the right to supra-national arbitration, which is assertable against the host state alone acting as an international person. The other substantive rights given by BITs, such as the right to fair and equitable treatment or full protection and security, to foreign investors are public rights in nature since they are assertable against the public at large including the citizens of the host

state. This legal dynamic calls for balancing because it makes the investor's rights comparable to those rights of the citizens that are present in BITs, or that can be impliedly established from BIT provisions (for example, the right to health, safety and the environment), or that arise from non-investment treaties concluded by host states.

For the resolution of these treaty conflicts and to achieve the required balance, tribunals need to interpret investment treaties by applying the total sum of international law, including the human rights, environmental protection and development components. Tribunals must take account of the factual and analytic truth of conflicting state obligations arising from investment and non-investment treaties, and use their discretion to strike a balance between conflicting rights and obligations instead of unduly favouring foreign investors. However, such balancing requires an interpretive methodology that is based on rationalisation of treaty conflicts in terms of value conflicts, where conflicting values are prioritised one over the other on the bases of collective good and universal well-being aiming at protection of the fundamental interests of the mankind. International courts and tribunals have already adopted the practice of value-based prioritising of interests arising from conflicting norms in two treaties or within one treaty. Adherence to this value-based balancing and prioritising of conflicting treaties and treaty norms would develop the investor-state arbitral system as a system of collective values, and will enhance its legitimacy and integrity as a just system for rights adjudication.

However, investor-state tribunals are falling short on their determination of applicable international law to resolve treaty conflicts. They are not vigilantly monitoring and taking cognisance of the conflicts existing between investment and non-investment treaties. Their jurisdiction might be limited to a particular treaty and a dispute, but the limits of applicable law are set by the VCLT Article 31(3) (c), which prescribes the application of all relevant treaties in treaty interpretation. This is the law and interpretation method that tribunals can and must apply and follow. Given the increasing normative overlap and interaction between the international investment regime and other fields of international law, such as the WTO Agreements and treaties relating to the protection of environment, public health, and human rights, tribunals cannot interpret and apply investment treaties in isolation. In order to achieve coherence between international investment law and the wider spectrum of public international law, this research suggests that investor-state tribunals should achieve an interpretive compatibility between investment treaties and other rules of international law. This would facilitate the "systemic integration" of international law, which is required by the VCLT Article 31(3) (c), and by the notions of justice to be maintained and promoted under the UN Charter and international law generally.

As we have seen in the reasoning and interpretive approach of the Romak award and the dissenting opinions in the Abaclat and Tokios Tokelés arbitrations, in cases of incompatibility between the objects and purposes of the ICSID Convention and a BIT, the tribunals and individual arbitrators ultimately have to choose between the collective normative framework agreed in the multilateral ICSID Convention and the mutual agreements manifested in bilateral investment treaties. The designation of the development-oriented ICSID Convention as "basic" treaty on investment protections as compared to investor-oriented BITs and application of the ICSID Convention's development objects and purposes when interpreting BITs, are positive developments in the right direction. These developments highlight the element of public good and collective values in the investor-state arbitration system. Although the Romak, Abaclat and Tokios Tokelés arbitrations involving BIT-ICSID incompatibility were

not related to state measures directly aimed at protection of public interests, in particular fact situations, where the BIT-ICSID objects and purposes conflict would generate conflict between investment protection and non-economic development objectives of host states, similar value oriented interpretation, balancing or prioritisation would result in the promotion and protection of development objectives and public interests.

Furthermore, in sharp contrast with foreign investors' rights and protections, states have gradually strengthened the protection of public interest in the shape of rights to health, safety and the environment of their citizens in the latest generation of concluded and proposed BITs. Although such provisions in future BITs would not immediately affect the normative regime of several thousand existing BITs, by requiring states to maintain the regulatory regime prevailing at the time of entry of foreign investment, these recent and future BITs would have at least the effect of maintaining the status quo for the minimum level of protections available in domestic laws of host states for citizen's rights to health, safety and the environment. A gradual transition from the modest recognition and conservation of these rights to a general authorisation of more abstract standards of human rights is expected in the light of increasing pressure on states to curtail the privileges granted to foreign investors that may prove detrimental to public interests. In this vein, the investor-state tribunals should also assume a positive role and develop the investor-state arbitral system that is responsive to the needs for balancing the rights and obligations of all stakeholders.

There is no legal obstacle for the investor-state arbitral system to promote greater sustainability objectives and protect public interests corresponding to collective values and fundamental human rights. The rules and principles of treaty interpretation well equip tribunals with the required legal bases for the promotion of such objectives. Tribunals should endeavour to bring the system to a level where it has minimum inconsistencies with the general framework of international law and has the ability to resolve tensions between the complex webs of obligations acquired by states in other regional or multilateral forums vis-à-vis investment treaties. The tribunals' adherence to the systemic integration of treaties will bring doctrinal clarifications in the system and would help alleviate the problems posed to the system's utility. Without a pragmatic systemic reassessment, the legitimacy of the existing system will continue to be questioned. If positive steps that I have suggested in this research are not taken, the system may fail to harness both from within and also with its relationship with other systems of international law. There is a need to adopt a more balanced approach to resolve tensions between competing rights, interests and values, and prove that investor-state arbitration is a legitimate system for rights adjudication.

In the context of intra-EU BITs and the TFEU-BITs incompatibility, investment tribunals have shown a strong tendency to reject the EU law arguments against their jurisdiction. The assumption of jurisdiction in the Eastern Sugar, AES and Eureko arbitrations, despite the EU Commission's and the respondent states' strong objections, reveals the willingness of tribunals to secure the foreign investor's procedural right to international arbitration granted in the investment treaties. Although the first post Lisbon Treaty (or TFEU) Eureko tribunal made some expansive assertions to distinguish the subject matters covered by the BIT and TFEU, the jurisdiction of investment tribunals over matters relating to foreign investment would remain intact for a number of parallel reasons. However, the Eureko arbitration was initiated before the entry into force of the Lisbon Treaty and this fact gained some weight in the tribunal's reasoning to avoid the application of Lisbon Treaty. Future cases may be treated differently,

however, there is no legal impediment if tribunals are inclined to exercise jurisdiction in the matters coming under intra-EU BITs. As it is clear from the Eureko award, the tribunals would ultimately apply and decide the matter in accordance with the EU law; and, if the tribunals act in line with the interpretive approach proposed by this research, there are no apparent legal hazards if the matters pertaining to EU law are decided by the arbitral tribunals. The first step for the EU Commission towards blocking this jurisdiction would surely be to require its member states to terminate their intra-EU BITs; although such termination, if achieved, would not eliminate the other legal bases available for arbitral tribunals to assume and exercise their jurisdiction.