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Towards a greater role for states?

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DOI
10.1017/CBO9781139855921.028

Publication date
2010

Document Version
Final published version

Published in
Investment Law Within International Law

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Non-investment obligations in investment treaty arbitration: towards a greater role for states?

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I Introduction

The growth of investment jurisprudence that has been witnessed in the past two decades has brought about a certain maturation of the field of foreign investment law, and with it an ever-increasing interaction with other fields of international law. Until recently, the study of this interaction received only scant attention, but with the growing impact of international investment law, scholarly interest has now turned to considering more closely the interface between investment and other areas of international regulation.[1] Undoubtedly, the need for studying and reflecting upon this interaction is not only academic, but also practical. Not only can developments in other fields of international law contribute to the development of international investment law, as attested to by the occasional instances of 'judicial borrowing' when investment tribunals rely upon legal solutions developed in other treaty regimes, such as the World Trade Organization (WTO) or human rights systems.[2] These

* The author would like to thank Freya Baetens, Eric de Brabandere, Robert Heinsch and Yannick Radi of Leiden Law School for their valuable comments on an earlier draft. The responsibility for any errors remains with the author.

[1] The emerging literature seeks to capture different aspects of this interface, focusing on the role of human rights (see, e.g., the various contributions in P-M. Dupuy, E-U. Petersmann and F. Francioni (eds), *Human Rights in International Investment Law and Arbitration* (Oxford University Press, 2009)), environmental protection standards (see, e.g., J. E. Viñuales, *Foreign Investment and the Environment in International Law* (Cambridge University Press, 2012)) or European law (see, e.g., M. Bungenberg, J. Griebel and S. Hindelang (eds), *International Investment Law and EU Law* (Heidelberg: Springer, 2011)), to mention a few examples.

[2] See, e.g., *Pope & Talbot Inc.* v. *Government of Canada*, UNCITRAL, Award on the Merits of Phase 2, 10 April 2001, paras 45–82 (where the tribunal relied in its reasoning upon WTO jurisprudence), or *Mondev International Ltd* v. *United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002, paras 143–4, and *Saipem SpA* v. *People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction

'other' fields of international law also directly enter investor–state disputes, as norms and rules originating from other subsystems of international law are now increasingly invoked and relied upon by both claimants and respondents in investment arbitration, often in conjunction with competing claims to priority and supremacy.

The increased complexity of the legal issues that, as a result, are facing investment tribunals calls for a theoretical examination of the relationship between investment law and its broader normative environment. On the one hand, issues have occasionally arisen about the concurrent application of protection standards offered by separate, albeit complementary, treaty regimes, as when investors sought to rely upon guarantees provided under human rights treaties to broaden the protections available to their investments under international investment agreements (IIAs).[3] On the other hand, there is also a growing perception of investment protection standards as potentially encroaching upon and conflicting with other areas of international regulation. And it is the problem of 'normative conflicts', potential and real, that has generated most scholarly debate. This problem started to manifest itself when foreign investors began to challenge legislative and administrative measures adopted by the host state in pursuance of public policy objectives – such as those aimed at the realisation of basic human rights, promotion of public health or protection of the environment – on the ground that these regulatory measures violated investment protection standards.[4] Expectedly, this has given rise to concerns that the standards of behaviour prescribed by international investment treaties might be unduly restraining the

and Recommendation on Provisional Measures, 21 March 2007, paras 130–2 (where the tribunals found support for their reasoning in the jurisprudence of the European Court of Human Rights).

[3] See, e.g., *Spyridon Roussalis* v. *Romania*, ICSID Case No. ARB/06/1, Award, 7 December 2011 (where the claimant not only alleged breaches of the respondent's international obligations under the Greece–Romania BIT, but also Art. 1 of the First Additional Protocol to the European Convention on Human Rights).

[4] For some earlier cases, see, e.g., *Aguas del Tunari SA* v. *Republic of Bolivia*, ICSID Case No. ARB/02/3 (concerning host state interference with water concession rights allegedly pursued in the realisation of the citizen's right to water) or *Metalclad Corporation* v. *Mexico*, ICSID Case No. ARB(AF)/97/1 (arising out of the refusal by the local authorities of Mexico to issue a waste disposal permit and the subsequent adoption of an environmentally protected area). More recent examples include *Philip Morris Asia Ltd* v. *Australia*, UNCITRAL (arising out of the adoption by Australia of stringent tobacco legislation) or *Vattenfall* v. *Federal Republic of Germany* ICSID Case No. ARB/09/6 (arising out of Germany's decision regarding its nuclear phase-out).

host states' regulatory space.[5] At the same time, it has also pointed to potential incompatibilities between obligations arising under investment treaties and host states' other international obligations, given that the adoption of disputed domestic regulatory measures was often dictated by specific international instruments.[6] Recently, the problem of normative conflicts has also arisen in relation to the EU legal order, where the (in)compatibility of obligations under IIAs and under EU treaties is increasingly becoming an issue.[7]

In light of these developments, the present chapter examines some of the legal avenues that investment tribunals can use to consider arguments based on sources of obligations other than the investment treaty, and take them into account in adjudicating investor–state disputes. Section II touches upon the problems concerning the limited jurisdictional competence of investment tribunals, and the discrepancy between that jurisdiction and the applicable law. It essentially argues that, while investment

[5] See, especially 'Business and Human Rights: Towards Operationalizing the "Protect, Respect and Remedy" Framework', Report of the Special Representative of the UN Secretary General on the Issue of Human Rights, Transnational Corporations and Other Business Enterprises, UN Doc. A/HRC/11/13, 22 April 2009, para. 30.

[6] See, e.g., *Piero Foresti, Laura de Carli & Others* v. *Republic of South Africa*, ICSID Case No. ARB(AF)/07/01 (concerning Black Economic Empowerment laws enacted by South Africa pursuant to the Convention on the Elimination of All Forms of Racial Discrimination); *S. D. Myers, Inc.* v. *Canada*, UNCITRAL, First Partial Award, 13 November 2000 (concerning an export ban on PCBs which was adopted by Canada pursuant to its obligations under the Basel Convention on the Control of Transboundary Movements of Hazardous Waste and Their Disposal); or *Compañia del Desarrollo de Santa Elena SA* v. *Republic of Costa Rica*, ICSID Case No. ARB/96/1, Award of the Tribunal, 17 February 2000 (concerning an expropriation of an investor's territory for the purpose of adding it to a national park, in pursuance of Costa Rica's obligations under the UNESCO World Heritage Convention).

[7] On the one hand, see Case C-205/06, *EC Commission* v. *Austria* [2006] OJ C165; Case C-249/06, *EC Commission* v. *Sweden* [2006] OJ C178; Case C-118/07, *EC Commission* v. *Finland* [2007] OJ C95, in which the European Court of Justice found the unrestricted transfer of funds clauses present in some EU Member States' BITs to be incompatible with EU law measures taken in the context of the fight against terrorism. On the other hand, the issue of incompatibility has also arisen with regard to the 190 or so BITs that still exist between some of the EU Member States (the so-called intra-EU BITs). The European Commission has steadily opposed such BITs, on the ground that their continued existence could lead to discrimination between EU investors that enjoy the benefits of such BITs and other EU investors. This has even led to the Commission's involvement in some ongoing investment arbitrations, beginning with *Eastern Sugar BV* v. *Czech Republic*, SCC Case No. 088/2004, Partial Award, 27 March 2007. See on these issues generally, M. Potestà, 'Bilateral Investment Treaties and the European Union: Recent Developments in Arbitration and Before the ECJ', *Law and Practice of International Courts and Tribunals* 8 (2009): 225–45.

tribunals generally enjoy considerable latitude with regard to the scope of legal rules that they are entitled to apply to a particular dispute, jurisdictional limitations may prevent them from considering claims based on obligations other than the jurisdiction-endowing treaties (section II.A). It also argues, on the other hand, that investment treaties cannot be applied in isolation of international law, and that tribunals are always bound to resort to rules other than the investment treaty (section II.B). Section III then suggests that some of these limitations may be overcome by taking account of non-investment obligations in the process of interpreting the provisions of the investment treaty. To that end, it proposes three interpretative techniques that could more often be applied by investment tribunals (sections III.A–C). It also acknowledges, however, that there are limits as to what can be achieved through the interpretative process. Therefore, section IV suggests that the problem ought to be resolved primarily through the political process. For that purpose, some practical ways are examined through which states could address problems concerning normative conflicts by improving the language of their investment treaties. Lastly, the chapter concludes with some final observations in section V.

