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THE 'DORMANT ENVIRONMENT CLAUSE':

ASSESSING THE IMPACT OF MULTILATERAL ENVIRONMENTAL AGREEMENTS ON FOREIGN INVESTMENT DISPUTES?

J. E. Viñuales

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J. E. Viñuales*

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I. INTRODUCTION

In the last decade, a growing number of investment claims have been brought against States in connection with the adoption of environmental measures.[1] These measures have often a purely domestic legal basis[2] but, in some cases, they follow or are linked to multilateral

* Pictet Chair in International Environmental Law, The Graduate Institute, Geneva.

1 *See* Appendix I (investment disputes with environmental components, including pending cases as of 15 December 2011).

2 *See* e.g. *Robert Azinian, Kenneth Davitian and Ellen Baca v. United Mexican States*, ICSID Case No ARB(AF)/97/02, Award (1 November 1999) (*'Azinian v. Mexico'*) (measure concerned: regulation banning trade in a gasoline additive); *Metalclad Corp. v United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award (25 August 2000) ('*Metalclad v. Mexico*') (measures concerned: refusal of a permit to build a landfill and decree declaring the area a natural preserve); *Methanex Corporation v.*

environmental agreements (MEAs).[3] Yet, in practice, the treatment of purely domestic and internationally-induced measures has been amalgamated by investment tribunals. Conflicts between two norms of international law ('normative conflicts') have thus been conflated with conflicts between a domestic (environmental) measure and an international (investment) norm ('legitimacy conflicts'). As a result, the impact of MEAs on foreign investment disputes remains unclear. This article seeks to assess this impact at two levels. First, it focuses on the relationship between MEAs (or assimilated treaties) and bilateral investment treaties (BITs) to determine whether internationally-induced measures call for a different treatment legal than the one given to purely domestic measures. Second, it assesses whether, in practice, MEAs make a difference for the outcome of investment disputes.

The main finding of this article is that MEAs do have an impact on the outcome of investment disputes but that, so far, this impact has only been indirect, i.e. by influencing the use of certain legal concepts (e.g. environmental differentiation, the level of 'reasonableness' expected from investors, the police powers doctrine, or the scope of emergency/necessity clauses) that are in turn key to interpret investment disciplines. This *modus operandi* of investment tribunals can be seen as an intermediate stage between a 'traditional' but legally inaccurate approach (i.e. treating all conflicts as legitimacy conflicts) and a 'progressive' but practically difficult one (i.e. applying a different approach

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United States of America, NAFTA (UNCITRAL), Award (3 August 2005) ('*Methanex v. United States*') (measure concerned: regulation indirectly banning the commercialization of a fuel additive); *Técnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award (29 May 2003) ('*Tecmed v Mexico*') (measure concerned: non-renewal of the operation permit of a waste treatment facility); *MTD Equity Sdn Bhd and MTD Chile SA v. Republic of Chile*, ICSID Case No. ARB/01/7, Award (25 May 2004) (measure concerned: refusal of a permit based on a zoning requirement); *Plama Consortium Ltd. v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award (27 August 2008) (measure concerned: change in domestic environmental laws); *Glamis Gold Ltd. v. The United States of America*, NAFTA Arbitration (UNCITRAL), Award (16 May 2009) ('*Glamis v. United States*')(measures concerned: delays and legislative/regulatory action based on environmental and cultural protection).

[3] *See* e.g. *Southern Pacific Properties (Middle East) Limited (SPP) v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award (20 May 1992) ('*SPP v. Egypt*')(link to: World Heritage Convention); *Compañía del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, Award (17 February 2000) ('*CDSE v. Costa Rica*') (link to: several biodiversity instruments, including the Convention on Biological Diversity); *S.D. Myers Inc. v. Canada, NAFTA Arbitration* (UNCITRAL Rules), Partial Award (13 November 2000) ('*S.D. Myers v. Canada*') (link to: Basel Convention on Hazardous Waste); *Bayview Irrigation District v. United Mexican States*, ICSID Case No. ARB(AF)/05/1, Award (19 June 2007) (link to: water distribution treaty between the US and Mexico); *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award (11 September 2007)('*Parkerings v. Lithuania*')(link to: World Heritage Convention); *Suez, Sociedad General de Aguas de Barcelona S.A. and InterAguas Servicios Integrales del Agua S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/17 ('*Suez v. Argentina—03/17'*) (link to: the right to water as it arises from several treaties); *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/19 ('*Suez v. Argentina—03/19'*) (link to: the right to water as it arises from several treaties); *Chemtura Corporation (formerly Crompton Corporation) v. Government of Canada*, UNCITRAL, Award (2 August 2010) ('*Chemtura v. Canada*') (link to: POP Protocol to the LRTAP Convention and POP Convention).