II Choice-of-law provisions as the obvious entry point for considering obligations other than the investment treaty

One can think of a number of different settings in which non-investment obligations could potentially feature in investment treaty arbitration. On the one hand, it is perfectly possible that non-investment obligations are invoked by an investor as part of its principal or subsidiary claims.[8] In the more likely situation, however, they will be relied upon by the host state in defence of its liability. The latter may argue that a specific measure said to be in breach of investment obligations was in furtherance of obligations undertaken in non-investment instruments, as in the case of the adoption of regulatory measures aimed at the realisation of basic human rights, the establishment of an environmentally protected area

[8] See, e.g., the dispute between a Canadian investor and Barbados concerning the former's investment in an eco-tourism facility in one of Barbados' natural wetlands areas, where the claimant contended that the government of Barbados had violated its international obligations under the Canada–Barbados BIT by refusing to enforce its environmental laws, in defiance of Barbados' obligations under the RAMSAR Convention on Wetlands of International Importance and the United Nations Convention on Biological Diversity. Notice of Dispute, available at: http://graemehall.com/legal/papers/BIT-Complaint.pdf.

pursuant to an international environmental agreement or, say, the implementation of EU regulations. Alternatively, the respondent state may argue that the investor's conduct was undermining the state's obligations under non-investment instruments and that its intervention was necessary to fulfil these obligations. This might, for example, be contended in the case of a refusal to issue a permit due to the danger of pollution or of interference with a water supply concession. But this is not to say that non-investment obligations could not also influence the outcome of investment proceedings in other, incidental ways. For instance, they could importantly affect the tribunal's jurisdiction by making the whole investment treaty inapplicable, or be indirectly determinative for defining the scope of protected assets or the legality of a given investment.[9] In all such situations, investment tribunals may thus be bound to take account of non-investment obligations in the adjudicative process, either as part of the principal or incidental determinations. And the most obvious and direct way to do so is to consider them as part of applicable law.

While not always oblivious of host state's obligations other than those under the investment treaty,[10] investment tribunals have generally shown a rather reluctant attitude when it came to considering and applying external, non-investment rules in the context of an investor–state dispute, thus fuelling the perception of arbitrators being inclined to apply investment law in isolation of other fields of law.[11] As some

[9] This is particularly the case with EU law, which may operate in several distinct ways. See on this, *Eureko BV* v. *Slovak Republic*, PCA Case No. 2008–13, Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010, para. 229.

[10] See, e.g., *Southern Pacific Properties (Middle East) Ltd* v. *Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award, 20 May 1992, paras 154ff. (where account was taken of Egypt's obligations under the 1972 UNESCO Convention for the Protection of World Cultural and Natural Heritage in determining the quantum of compensation); *S. D. Myers*, paras 201–21 (where consideration was given to Canada's obligations under the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Waste and Their Disposal); *Maffezini* v. *Spain*, ICSID Case No. ARB/97/7, Award on the Merits, 13 November 2000, para. 67 (where account was taken of the obligation to conduct an environmental impact assessment procedure as required by Spanish and European law, as well as by the 1991 Espoo Convention on Environmental Impact Assessment in a Transboundary Context); or *Parkerings-Compagniet AS* v. *Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007, paras 377–97 (where the differential treatment of the claimant's investment was found to be legitimate considering the location of the latter in a UNESCO-protected area).

[11] See generally on this M. Hirsch, 'Conflicting Obligations in International Investment Law: Investment Tribunals' Perspective', in T. Broude and Y. Shany (eds), *The Shifting Allocation of Authority in International Law: Considering Sovereignty, Supremacy and Subsidiarity* (Oxford: Hart, 2008), pp. 321–43. See also E. de Brabandere, 'Human Rights

have suggested, this may have to do with the general inclination of investment arbitrators to adopt the private, *inter partes* model of dispute settlement that is prevalent in commercial arbitration, which makes investment tribunals less likely to take into account wider public policy considerations in the settlement of specific disputes.[12] It may also have to do with arbitrators' lack of acquaintance with other specialised fields of international law.[13] At least partly, however, it may be attributed to the limited jurisdictional competence of investment tribunals.[14]

A Jurisdictional constraints

Surely, investment tribunals are not tribunals of unqualified, general jurisdiction. Like other international tribunals, they are creatures of state consent, which means that their jurisdiction is not only based on the consent of the parties, but also limited by the scope of such consent. Their jurisdiction is usually confined to a particular type of dispute (e.g., disputes concerning an investment)[15] or to disputes arising under a particular instrument (e.g., disputes concerning the application or interpretation of an investment treaty or disputes concerning violations

Considerations in International Investment Arbitration', in M. Fitzmaurice and P. Merkouris (eds), *Critical Essays on the European Convention on Human Rights* (Leiden: Nijhoff, 2012) regarding the relative reluctance of investment tribunals to engage with human rights arguments.

[12] See, e.g., B. Simma, 'Foreign Investment Arbitration: A Place for Human Rights?', *International and Comparative Law Quarterly* 60 (2011): 573–96, at p. 576. For an example of this inclination, see *Glamis Gold Ltd* v. *United States of America*, UNCITRAL, Award, 8 June 2009, para. 3. That investment tribunals are, indeed, 'dispute-oriented' has also been statistically demonstrated by O. K. Fauchald, 'The Legal Reasoning of ICSID Tribunals: An Empirical Analysis', *European Journal of International Law* 19 (2008): 301–64, at p. 357.

[13] See, e.g., E. Kentin, 'Sustainable Development in International Investment Dispute Settlement: The ICSID and NAFTA Experience', in N. J. Schrijver and F. Weiss (eds), *International Law and Sustainable Development: Principles and Practice* (Leiden: Nijhoff, 2004), pp. 309–38, at p. 324.

[14] See, e.g., B. Simma and T. Kill, 'Harmonizing Investment Protection and International Human Rights: First Steps Towards a Methodology', in C. Binder, U. Kriebaum and A. Reinisch (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (Oxford University Press, 2009), pp. 678–707, at p. 679, who contend that 'affirmative claims based on international human rights law are well outside the jurisdiction of arbitration tribunals convened pursuant to BIT dispute settlement clauses'.

[15] See, e.g., Germany Model BIT 2008, Art. 10; Netherlands Model BIT 2004, Art. 9; or France Model BIT 2006, Art. 7.

of the substantive rights under the treaty).[16] Ignoring the jurisdictional limits can have important consequences, insofar as the exercise by an investment tribunal of jurisdiction that it does not have can potentially be sanctioned by the annulment of an award due to an excess of power – just like the failure to apply the proper law to the arbitration.[17] What must not be forgotten, however, is that limitations to jurisdictional competence do not necessarily restrict the scope of the law applicable to the dispute; for, the latter is a different matter than the scope of jurisdiction. Even the jurisdiction of the International Court of Justice (ICJ), which is otherwise directed to apply the sources of international law laid down in Article 38 of its Statute, is necessarily limited by the instrument upon which the Court's jurisdiction is founded in each case.

At least as far as the clauses on applicable law that are typically found in investment treaties are concerned, these do not necessarily prevent an investment tribunal from considering and applying international obligations other than those arising under an investment treaty. In fact, a large number of IIAs do not even identify the scope of the law applicable to the resolution of disputes.[18] But when they nonetheless do, investment treaties almost invariably provide for the application of international law, in addition to the treaty in question and/or the domestic law of the host state.[19] To the same extent, neither do default choice of law clauses in the ICSID Convention or other arbitral rules prevent the application of non-investment obligations by an investment tribunal. As regards the former, the second part of Article 42(1) of the ICSID Convention, which applies in case there is no party agreement on the applicable law, directs the tribunal to apply, in addition to the national laws of the party to the dispute, 'such rules of international law as may be applicable'.[20] The

[16] See, e.g., UK Model BIT, Art. 8(1); NAFTA, Art. 1116(1); or ECT, Art. 26.

[17] See generally, C. Schreuer *et al.* (eds), *The ICSID Convention: A Commentary*, 2nd edition (Cambridge University Press, 2009), pp. 943 ff.

[18] For an analysis, see E. Gaillard and Y. Banifatemi, 'The Meaning of "and" in Article 42(1), Second Sentence, of the Washington Convention: The Role of International Law in the ICSID Choice of Law Process', *ICSID Review: Foreign Investment Law Journal* 18 (2003): 375–411, at pp. 376–8, claiming that the majority of BITs entered into by countries such as the United States, the United Kingdom, France or Germany do not contain a clause on the applicable law regarding investor–state disputes. This is also the case with BITs of the Netherlands, which are generally silent on applicable law.

[19] See, e.g., NAFTA, Art. 1131; ECT, Art. 26(6); US Model BIT 2004, Art. 30; Canada Model BIT 2004, Art. 40(1); Chinese Model BIT 2003, Art. 9(3).

[20] Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Establishing the International Centre for the Settlement of Investment

reference to the language 'as may be applicable' must not be understood as in any way conditioning the application of international law, but 'as making reference, within international law, to the competent rules to govern the dispute at issue'.[21] The pertinence of the rule to the dispute at issue generally depends on the question of whether the rule is intended to bestow the parties to the proceedings with certain rights or obligations and whether it relates to an investment.[22] With regard to other arbitration rules, these generally provide investment tribunals with even greater latitude in deciding upon the scope of applicable law. For example, pursuant to Article 35(1) of the UNCITRAL Arbitration Rules (as revised in 2010), an investment tribunal established in accordance with those rules will apply, in the absence of a designation by the parties of rules applicable to the substance of the dispute, 'the law which it determines to be appropriate'.[23] Neither ICSID nor non-ICSID tribunals will thus be *a priori* precluded from considering arguments relating to non-investment obligations in view of the broad discretion that they will generally enjoy in determining the law applicable to the dispute.[24] To a certain extent, they may even be bound to consider non-investment obligations, in the event that investment protection guarantees conflict with *jus cogens* norms[25] or other types of prevailing obligations.[26]

Disputes, Washington, 18 March 1965, entered into force 14 October 1966, 575 *UNTS* 159, 4 *ILM* 532 (1965) (ICSID Convention).

[21] *LG&E* v. *Argentina*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, para. 88.

[22] The frame of reference in this regard is Art. 25(1) of the ICSID Convention, which requires the dispute to be a 'legal dispute arising directly out of an investment'.

[23] UNCITRAL Arbitration Rules as revised in 2010, UN Doc. A/RES/65/22, 6 December 2010. Similarly, the 1976 UNCITRAL Arbitration Rules provide in Art. 33(1) that: 'the arbitral tribunal shall apply the law designated by the parties as applicable to the substance of the dispute'. UNCITRAL Arbitration Rules, UN Doc. A/31/17 (1976). Similar provisions can also be found in arbitral rules of different chambers of commerce.

[24] In fact, even where the applicable law clause would provide only for the application of domestic laws, international non-investment obligations may still be applicable indirectly, to the extent they are explicitly incorporated in the national law of the host state.

[25] Pursuant to Art. 53 of the Vienna Convention on the Law of Treaties (VCLT), an investment treaty will also be void, if it conflicts with a peremptory norm of general international law. As appropriately observed in this respect by an investment tribunal, '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'. *Phoenix Action Ltd* v. *Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, para. 78.

[26] Important in this category are especially the obligations under the UN Charter, which shall prevail, by virtue of Art. 103 of the UN Charter, in the event of a conflict with obligations under any other international agreement. In the context of the investment

The matter is in principle not any different when it comes to considering and applying European law in an investor–state dispute; in fact, as properly noted by the tribunal in *Eureko* v. *Slovakia*, 'far from being precluded from considering and applying EU law the Tribunal is bound to apply it to the extent that it is part of the applicable law(s)'.[27] This can be either as a matter of international law or as a matter of domestic law, given that EU law may operate at the level of international law as between the parties to an investment treaty (if these are both member states of the EU), but also as part of the domestic legal order of the host state (when the latter is an EU member).[28] Alternatively, it may even be taken into account as a relevant *fact* when determining the respondent's compliance with its investment treaty obligations, particularly in situations where the applicable law clauses exclude the application of domestic law.[29] In any event, there is nothing that would suggest that European law could not be interpreted and applied by an investment tribunal, nor that the European Court of Justice (ECJ) would have exclusive jurisdiction over investor–state disputes. The jurisdiction of the latter may be exclusive with regard to certain categories of disputes between two EU member states, but certainly not with regard to all disputes that arise between an EU member state and an individual investor.[30]

To be sure, the possibility of applying international (or European) law as such to an investment dispute does not automatically extend the competence of an investment arbitral tribunal to the consideration of *claims* based on others' non-investment instruments. The extent to which an investment tribunal may be capable of pronouncing – as an independent head of claim – upon, say, the host state's violations of investors' rights under a human rights convention or breaches by the host state of its obligations under an environmental agreement, very much depends on the specific language of the instruments from which the tribunal

regime, this could play a role, e.g., in the event of smart sanctions adopted by the Security Council, as the measures demanding the freezing of funds which could conflict with unlimited transfer of funds clauses in a BIT. Furthermore, non-ICSID tribunals will have to take account of constraints potentially imposed by the mandatory rules of the *lex loci arbitri* and by considerations of transnational public policy, insofar as a failure to respect these rules may be ground for annulment of an award or later inhibit its enforcement.

[27] *Eureko*, para. 281.

[28] See, e.g. *Eureko*, para. 225; *AES Summit Generation Ltd and AES-Tisza Erömü Kft* v. *Republic of Hungary*, ICSID Case No. ARB/07/22, Award, 23 September 2010, para. 7.6.6.

[29] *AES*, paras 7.6.6–7.6.9. [30] See on this *Eureko*, paras 276 and 283.

derives its authority, and the source of the rights and obligations in issue. So far, international courts and tribunals have generally refused to pronounce upon claims other than those falling within the ambit of the compromissory clause, even if the clause on applicable law directed them to apply a broader set of rules than those contained in the jurisdiction-conferring instrument.[31] In this regard, one could argue that an investment tribunal may not be able to pronounce upon claims based on non-investment instruments in case its jurisdiction is limited to disputes concerning the interpretation or application of a particular investment treaty – unless, of course, the treaty itself includes a direct *renvoi* to other instruments. The latter would be the case, for example, with various 'preservation of rights' clauses providing that other obligations under international law potentially prevail to the extent that they are more favourable than the protections provided for in the investment treaty.[32] It would also be the case where the treaty provides that the investor has to comply with domestic legislation in order to be protected, and this legislation would be the implementation of obligations under international instruments.[33]

[31] This has been the case in many situations where the jurisdiction was confined to disputes 'concerning the interpretation or application' of a particular instrument. See, e.g., *Dispute Concerning Access to Information Under Article 9 of the OSPAR Convention between Ireland and the United Kingdom of Great Britain and Northern Ireland*, Final Award, 2 July 2003, 23 *RIAA* 59, para. 85; *MOX Plant Case* (*Ireland* v. *United Kingdom*), Order No. 3, 24 June 2003, 126 *ILR* 310, para. 19; *The Channel Tunnel Group Limited/France-Manche SA* v. *The Secretary of State for Transport of the Government of the United Kingdom of Great Britain and Northern Ireland/Le ministre de l'équipement, des transports, de l'aménagement du territoire, du tourisme et de la mer du Gouvernement de la République française*, Partial Award, 30 January 2007, 132 *ILR* 1, paras 144–51; or *Case concerning Pulp Mills on the River Uruguay* (*Argentina* v. *Uruguay*) *ICJ Reports* 2010, p. 14, paras 52 ff. For an informative study on the jurisdiction–applicable law distinction, see L. Bartels, 'Jurisdictions and Applicable Law Clauses: Where does a Tribunal find the Principal Norms Applicable to the Case before it?' in T. Broude and Y. Shany (eds), *Multi-sourced Equivalent Norms in International Law* (Oxford: Hart, 2011), pp. 115–42.

[32] See, e.g., US Model BIT 2004, Art. 16 or Dutch Model BIT 2004, Art. 3(5). However, as demonstrated by *Spyridon Roussalis*, para. 312, the existence of such clauses may not necessarily induce an investment tribunal to pronounce upon claims based upon those other obligations. The tribunal in that case, while not excluding the possibility that obligations deriving from the European Convention of Human Rights and its Additional Protocol No.1 could provide for 'more favourable' rules, refused to actually consider claims based upon the latter by arguing that the issue was moot, given the higher and more specific level of protection offered by the BIT to the investors compared with the more general protections offered to them by the human rights instruments.

[33] See, e.g., *Maffezini*, para. 71.

But in case an investment treaty provides for arbitration with regard to *any dispute concerning an investment*, there appears to be no bar, in principle, for an investment tribunal to consider (at least, in conjunction with a breach of an investment protection standard) claims arising under other instruments as well, to the extent that such claims indeed 'concern' an investment. This has been practically demonstrated in *Biloune* v. *Ghana*, where the tribunal did not deem itself debarred from considering the alleged violations of the investor's human rights resulting from his alleged arbitrary detention and expulsion by the government of Ghana to the extent that these violations 'may be relevant in considering the investment dispute under arbitration'. It must also be noticed, though, that the tribunal at the same time found itself without competence to pronounce upon these human rights violations 'as an independent cause of action', since its jurisdiction was limited to disputes 'in respect of' a foreign investment.[34]

Admittedly, pronouncing upon breaches of a non-investment instrument as an independent head of claim is not the same as considering such breaches for the purpose of making a principal determination under the investment treaty. In the latter case, the issue may not be considered as one of expanding the jurisdiction of the arbitral tribunal to claims under other instruments, but as one of determining a legal fact which is relevant for the purpose of applying the jurisdiction-conferring treaty. The point appears to have been well accepted by the Permanent Court of International Justice (PCIJ), which as far back as in the *Upper Silesia* judgment of 1925 was able to observe that 'the interpretation of other international agreements is indisputably within the competence of the Court if such interpretation must be regarded as incidental to a decision on a point in regard to which it has jurisdiction'.[35] Be that as it may, one can also expect that investment tribunals are likely to refrain, as far as possible, from making determinations on such incidental matters. Thus, the tribunal in *Eureko* v. *Slovakia* rejected the possibility that it would have jurisdiction to rule on alleged breaches of EU law as such; instead,

[34] *Biloune* v. *Ghana Investments Centre*, Award on Jurisdiction and Liability, 27 October 1989, 95 *ILR* 183, p. 203.

[35] *Case concerning Certain German Interests in Polish Upper Silesia* (*Germany* v. *Poland*), Preliminary Objections, *PCIJ Reports*, Series A, No. 6, p. 18. The Permanent Court made this observation after noting that the application of the 1922 Convention between Germany and Poland relating to Upper Silesia (9 *LNTS* 466), upon which its jurisdiction was founded in that case, was hardly possible without giving an interpretation of Art. 256 of the Treaty of Versailles and several other international agreements invoked by Poland.

its jurisdiction was 'confined to ruling upon alleged breaches of the BIT', notwithstanding the fact that investment treaty in question provided for the arbitration of all disputes 'concerning an investment'.[36] In the end, it would be reasonable to expect investment tribunals to at least *consider* the obligations that the host state may have under other instruments as questions preliminary, or incidental, to the application of the investment treaty, to the extent that is necessary to pronounce upon claims based on the investment treaty itself. All the more so, since it is precisely the application of these other instruments that often gives rise to issues under the investment treaty.