to normative and legitimacy conflicts, respectively). This intermediate stage is characterized by the use of an 'adjusted' traditional approach under which international environmental law is, to use an image, still considered as a sort of 'foreign' or 'immigrant' law in the lands of foreign investment law (as it only has the space granted to it by investment law) but with an enhanced 'immigration status' (because investment law is interpreted so as to grant more space for domestic environmental regulation). This is because international environmental law adds a measure of legitimacy to what tribunals still perceive, sometimes inaccurately, as purely domestic environmental measures.

Section (II) introduces the theoretical problem addressed in this article by reference to a pending dispute relating to an environmental claim for approximately US$ 18 billion. This is followed by a discussion of the operation of the 'traditional approach' to the relations between environmental and investment protection (III). The analysis shows that this approach is based on two un-spelt assumptions, namely that environmental measures are 'suspicious' (as they may justify measures adopted for protectionist or other political purposes) and that they are 'subordinated' to international investment law. These two assumptions are largely a residue from the factual context in which tensions between environmental protection and investment disciplines first arose. Yet, when such tensions are approached as 'normative conflicts', a different approach is required. An internationally-induced measure is in all likelihood less 'suspicious' than a unilateral one and the relations between such a measure (which is required by IEL) and investment disciplines cannot be approached as a conflict between a purely domestic measure and international law. Section (IV) analyzes these differences and assesses the extent to which they have, in practice, been incorporated in the case-law. It shows that, whereas 'suspicion' seems to be receding, paving the way for an 'adjusted traditional approach', tensions between environmental protection and investment disciplines are still approached as legitimacy conflicts. The concluding section identifies two main difficulties underlying the limited acceptance of the 'progressive approach' and suggests different avenues to address them (V).

II. CIRCUMSCRIBING THE PROBLEM: 'LEGITIMACY CONFLICTS' VS 'NORMATIVE CONFLICTS'

The basic problem addressed in this article can be introduced by reference to a pending dispute between Chevron Corp and the Republic of Ecuador.[4] The dispute arose from the oil extraction activities of Texaco (subsequently acquired by Chevron) in the Ecuadorian jungle. Between 1964 and 1990, Texaco conducted oil extraction operations in Ecuador, which led to severe pollution of the Ecuadorian jungle with grave health consequences for the local population. In the last two decades, numerous proceedings have been brought in

[4] *Chevron Corporation and Texaco Petroleum Company v. Republic of Ecuador*, PCA Case No 2009-23 (UNCITRAL Rules), Jurisdictional Decision (27 February 2012)('*Chevron v. Ecuador II*').

connection with different aspects of the underlying dispute before domestic courts[5] as well as before international adjudicatory[6] and quasi-adjudicatory bodies, such as the Inter-American Commission on Human Rights ('ICommHR').[7]

Following a failed attempt to hold Texaco/Chevron liable before the federal courts of the United States, the affected groups initiated judicial proceedings in Ecuador. These proceedings resulted in a decision ordering Chevron to pay some US$ 18 billion to the plaintiffs.[8] Chevron struck back energetically but, for the most part, unsuccessfully. An appeal against the judgment of first instance was indeed dismissed by an Ecuadorian court of appeals.[9] Similarly, Chevron efforts to obtain from U.S. courts an injunction banning the enforcement of the Ecuadorian judgment were thwarted after the initial injunction issued by a federal district court was vacated on appeal.[10] Interestingly, the company also brought an investment claim against Ecuador for denial of justice[11] seeking to preempt the outcome of the proceedings in Ecuador. According to Chevron:

'Ecuador's judicial branch has conducted the [… domestic environmental litigation against the investor …] in total disregard of Ecuadorian law, international standards of fairness, and Chevron's basic due process and natural justice rights, and in apparent coordination with the executive branch and the […] plaintiffs'.[12]