B The 'clinical isolation' problem

Notwithstanding the potentially limited scope of jurisdictional clauses, it is obvious that an investment tribunal cannot be oblivious to other rules of international law, nor entirely exclude their application, even in cases where the clause governing applicable law may only direct it to apply the investment treaty as such. For the provisions of an investment treaty, like any other treaty, cannot be interpreted and applied in a vacuum, but against the normative background of the legal order to which the treaty belongs; that is, public international law.[37] Already in *AAPL* v. *Sri Lanka*, the first ICSID case based on a jurisdictional clause in a BIT, the tribunal cogently observed that:

> the Bilateral Investment Treaty is not a self-contained closed legal system limited to provide for substantive 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.[38]

[36] *Eureko*, para. 290.

[37] Arbitral and judicial bodies in other treaty regimes have already demonstrated that they will not be oblivious to systemic considerations, even where their jurisdiction is circumscribed to the interpretation and application of the instrument, upon which their jurisdiction is founded. See, e.g., the statements to such effect by the European Court of Human Rights in *Banković and others* v. *Belgium and others*, No. 52207/99, para. 57, or *Al-Adsani* v. *United Kingdom*, No. 35763, para. 60, as well as by the WTO Appellate Body in *US–Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R. 29 April 1996, p. 18.

[38] *Asian Agricultural Products Ltd (AAPL)* v. *Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award, 27 June 1990, para. 21. In a similar way, the tribunal in *Phoenix Action Ltd* v. *Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April

In practice, investment tribunals have regularly resorted to other rules of international law in order to determine matters not governed by the investment treaty. Today, one could practically not imagine an investment tribunal not applying the customary rules governing the interpretation of treaties as codified in Articles 31 and 32 of the 1969 Vienna Convention on the Law of Treaties (VCLT).[39] Nor could one imagine a tribunal not resorting to the customary rules on state responsibility when it comes to issues of attribution, circumstances precluding wrongfulness or reparation.[40] Last, but not least, tribunals have never considered themselves debarred from resorting, independently from any treaty provision, to certain general principles of law, such as the principle of good faith or estoppel, in analysing investors' claims.[41]

Of course, the recourse to such *secondary* rules of international law may not be considered at all problematic, for these are to be considered applicable by default in the absence of specific rules prescribed by the investment treaties themselves. Being confined in their content to a set of primary rules on investment protection, investment treaties were certainly never intended to function as self-contained regimes. What does give rise to problems, however, is the applicability of other *primary* rules of international law – be they of customary or conventional character. In principle, other primary rules remain operative in the absence of any treaty provisions that had the effect of excluding them, which means that an investment tribunal may apply them, unless and to the extent that the investment treaty providing the tribunal's jurisdictional basis has created

2009, para. 78, emphasised that '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'.

[39] The customary rules of interpretation embodied in Arts 31 and 32 of the VCLT have regularly been applied to the interpretation of treaties that were concluded even before the VCLT's entry into force, such as the ICSID Convention. See, e.g., *Malaysian Historical Salvors Sdn Bhd* v. *Malaysia*, ICSID Case No. ARB/05/10, Decision on the Application for Annulment, 16 April 2009, para. 56, where the ICSID Annulment Committee 'consider[ed] itself on firm ground in resorting to the customary rules on interpretation of treaties as codified in the Vienna Convention'.

[40] See, e.g., *Sempra Energy International* v. *Argentine Republic*, ICSID Case No. ARB/02/16, Award, 28 September 2007, para. 378; *Enron Corporation and Ponderosa Assets LP* v. *Argentine Republic*, ICSID Case No. ARB/01/3, Award, 22 May 2007, para. 334, where the tribunals resorted to the customary law rules governing the invocation of a state of necessity.

[41] See, respectively, *Inceysa Vallisoletana SL* v. *Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, 2 August 2006, paras 179–81; *Fraport AG Frankfurt Airport Services Worldwide* v. *Philippines*, ICSID Case No. ARB/03/25, Award, 16 August 2007, para. 346.

a *lex specialis*.[42] This relationship of specialty can be defined by way of exception to the general rule, the typical example being 'the inalienable right of all States freely to dispose of their natural wealth and resources in accordance with their national interests' as an element of the customary international law principle of permanent sovereignty over natural resources,[43] the operation of which is affected by investment treaty provisions governing the legality of expropriations. Alternatively, specialty can also be established through elaboration of the general rules, as in the case of the minimum standard of treatment of aliens under customary international law, which may be modified by more specific standards of treatment contained in investment treaties. Essentially, the principle of *lex specialis* can therefore have a bearing on the determination of other primary rules that could be applied by an investment tribunal in adjudicating the claim under the investment treaty.

At the same time, the principle is of limited usefulness for resolving normative conflicts between the investment treaty and other primary rules. For, it is well known that the application of *lex specialis* may face difficulties when one needs to determine the relationship between two different normative orders or rules deriving from different areas of law, such as investment law, on the one hand, and human rights law or environmental law, on the other.[44] Being an interpretative rule without substantive content, *lex specialis* cannot in fact provide guidance in determining which of the subsystems is general and which specific, and which thus shall prevail over the other. Therefore, it cannot resolve a conflict potentially arising between the application of investment protection guarantees and the implementation of states' obligation under customary international law to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction,[45] if measures relating to the implementation of this obligation were to negatively affect an investor and breach its rights under an investment treaty.

[42] See, e.g., *Sempra*, para. 378, and *Enron*, para. 334, for the acknowledgement that 'a treaty regime specifically dealing with a given matter will prevail over more general rules of customary law'. Cf. *OSPAR* Arbitration, para. 84.

[43] Permanent Sovereignty over Natural Resources, UN GA Resolution 1803 (XVII), 14 December 1962.

[44] See A. Lindroos, 'Addressing Norm Conflicts in a Fragmented Legal System: The Doctrine of *Lex Specialis*', *Nordic Journal of International Law* 74 (2005): 27–66, at pp. 41–2.

[45] Cf. *Legality of the Threat or Use of Nuclear Weapons*, *ICJ Reports* 1996, p. 26, para. 29.

Nor can it resolve normative conflicts where the standards of behaviour prescribed by the investment treaty appear to be inconsistent with the obligations arising under other conventional instruments to which the host state is a party.

But, in fact, neither can other treaty-conflict rules successfully resolve the tensions between investment and non-investment rules.[46] As regards, for example, the *lex posterior derogat anteriori* rule as expressed in Article 30 of the VCLT, it is well known that its application is conditioned upon not only identity of the parties to the successive treaties, but requires the latter to relate to 'the same subject matter'.[47] Yet to establish that the provisions of an investment treaty relate 'to the same subject matter' as provisions, say, in a human rights convention, an environmental agreement or provisions under EU law may often require a considerable effort in creativity. Indeed, as demonstrated by a few recent decisions involving questions on the relationship between investment treaties and EU treaties, arbitral tribunals may not easily accept that provisions under different treaties indeed relate to the same subject matter.[48]

Be that as it may, in the end, it cannot be disputed that obligations under customary and conventional international law will remain in force for the host state and may continue to govern the relationship of the latter with the other party to the investment treaty and/or third states.[49] And to the extent that they may be relevant to the dispute between an investor and the host state, they can – and should – be considered in the process of treaty interpretation.

[46] On the inadequacy of traditional conflict rules for resolving conflicts between different branches of international law, see generally J. Klabbers, *Treaty Conflict and the European Union* (Cambridge University Press, 2009); R. Michaels and J. Pauwelyn, 'Conflict of Norms or Conflict of Laws? Different Techniques in the Fragmentation of International Law', in T. Broude and Y. Shany (eds), *Multi-sourced Equivalent Norms in International Law* (Oxford: Hart, 2011), pp. 19–44.

[47] Cf. Art. 30(1) and (3) of the VCLT.

[48] See *Eastern Sugar*, para. 160, and *Eureko*, paras 258 ff.

[49] Thus, the ICJ in the *Gabčíkovo-Nagymaros Project*, while considering that the relationship between Slovakia and Hungary was governed by a disputed treaty of 1977, appositely added that the 'relationship [between the Parties] 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*'. *Gabčíkovo-Nagymaros Project* (*Hungary* v. *Slovakia*), *ICJ Reports* 1997, p. 7, para. 132.

III Consideration of non-investment obligations through the process of treaty interpretation

The legal framework for considering non-investment rules in the analysis of investment treaty claims is not only determined by the clauses on applicable law, but is also laid down in the general rules of treaty interpretation, in accordance with which an investment treaty, like any other treaty, must be interpreted. Hence, notwithstanding the jurisdictional limitations potentially preventing an investment tribunal from directly applying other rules of international law in adjudicating investors' claims, there is no impediment for investment tribunals to consider these rules when constructing the meaning of the substantive protections laid down in an investment treaty.[50] There are three techniques in particular that can be employed by an investment tribunal for the purpose of considering external, non-investment rules in the interpretative process and each of these will be briefly dealt with below.[51]

A Principle of systemic integration

It is beyond doubt that the starting point of any interpretative exercise must be the ordinary meaning of the terms of the treaty, in their context and in the light of the treaty's object and purpose, in accordance with Article 31(1) of the VCLT. Yet it is obvious that the search for the ordinary meaning is sometimes bound to bear few results. A typical case is the notion of 'fair and equitable treatment', the ordinary meaning of which, as has once been noted, 'can only be defined by terms of almost equal vagueness'.[52] In such cases, resort to Article 31(3)(c) of the VCLT – which directs the interpreter to take account of 'any relevant rules of international law applicable in the relations between the parties' – may provide a useful technique for determining the meaning of open-ended standards of protection.

[50] In *Pulp Mills*, paras 63–66, the ICJ expressly noted that the taking into account in the interpretative process of other relevant rules applicable in the relations between the parties had no bearing on the scope of the jurisdiction conferred on the Court.

[51] On these mechanisms of incorporation generally, see D. French, 'Treaty Interpretation and the Incorporation of Extraneous Legal Rules', *International and Comparative Law Quarterly* 55 (2006): 281–314.

[52] *Saluka Investments BV (the Netherlands)* v. *Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, para. 297.

In view of its usefulness, it is rather surprising that the importance of Article 31(3)(c) of the VCLT has long been neglected, and that it was only in its 2006 Report on Fragmentation that the International Law Commission (ILC) rediscovered and even embraced it – together with the principle of 'systemic integration' to which the provision is said to give expression – as a means of harmonising the disparate and ever-fragmenting fields of international law.[53] Indeed, accepted today as a codification of customary international law,[54] Article 31(3)(c) of the VCLT definitely bears the capacity to also promote coherence between investment and non-investment obligations in investment treaty arbitration, inasmuch as it requires the adjudicator to interpret international obligations by reference to their normative environment.[55] But aside from the practical usefulness of resorting to other relevant rules of international law when the ascertainment of the ordinary meaning proves impossible, it must not be forgotten that the application of Article 31(3)(c) of the VCLT is in fact a *mandatory* part of the interpretation process. Unlike the resort to supplementary means of interpretation, which in accordance with Article 32 of the VCLT 'may' be referred to when the meaning of treaty terms is ambiguous, obscure, absurd or unreasonable, Article 31(3)(c) of the VCLT clearly demands from the interpreter that such rules 'shall' be taken into account. In fact, recourse to 'any relevant rules of international law applicable in the relations between the parties' is part and parcel of the same interpretative process, which starts, but does not stop, with the ordinary meaning of the terms of the treaty in accordance with Article 31(1) of the VCLT. All in all, it is well known that Article 31 of the VCLT lays down a single, general rule of interpretation, the provisions of which form one

[53] See 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law', Report of the Study Group of the International Law Commission, UN Doc. A/CN.4/L.682, 13 April 2006.

[54] *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti* v. *France) ICJ Reports* 2008, p. 177, para. 112.

[55] On systemic interpretation of investment treaties, see generally C. McLachlan, 'Investment Treaties and General International Law', *International and Comparative Law Quarterly* 57 (2008): 361–401, at pp. 369 ff. See also Simma and Kill, 'Harmonizing Investment Protection and International Human Rights', pp. 695–707, who demonstrate that international human rights law may well be taken into account through the application of Art. 31(3)(c) of the VCLT; or J. E. Viñuales, 'Foreign Investment and the Environment in International Law: An Ambiguous Relationship', *British Yearbook of International Law* 80 (2009): 244–332, who emphasises the importance of this provision for considering environmental obligations in investment treaty arbitration.

integrated whole, and that therefore the process of interpretation 'is ultimately a holistic exercise that should not be mechanically subdivided into rigid components'.[56]

Against this backdrop, one may wonder why references to Article 31(3)(c) of the VCLT have not figured more often in the reasoning of investment tribunals; at least explicitly. Surely, resort has sometimes been made in the interpretative process to other relevant rules of international law, particularly of a customary law nature, but without expressly mentioning Article 31(3)(c) of the VCLT. Thus, the tribunal in *ADF Group Inc.* v. *USA* seems to have relied on the rule implicitly when considering 'that any general requirement to accord "fair and equitable treatment" and "full protection and security" must be disciplined by being based upon State practice and judicial or arbitral case law or other sources of customary or general international law'.[57] In contrast, the award in *Saluka* v. *Czech Republic* (2006) appears to be one of the rare instances so far where Article 31(3)(c) of the VCLT was explicitly relied upon in interpreting one of the treaty's substantive investment protection standards. At the same time, it was also one of the more odd instances of the use of the rule. Namely, the tribunal in that case did not interpret the concept of 'deprivation' as this was used in the investment treaty's expropriation clause by reference to the respondent's non-investment obligations. Instead, it relied upon Article 31(3)(c) of the VCLT for the purpose of importing into the treaty the customary international law exception that a deprivation could be justified if it resulted from the exercise of regulatory actions aimed at the maintenance of public order, in which case the host state was not liable to pay compensation to a foreign investor.[58] Be that as it may, the precedent retains importance for its acknowledgement that the host state's sovereign powers to regulate are implicitly preserved under customary international law, and that an exception for the exercise of these powers can be imported into an investment treaty through the process of interpretation. This is a reaffirmation that will undoubtedly have important consequences considering that currently the large majority of investment treaties do not expressly acknowledge the host state's right to regulate in pursuit of policy objectives other than the promotion and

[56] *EC–Customs Classification of Frozen Boneless Chicken Cuts*, WT/DS269/AB/R and WT/DS286/AB/R, 12 September 2005, para. 176. See generally also *ILC Yearbook* 1966, vol. II, at pp. 219–20, para. 8.

[57] *ADF Group Inc.* v. *USA*, ICSID Case No. ARB(AF)/00/1, Award, 9 January 2003, para. 184.

[58] *Saluka*, paras 254–5.

protection of investments.[59] Furthermore, *Saluka*'s importance is also in implicitly acknowledging that the scope of regulatory powers, inasmuch as their content would follow the evolution of customary international law, may now well encompass measures aimed at the preservation of the environment or the attainment of basic human rights.[60] This was later demonstrated in *Chemtura* v. *Canada*, where the tribunal, by expressly referring to the *Saluka* decision, considered that the respondent's measures, which led to the cancellation of the registrations of a group of products based on the lindane pesticide (and which resulted from Canada's obligations under the Aarhus Protocol to the Long-Range Transboundary Air Pollution Convention), constituted a valid exercise of the respondent's police powers.[61]

But while the tribunal in *Saluka* – and the few other investment tribunals that have actually referred to Article 31(3)(c) in their reasoning[62] – have used that provision as a gateway to interpreting by reference to rules of customary international law, it needs to be emphasised that the wording of

[59] See generally on this S. A. Spears, 'The Quest for Policy Space in a New Generation of International Investment Agreements', *Journal of International Economic Law* 13 (2010): 1037–75. See *ADC Affiliate Ltd and ADC & ADMC Management Ltd* v. *The Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006, para. 423, for one of the few instances where a tribunal expressly, reaffirmed 'the basic international law principle' that 'a sovereign state possesses the inherent right to regulate its domestic affairs' (albeit adding that the exercise of such right is not unlimited and has its boundaries in the rule of law).

[60] See for a similar reasoning the considerations of the ICJ in the *Dispute Regarding Navigational and Related Rights*, where the Court – after acknowledging that Nicaragua, as sovereign over the San Juan River, had the inherent power to regulate Costa Rica's right to freedom of navigation; a right that was granted to the latter under a boundary treaty of 1858 – considered that 'over the course of the century and a half since the 1858 Treaty was concluded, the interests which are to be protected through regulation in the public interest may well have changed in ways that could never have been anticipated by the Parties at the time: protecting the environment is a notable example'. *Case concerning the Dispute Regarding Navigational and Related Rights* (*Costa Rica* v. *Nicaragua*) *ICJ Reports* 2009, p. 213, at paras 87–9.

[61] *Chemtura Corporation* v. *Government of Canada*, UNCITRAL, Award, 2 August 2010, para. 266. However, the principle that a non-discriminatory regulation for a public purpose may not be deemed expropriatory and compensable (i.e., 'police powers' exception) had previously already been upheld by the arbitral tribunals in *S. D. Myers*, paras 281–2, and *Methanex* v. *United States*, UNCITRAL, Final Award, 3 August 2005, paras 7ff, both of which also concerned environment-related cases. The principle had also been recognised by the Iran–US Claims Tribunal in *SEDCO, Inc., et al.* v. *National Iranian Oil Company and the Islamic Republic of Iran* (1985) 9 IUSCTR 248, para. 275.

[62] See *Ioannis Kardassopoulos* v. *Republic of Georgia*, ICSID Case No. ARB/05/18, Decision on Jurisdiction, 6 July 2007, paras 207 ff.; *Veteran Petroleum Ltd (Cyprus)* v. *Russian Federation* and *Hulley Enterprises Ltd (Cyprus)* v. *Russian Federation*, UNCITRAL, Interim Award on Jurisdiction and Admissibility, 30 November 2009, para. 309, all relying on Art. 31(3)(c) of the VCLT when referring to the rules of customary international law relating to the provisional application of an investment treaty.