More specifically, Chevron contends that the acts of the Ecuadorian judiciary granting relief to the Ecuadorian plaintiffs are in breach of the bilateral investment treaty between Ecuador and the United States. Although this may appear as a long shot, the results so far

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5 A claim for environmental damage was first brought in 1993 against Texaco before a federal court in New York but it was dismissed on jurisdictional grounds. Subsequently, an action was initiated before Ecuadorian courts. In February 2011, ordered Chevron to pay US$ 18 billion in damages. *See* Summary of Judgment & Order of Superior Court of Nueva Loja, *Aguinda v. Chevron Texaco*, No. 2003-0002, 14 February 2011 and Excerpts from Judgment & Order of Superior Court of Nueva Loja ('*Lago Agrio – first instance*'), available at www.chevrontoxico.com (accessed on 13 January 2012). Chevron appealed this judgment, but on 3 January 2012 the Ecuador Appeals Court dismissed the appeal. An English version of this decision is available at: www.docstoc.com/docs/110401927/Ecuador-Appeals-Court-Judgment-%28English%29 (accessed on 13 January 2012) ('*Lago Agrio – appeal'*). See L.-E. Peterson, 'Arbitral tribunal calls for hearings to discuss what Ecuador should do to help block enforcement of $18 billion environmental judgment against Chevron', 13 January 2012, available at: www.iareporter.com (accessed on 13 January 2012).

6 Before Chevron v. Ecuador II, above n. 4, the investor had brought another claim that was decided in 2010: *Chevron Corporation (U.S.A.) and Texaco Petroleum Corporation (U.S.A.) v. The Republic of Ecuador*, PCA Case No. 34877 (UNCITRAL Rules), Partial Award on the Merits (30 March 2010), Final Award (31 August 2011).

7 ICommHR, '*Report on the Situation of Human Rights in Ecuador*', OEA/ser.L/V/II.96, doc10 rev1 (24 April 1997) ('Ecuador Report'), available at: www.cidh.oas.org/countryrep/ecuador-eng/chaper-9.htm (accessed on 21 December 2011).

8 *Lago Agrio - first instance*, above n. 5 (8.6 billion in environmental remediation and the remnant in punitive damages if Chevron fails to acknowledge its responsibility).

9 *Lago Agrio - appeal*, above n. 5.

10 The decision of the U.S. Court of Appeals for the Second Circuit vacating the injunction initially granted is available at : http://www.ca2.uscourts.gov/decisions/isysquery/83c7e33b-75ca-4735-acec-95593be09f03/2/doc/11-1150_op.pdf (accessed on 28 February 2012).

11 *Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador*, UNCITRAL Rules (PCA), Notice of Arbitration (23 September 2009)('*Chevron v. Ecuador - NoA'*), para 1-2.

12 *Ibid*., para 4.

seem rather favorable to Chevron. Indeed, in its decision of 27 February 2012, the arbitral tribunal asserted jurisdiction over Chevron's claim, so the matter will now move onto the merits stage.

Chevron's argumentation can be contrasted with the picture arising from a different, albeit related, procedure. In chapter VIII of its Report on the situation of human rights in Ecuador, of 1997, the ICommHR discussed indeed the findings of an on-site visit to the interior of Ecuador (the 'Oriente') and, more specifically, to the 'Lago Agrio' area.[13] The inhabitants of this area claimed that 'oil exploitation activities taking place in or near their communities have contaminated the water they use for drinking, cooking and bathing, the soil they cultivate to produce their food, and the air they breathe'.[14] More specifically, they claimed that 'the Government ha[d] failed to regulate and supervise the activities of both the state-owned oil company and of its licensee companies'.[15] Importantly, the ICommHR noted that the government had taken some steps to address this situation and that '[o]ne of the Government's most visible activities with respect to the effects of oil development ha[d] been its effort to ensure that Texaco finance and implement a plan to clean up areas that were contaminated during the company's twenty-plus years of operation in the Oriente'.[16] After analyzing the situation in the light of the ACHR,[17] the ICommHR made the following recommendation:

'Given that the American Convention requires that all individuals of the Oriente have access to effective judicial recourse to lodge claims alleging the violation of their rights under the Constitution and the American Convention, including claims concerning the right to life and to live in an environment free from contamination, the Commission recommends that the State take measures to ensure that access to justice is more fully afforded to the people of the interior.'[18]