Article 31(3)(c) is not restricted to 'general international law', but extends to 'any relevant rules of international law applicable in the relations between the parties'. This includes other treaties too, to the extent that they are 'applicable'.[63] In fact, interpreting a bilateral investment treaty by reference to other conventional rules gives rise to fewer problems than interpreting the provisions of a multilateral convention by reference to other conventional rules, given that in a bilateral context it is easier to take account of the rules applicable between *all* the parties to the treaty under interpretation.[64] And there are good reasons, too, for investment tribunals to take account of other conventional obligations in the interpretation of the investment treaty. For one, it is difficult to contend that an investment treaty could have been intended to discharge the parties to it *inter se* from obligations that they may have assumed under other international instruments.[65] Furthermore, it is even more difficult to contend that the obligations in an investment treaty were assumed *a priori* to override other conventional obligations, such as those under labour conventions, international environmental agreements, human rights treaties or EU law. But, needless to say, these other conventional rules need also to be 'relevant' to the interpretation of a treaty term, which in the end depends upon the appreciation of them as such by the arbitral tribunal.[66] As suggested by the tribunal in *RosInvest*, relevance must be taken to mean those rules that 'condition the performance of the specific rights and obligations stipulated in the treaty'.[67] Then again, the scope of such 'relevant' rules may be considerably broad and not necessarily limited to obligations dealing with the same subject matter.[68]

[63] Cf. *Pulp Mills*, para. 66.

[64] On the limitations of Art. 31(3)(c) in this respect, see M. Samson, 'High Hopes, Scant Resources: A Word of Scepticism about the Anti-Fragmentation Function of Article 31(3)(c) of the Vienna Convention on the Law of Treaties', *Leiden Journal of International Law* 24 (2011): 701–14.

[65] Cf. *OSPAR* Arbitration, para. 85.

[66] Arguably, investment tribunals will have discretion in determining the 'relevance' of a particular rule. See, e.g., *Klöckner Industrie-Anlagen GmbH and others* v. *United Republic of Cameroon and Société Camerounaise des Engrais*, ICSID Case No. ARB/81/2, Decision of the *Ad hoc* Committee, 3 May 1985, para. 91, for the proposition that 'within the dispute's "legal framework", arbitrators must be free to rely on arguments which strike them as the best ones, even if those arguments were not developed by the parties (although they could have been).'

[67] *RosInvest* v. *Russian Federation*, SCC Case No. V 079/2005, Award on Jurisdiction, 1 October 2007, para. 39.

[68] Thus, in *Djibouti* v. *France*, para. 113, the ICJ considered the provisions of the 1977 Treaty of Friendship and Cooperation between the two parties as relevant for the purpose of

In practice, investment tribunals have already demonstrated their ability to take account of host states' conventional obligations (even those not directly relating to the treatment of investments) in the interpretation of key investment protection standards, albeit without expressly referring to Article 31(3)(c). Thus, the tribunal in *Parkerings-Compagniet* had no problem with considering the respondent's obligations under the UNESCO World Heritage Convention in the assessment of whether the investor was 'in like circumstances' for the purpose of pronouncing upon an alleged breach of the national treatment standard.[69]

However, key to considering other 'relevant rules' in the process of interpretation is that these are also 'applicable in the relations between the parties', which requires the relevant instrument to be in force for *both* parties to the investment treaty.[70] This eventually points to the limits of Article 31(3)(c) as a means of considering non-investment obligations through the interpretative process, given that it cannot be used as a gateway for interpreting provisions by reference to instruments that are concluded by only one of the parties to the investment treaty. This has the potential to give rise to problems, particularly in the context of investment treaties concluded between EU member states and third states, where only one of the contracting parties will be bound by obligations under EU treaties. Nor can Article 31(3)(c) be used for the purpose of allowing other rules of international law to be applied directly to the facts in the context of which the treaty is being considered.[71] For interpreting by reference to 'relevant rules' does not mean to defer to the scope and effect of those rules – save perhaps to the extent that the 'relevant rules' are of a higher hierarchical status – but to clarify the

interpreting the 1986 Convention on Mutual Assistance in Criminal Matters, even though the former did not deal at all with cooperation in criminal matters and contained only rules that were 'formulated in a broad and general manner, having an aspirational character'.

[69] *Parkerings-Compagniet*, paras 377–97.

[70] See on this problem, Simma and Kill, 'Harmonizing Investment Protection and International Human Rights', pp. 696–702.

[71] Though, admittedly, there may sometimes be only a fine line between applying non-investment rules directly and considering them indirectly through the process of interpretation. On this, see J. 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 M. Craven, M. Fitzmaurice and M. Vogiatzi (eds), *Time, History and International Law* (Leiden: Brill, 2007), pp. 141–61, at p. 161. See also A. Gourgourinis, 'The Distinction between Interpretation and Application of Norms in International Arbitration', *Journal of International Dispute Settlement* 2 (2011): 31–57, who extensively discusses the differences between the normative processes of interpretation and application.

content of the provisions being interpreted.[72] For the 'relevant rules' to prevail, the treaty under interpretation would have to be open to being interpreted as allowing these other rules to prevail, which can be the case where the treaty under interpretation contains specific language on its relation with other agreements.[73] This may not necessarily be an issue of treaty interpretation, though, but probably one concerning the application of parallel or successive treaties, as provided for in Article 30(2) of the VCLT.

B Interpretation of 'generic' terms of an evolving character

In resolving conflicts between divergent obligations, investment tribunals shall also make use of the interpretative flexibility that is inherent in provisions that may be deemed to have an 'evolving character'. While it is one of the general axioms of treaty interpretation that the terms used in a treaty must be interpreted in light of what is determined to have been the parties' common intention at the time of the treaty's conclusion,[74] it is also well established that international courts and tribunals shall not be oblivious to later developments of international law in the interpretation of treaty terms that could be characterised as 'conceptual' or 'generic'.[75]

[72] See R. K. Gardiner, *Treaty Interpretation* (Oxford University Press, 2008), p. 271; A. Orakhelashvili, 'Restrictive Interpretation of Human Rights Treaties in the Recent Jurisprudence of the European Court of Human Rights', *European Journal of International Law* 14 (2003): 529–68, at p. 537.

[73] See, e.g., ECT, Art. 16 or NAFTA, Art. 104. But this could arguably also be the case with some recent Dutch BITs, which affirm in their preamble that the treaty objective of encouragement and reciprocal protection of investments 'can be achieved without compromising health, safety and environmental measures of general application'.

[74] This has often been seen as requiring the interpreter to ascertain the meaning of a treaty term at the time when the treaty was drafted, in accordance with Judge Huber's famous dictum 'that a juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled'. *Island of Palmas Case* (*Netherlands* v. *United States of America*) (1928) 2 *RIAA* 829, at p. 846. Hence, the ICJ found it justified in a few cases to adhere to the original meaning of a term, even where that meaning had evolved since the conclusion of the treaty at issue. See, in particular, the *Case concerning Rights of Nationals of the United States of America in Morocco* (*France* v. *United States of America*) *ICJ Reports* 1952, p. 176, at p. 189, or the *Case concerning Kasikili/Sedudu Island* (*Botswana* v. *Namibia*) *ICJ Reports* 1999, p. 1062, para. 25.

[75] Already in the *Namibia* Advisory Opinion, the ICJ considered that where the terms used in the treaty are 'not static, but were by definition evolutionary', their interpretation cannot remain unaffected by the subsequent development of law. *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)*

In the *Dispute Regarding Navigational and Related Rights*, the ICJ even considered that, when using such terms, the contracting parties must be presumed, as a general rule, to have intended those terms to have an evolving meaning, so as to make allowance for developments in international law.[76] Surely, there is no indication as to which terms may indeed be considered 'generic'. In the circumstances of that same case, the relevant term was the word 'commerce', which the ICJ interpreted as covering not only the purchase and sale of physical goods, but also services such as passenger transport, although this was certainly not what the signatories had contemplated when the treaty was drafted in 1858.[77] On the basis of similar reasoning, in the *Pulp Mills* case the ICJ interpreted the obligation 'to protect and preserve' the aquatic environment, which was laid down in the 1975 Statute of the River Uruguay, as entailing the obligation to undertake an environmental impact assessment, which in view of the Court had developed into a requirement under general international law since the conclusion of the 1975 treaty.[78]

Following the reasoning of the ICJ, one could say that many of the terms used in current IIAs potentially qualify as 'generic', and that their interpretation should make allowance for developments in international law. The more so, since IIAs are certainly not static instruments. While originally concluded for a fixed period of years, many of them have actually remained in force, through tacit extensions, for several decades.[79] In view of such practice, therefore, there is nothing to suggest that the parties to an IIA shall have intended its terms always to have a fixed meaning, particularly when it comes to concepts like 'discriminatory' or 'fair and equitable' treatment, the exact meaning of which will always have to be determined by reference to the specific circumstances of

notwithstanding Security Council Resolution 276 (1970) ICJ Reports 1971, p. 16, para. 53. A similar approach was later adopted in *Aegean Sea Continental Shelf* (*Greece* v. *Turkey*) *ICJ Reports* 1978, p. 3, para. 77, and *Gabčíkovo-Nagymaros Project*, paras 67–8. As for other tribunals, see *Iron Rhine ('IJzeren Rijn') Railway* Arbitration (*Belgium* v. *the Netherlands*), Award, 24 May 2005, 27 *RIAA* 35, para. 79; *US–Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, 12 October 1998.

[76] *Case concerning the Dispute Regarding Navigational and Related Rights* (*Costa Rica* v. *Nicaragua*) *ICJ Reports* 2009, p. 213, paras 64–6.

[77] *Costa Rica* v. *Nicaragua*, paras 70–1.

[78] *Pulp Mills*, paras 203–4.

[79] For example, a number of agreements on economic (and technical) cooperation that the Netherlands started to conclude with developing countries in the second half of the 1960s, and that already contained investment protection rules, are still in force today. See, e.g., the 1965 treaties with the Ivory Coast (*Tractatenblad*, 173 (1965)) and Cameroon (*Tractatenblad*, 208 (1965)).

application. The same may be said when the IIA uses generic terms that have a recognised meaning in customary international law, such as 'full protection and security', 'expropriation' or 'deprivation'.[80] Thus, already in its 1926 judgment on the merits in *Upper Silesia*, the PCIJ considered it 'reasonable to suppose' that, in using the word 'expropriation' in the relevant treaty, the intention of the parties was to convey the meaning that this word had under customary international law.[81] The scope of 'expropriation' would then also depend upon the developments in customary international law. As hinted at by the tribunal in *Saluka*, the same would also be the case with the meaning of the term 'deprivation'. This would depend upon the development of international law, particularly insofar as international law had 'yet to draw a bright and easily distinguishable line between non-compensable regulations, on the one hand, and, on the other, measures that have the effect of depriving foreign investors of their investment and are thus unlawful and compensable in international law'.[82] Inevitably, it would fall upon the adjudicator to determine the content of these obligations in the particular circumstances of each case.

C *Presumption in favour of coherence*

Lastly, in constructing specific treaty provisions, investment tribunals may more often resort to the interpretative presumption that there is no *a priori* conflict between the obligations accruing to a state under the applicable investment treaty and its other international legal obligations – a presumption which is now a well-accepted rule of treaty interpretation.[83] Paradoxical as this may sound, this may entail first

[80] On the use of customary international law for the purpose of interpreting such terms of art, see M. Paparinskis, 'Investment Treaty Interpretation and Customary Investment Law: Preliminary Remarks', in C. Brow and K. Miles (eds), *Evolution in Investment Treaty Law and Arbitration* (Cambridge University Press, 2011), pp. 65–96, who also argues that the use of customary international law in this way is a different technique than that of Art. 31(3)(c) of the VCLT.

[81] *Case concerning Certain German Interests in Polish Upper Silesia* (*Germany* v. *Poland*), Merits, *PCIJ Reports*, Series A, No. 7, p. 21.

[82] *Saluka*, para. 263.

[83] See R. Jennings and A. Watts (eds), *Oppenheim's International Law*, 9th edn (London: Longman, 1992), p. 1275. According to the ICJ, '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'.

establishing an incompatibility between the two sources of obligations, only for such an incompatibility subsequently to be 'interpreted away'.[84] Yet, save for the few arbitral tribunals that were willing to pronounce upon the issue of compatibility of respondents' obligations under intra-European BITs with their obligations under EU treaties,[85] investment tribunals have generally preferred to avoid deciding issues of compatibility of investment treaties with other instruments. For example, some have done so on the ground that the matter was not fully argued.[86] Others have sought to reframe the problem by changing the focus from the issue of compatibility to the examination of whether the respondent state had any alternative way to comply with investment obligations without impinging upon its non-investment obligations.[87]

The interpretative presumption in favour of coherence with existing international legal obligations of the host state is especially justified in cases where the parties to an investment treaty do not appear to have intended to alter their pre-existing obligations under conventional and customary international law. This may not always be easy to discern, considering the inherent nature of treaties as *leges speciales*, which can be

Right of Passage over Indian Territory (*Portugal* v. *India*) *ICJ Reports* 1957, p. 125, para. 141. Though, admittedly, the fiction of the unitary law-maker is becoming increasingly implausible in view of the growth in size and complexity of modern governmental bureaucracies.

[84] This is why the ILC considered that 'conflict-resolution and interpretation cannot be distinguished from each other. Whether there is a conflict and what can be done with *prima facie* conflicts depends on the way the relevant rules are interpreted. This cannot be stressed too much. Interpretation does not intervene only once it has already been ascertained that there is a conflict. Rules appear to be compatible or in conflict *as a result of interpretation*.' ILC, 'Report on Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law' (2006) A/61/10 (ILC, Report on Fragmentation), para. 412. On this, see also C. McLachlan, 'The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention', *International and Comparative Law Quarterly* 54 (2005): 279–320, at p. 286.

[85] See *Eastern Sugar*, paras 168–9, and *Eureko*, paras 263–6. For a broader discussion of EU law compatibility issues, see H. Wehland, 'Intra-EU Investment Agreements and Arbitration: Is European Community Law an Obstacle?', *International and Comparative Law Quarterly* 58 (2009): 297–320.

[86] See, e.g., *Azurix* v. *Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14 July 2006, para. 261; or *Siemens AG* v. *Argentine Republic*, ICSID Case No. ARB/02/8, Award, 17 January 2007, para. 354.

[87] *Sempra Energy International* v. *Argentine Republic*, ICSID Case No. ARB/02/16, Award, 28 September 2007, paras 331–2. That decision was, however, annulled in its entirety due to a manifest excess of powers.

intended to derogate from general international law.[88] Nonetheless, it is also not warranted to adopt the assumption that the relationship between investment and non-investment obligations is necessarily contradictory (and certainly not when an investment treaty itself stipulates that its goal is not to undermine other public policy objectives).[89] In the end, it would be difficult to contend that IIAs were purposefully developed as a tool for derogating from human rights obligations or obligations aimed at the protection of the environment. Of course, as with the case of Article 31(3)(c), the presumption in favour of coherence remains an interpretative tool, which is not intended to serve as a means for deferring to the scope and effect of host states' other obligations. But the same presumption is also not a technique to avoid the applicability of non-investment obligations altogether; what it entails is actual harmonisation of obligations arising under IIAs with those arising under non-investment instruments.

IV The limits of legal technique

In the end, however, what needs to be recognised is that the different interpretative tools that were briefly discussed in the previous sections can be used only for resolving particular normative conflicts as they arise – and, indeed, investment tribunals should not shy away from resorting to these tools in order to bring broader, non-investment considerations into their process of deliberation. At the same time, it must be kept in mind that interpretative tools are obviously not intended to establish definite relationships of priority between investment law and other subsystems of international law. As carefully noted in this respect by the ILC in its 2006 Report on Fragmentation:

> Normative conflicts do not arise as technical 'mistakes' that could be 'avoided' by a more sophisticated way of legal reasoning. New rules and legal regimes emerge as responses to new preferences, and sometimes out

[88] Yet, as noted by McLachlan, 'Investment Treaties and General International Law', p. 372, the framers of investment treaties often consciously sought not to go beyond obligations that were thought to reflect the current state of international law. Arguably, rather than extending investors' rights themselves, the purpose of investment treaties was to enhance the mechanisms for the protection of those rights.

[89] For example, a number of Dutch BITs of the latest generation now expressly provide that the treaty objectives of encouragement and reciprocal protection of investments 'can be achieved without compromising health, safety and environmental measures of general application'.

> of conscious effort to deviate from preferences as they existed under old regimes. They require a legislative, not a legal-technical response.[90]

Hence, it is primarily through the political process that conflicts between the investment law regime and non-investment obligations should be addressed.

This implies, in the first place, the drafting of 'better' IIAs: that is, agreements that will provide those called upon to construe their provisions with better guidance on how to address the interplay of investment protection standards with host states' other obligations, so as to ensure greater predictability and coherence in the interpretation of treaty terms. Recent treaty-making practice demonstrates that this can be done in several ways.[91] The most obvious solution is to insert specific provisions defining the relationship of the IIA with the rights and obligations that contracting parties may have under other agreements, either existing or prospective, and specifying how inconsistencies shall be resolved if they arise.[92] But addressing the interplay can also be done in less direct ways. In several IIAs of the latest generation, states have sought to clarify the scope of some of the most commonly invoked standards of treatment – such as expropriation, fair and equitable treatment and non-discrimination – by including interpretative language refining or reinterpreting the standards and thereby providing guidance to the interpreter on how to balance the competing objectives of investor protection and other concerns of the host state.[93] Such interpretative

[90] ILC, Report on Fragmentation, para. 484.

[91] For an overview of these developments, see particularly S. A. Spears, 'Making Way for the Public Interest in International Investment Agreements', in C. Brow and K. Miles (eds), *Evolution in Investment Treaty Law and Arbitration* (Cambridge University Press, 2011), pp. 271–97.

[92] See, e.g., Art. 32 of the 2007 Investment Agreement for the COMESA Common Investment Area.

[93] Interpretative language is sometimes included in annexes, as in the case of Annex B.13(1) of the 2004 Canadian Model FIPA, which clarifies the scope of indirect expropriation; Annexes A and B of the 2012 US Model BIT, which provide guidance on how to interpret the treaty's provisions on the minimum standard of treatment and expropriation; or Annex 2 of the 2009 ASEAN Comprehensive Investment Agreement, which clarifies the scope of the provisions on expropriation and compensation. Sometimes, interpretative guidance is directly provided in footnotes to the relevant provisions, as in the case of Arts 4(c) and 6 of the 2009 ASEAN Comprehensive Investment Agreement, which define the scope of protected investments and of the most-favoured-nation treatment clause, respectively. Eventually, interpretative guidance can also be added as an integral part of the provision concerned. Examples of this type of drafting are the detailed provisions on fair and equitable treatment (Art. 14), expropriation (Art. 20) or national treatment

language may not necessarily be included in the treaty, but can also be provided in a separate agreement adopted at the time of treaty's conclusion, in the sense of Article 31(2) of the VCLT. Alternatively (and sometimes in addition to this), general exceptions clauses have begun to be inserted into IIAs, providing contracting parties with the possibility of derogating – subject to several substantive or procedural requirements – from the obligations of the treaty in situations where compliance would prevent a party from adopting or enforcing measures necessary for the achievement of certain non-investment policy goals, such as the protection of human health or the natural environment.[94] Last, but not least, states have also sought to broaden the policy objectives of recent IIAs, by clarifying in the treaty preambles that investment protection must not be at the cost of other societal concerns or even by adding non-investment policy goals as self-standing treaty objectives, and thereby also providing guidance for interpreting treaty protections.[95] All in all, it is hoped that the new drafting will embolden investment tribunals to consider non-investment rules more often than they have done in the past and enable them to properly balance investors' rights against the regulatory concerns of the host states.

But as the large majority of current IIAs will remain in force for several years – while renegotiating the terms of existing IIAs is not particularly feasible, especially for countries like Germany, China or Switzerland with 100 and more agreements in force – states should also consider addressing the potential for normative conflicts by adopting interpretative statements to clarify the scope of substantive investment protection standards in their current IIAs. A known example of such practice is the Note of Interpretation adopted by the NAFTA Free Trade Commission in 2001, through which the NAFTA contracting parties clarified that the reference to the fair and equitable provision in Article 1105 of the NAFTA was

(Art. 17) of the 2007 Investment Agreement for the COMESA Common Investment Area. The latter's provision on national treatment even provides a test for assessing what 'like circumstances' are.

[94] See, e.g., Art. 10 of the 2004 Canadian Model FIPA, Art. 17 of the 2009 ASEAN Comprehensive Investment Agreement, or Art. 16 of the 2002 Japan–Korea BIT.

[95] See, e.g., the preamble of the 2004 Dutch Model BIT, which stipulates that the treaty objectives 'can be achieved without compromising health, safety and environmental measures of general application', or the preamble of the 2012 US Model BIT, which expresses the desire to achieve the treaty objectives 'in a manner consistent with the protection of health, safety, and the environment, and the promotion of internationally recognized labor rights'.

equivalent to the international minimum standards of aliens under customary international law, rejecting thereby the proposition made a few months earlier by the tribunal in *Pope & Talbot* that the fair and equitable treatment provision was an autonomous treaty standard that was 'additive' to the minimum standard of treatment.[96] While this has attracted criticism that the Note of Interpretation amounted to a treaty amendment that was not in the power of the Free Trade Commission to make, it is beyond doubt that the contracting parties to an IIA, as the masters of the treaty, retain the right to authoritatively interpret its provisions, even in the absence of formal clauses explicitly providing for such possibility.[97] Provided that they clearly establish a common understanding of the contracting parties, such interpretative statements will have to be 'read into the treaty' for the purpose of its interpretation, as Article 31(3)(a) of the VCLT clearly directs the interpreter to take into account 'any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions'. The danger, on the other hand, is that interpretative statements, in their effect, eventually result in treaty amendments proper. And, admittedly, the difference between an authoritative interpretation in the sense of Article 31(3)(a) of the VCLT and a treaty amendment in the sense of Article 39 of the VCLT may often be rather thin.[98] But while there is nothing that prohibits contracting parties making amendments to their IIAs, it is certain that modifications radically altering the level of protections will not be met with approval by investors who, albeit beneficiaries, are not parties to IIAs. These may legitimately expect that the level of protection available to their investments will not be subject to abrupt changes as a result of treaty amendments. On the other hand, there is also nothing that should warrant investors' expectation that the broadly formulated investment protection standards currently present in many IIAs should always be interpreted in their favour. States are perfectly justified in clarifying what the originally intended scope of these protection standards was through authoritative interpretations.

[96] *Pope & Talbot*, para. 110.

[97] Already the Permanent Court of International Justice confirmed the 'established principle that the right of giving an authoritative interpretation of a legal rule belongs solely to the person or body who has power to modify or suppress it'. *Delimitation of the Polish–Czechoslovakian Frontier* (*Question of Jaworzina*) *PCIJ Reports*, Series B, No. 8, p. 37.

[98] A. Aust, *Modern Treaty Law and Practice*, 2nd edn (Cambridge University Press, 2007), p. 239.

Authoritative interpretations – and also treaty amendments, for that matter – are not subject to any prescribed forms and certainly need not be effected through the conclusion of a supplementary treaty. This follows from Articles 31(3)(a) and 39 of the VCLT, which both use the word 'agreement' and not 'treaty'. Indeed, investment tribunals have already accepted that a subsequent agreement within the meaning of Article 31(3)(a) of the VCLT need not be concluded with the same formal requirements as a treaty.[99] The adoption of interpretative statements could easily be implemented in the context of existing IIAs, since the large majority of them provide the possibility of holding consultations on matters concerning the interpretation or application of the treaty at the request of either party. These 'consultation clauses' not only provide a mechanism to avoid or prevent potential disputes from arising between the contracting parties, but could thus be used as a setting for clarifying the meaning of specific treaty provisions. One instance of such an interpretative exercise has already occurred in the context of a dispute between the Czech Republic and CME. Following dissatisfaction with the application of the Netherlands–Czech Republic BIT by the tribunal in its Partial Award in that case, the Czech Republic requested that the Netherlands should hold consultations, the outcome of which was a common understanding between the parties regarding three issues of treaty interpretation that arose out of the Partial Award. The understanding was recorded in Agreed Minutes, which were formally signed and exchanged between the two governments and subsequently also taken into account by the tribunal in the Final Award.[100] At the same time, the case also demonstrates the potential for abuse of such consultative processes, as states that find themselves as respondents in a dispute with the foreign investor may seek to influence the outcome of litigation through the adoption of interpretative instruments. Yet both authoritative interpretations and treaty amendments require common agreement of all contracting parties, which means that the non-disputing state (i.e., the state of the investor's nationality) may always resist any attempts to unduly influence the dispute settlement process. In fact, there is essentially nothing wrong with the possibility that states effect clarifications of their obligations under IIAs even after a dispute has arisen. Some

[99] *Methanex* v. *United States*, UNCITRAL, Final Award, 3 August 2005, para. 20. See also *Philippe Gruslin* v. *Malaysia*, ICSID Case No. ARB/99/3, Award, 27 November 2000, para. 23.4.

[100] See *CME Czech Republic BV* v. *Czech Republic*, Final Award, 14 March 2003, paras 87–93, 437 and 504.

IIAs even expressly provide for the possibility of arbitral tribunals requesting that the contracting parties adopt an interpretation on a specific point at issue,[101] or at least permit the intervention of non-disputing parties.[102] In the end, however, a greater involvement in the interpretative process may not always be in the interests of all states. Many capital-exporting states have not yet been exposed to litigation 'at the wrong end of the stick' and, without having themselves experienced the role of the respondent party in investment treaty arbitration, they may therefore have little incentive to implement any changes that could potentially result in a dilution of the protections contained in their IIAs.

V Conclusion

As this chapter has sought to demonstrate, there is more than one avenue available for investment tribunals to consider non-investment obligations in deciding investor–state disputes. The general latitude that investment tribunals enjoy with regard to the scope of legal rules that they are entitled to apply, as well as the rules on treaty interpretation that enable them to take account of the broader normative environment in the interpretative process, provide them with a sufficient degree of flexibility to properly consider obligations arising under instruments other than the investment treaty, without necessarily exceeding their jurisdictional limits. Of course, in a world that is 'irreducibly pluralistic', as we have been importantly reminded by the ILC, law cannot resolve in an abstract way the normative conflicts that may arise between different regimes.[103] The investment law regime, like any other subfield of international law, has its own priorities and preferences, which possibly do not coincide with those of the human rights regimes, environmental protection regimes or the European legal order. Investment lawyers, like any other epistemic community, prioritise their own concerns and interests over those of others.[104] And these, as has often

[101] Japan–Mexico FTA (2004), Art. 89 or US–Uruguay BIT (2005), Art. 31.
[102] See, e.g., NAFTA, Art. 1128. [103] ILC, Report on Fragmentation, para. 488.
[104] See generally on this problem M. Hirsch, 'The Interaction between International Investment Law and Human Rights Treaties: A Sociological Perspective', in T. Broude and Y. Shany (eds), *Multi-sourced Equivalent Norms in International Law* (Oxford: Hart, 2011), pp. 115–42, who suggests that the reluctance to accord significant weight to non-investment obligations in international treaty arbitration can be attributed to the 'socio-cultural distance' between investment lawyers and practitioners in other international legal settings and the deep-rooted tensions between the relevant communities.

shown, may not necessarily coincide with those of other societal groups. This is why the regulation of the interaction between investment law and other subfields of international law requires primarily a policy response. Investment arbitral tribunals should not be entrusted with deciding which societal concerns have priority; their task is primarily in finding the precise balance between the acts that may reasonably be found to constitute interference with investors' rights, and acts that fall within the state's legitimate right to regulate.