Thus, on the one hand, the State would be required under the ACHR to provide redress mechanisms to the victims of environmental degradation while, on the other hand, the investor claims that such redress mechanisms are in breach of an investment treaty. To be sure, the argumentation of the investor will be subtler than this statement. It will likely agree with the need to provide redress while advancing that it has fulfilled all its obligations under Ecuadorian law and that the procedures against it are inconsistent with due process requirements. But, for present purposes, the crux of the matter lies elsewhere, i.e. in the tension between two potentially competing obligations of Ecuador. Depending on how this tension is framed, the legal framework applicable to it may be significantly different. A first approach could be to see it as a 'legitimacy conflict' between a domestic environmental measure (the domestic judgment) and an international investment norm. A second approach would be to consider this tension as a 'normative conflict' between the ACHR and an investment discipline to the extent that, as noted by the ICommHR, Ecuador was required

[13] Ecuador Report, above n. 7.
[14] *Ibid*., chapter XIII, The Situation in the Oriente, third paragraph.
[15] *Ibid*., chapter XIII, The Situation in the Oriente, sixth paragraph
[16] *Ibid*., Chapter VIII, Government Action on the Issue of Oil Development, fourth paragraph.
[17] American Convention on Human Rights, 22 November 1969, 1144 U.N.T.S. 123.
[18] *Ibid*., Chapter VIII, fourth recommendation.

to 'ensure that access to justice is more fully afforded to the people of the interior'.[19] The two approaches differ considerably because the rules applicable to solve conflicts between a norm of international law and a domestic measure are not the same as those applicable to conflicts between two norms of international law. One important difference is that the hierarchy of international norms over domestic norms recognized in many legal systems – including international law itself (and IIL specifically[20]) – only applies to legitimacy conflicts. The characterization of the conflict is therefore an important issue in practice.

One may ask what are the variables influencing such characterization. As I will discuss in more detail in section V below, perhaps the two most important considerations are (i) the link between the domestic environmental measure (e.g. the court decision) and the international environmental obligation of the State (e.g. the requirements of the ACHR), and (ii) the forum where the question is raised (e.g. the investment tribunal). As anticipated in the introduction, the 'traditional approach' has been to consider such hypotheses as 'legitimacy conflicts' with the ensuing consequence that the standards of environmental protection could only operate within the bounds set by the 'higher' (international) law, i.e. investment disciplines.

III. THE 'TRADITIONAL APPROACH'

The traditional approach to the relations between environmental and investment protection can be seen as a generalization of the holdings of certain tribunals in cases where a domestic environmental measures adversely affected the operations of a foreign investor in a manner (allegedly) inconsistent with international investment protection standards. It is important to keep in mind this initial context because it has influenced both the approach followed by investment tribunals and the way in which early commentators framed the question.

In the following paragraphs, I analyze how some features of this initial context – despite being dispute-specific – made their way into the general approach distilled from these disputes and still influences the way in which policy instruments perceive the relations between environmental measures and investment disciplines. Under this traditional approach, environmental measures are seen as 'suspicious', because they could hide a protectionist intent (A). Moreover, because they are seen as detached from IEL, their legality is subject to their conformity with international (investment) law, although some room for environmental regulation is recognized as a an exercise of the State's police powers (B).

A. 'Suspicious' environmental measures

[19] Ecuador Report, above n 13, fourth recommendation *in fine*.
[20] See below section III(B).

The disputes that provided the initial context for the analysis of this question[21] – cases such as *Ethyl corp v. Canada*,[22] *Metalclad v. Mexico*,[23] *S.D. Myers v. Canada*,[24] or *Tecmed v. Mexico*[25]– all shared the fact that the main purpose underlying the adoption of the relevant environmental measure had likely not been genuinely environmental. This point is difficult to establish because tribunals tend to avoid taking blunt stances on such issues. However, aside from *Ethyl corp v. Canada*, which was settled shortly after the decision of the tribunal accepting jurisdiction, a fine-grained analysis of the awards in the three other cases mentioned clearly suggests that the tribunals gave a considerable – and perhaps decisive – weight to the fact that the measures did not pursue a genuine environmental purpose.

In *Metalclad v. Mexico*, the tribunal seemed skeptical as to the grounds for declaring the land of the investor part of a natural preserve for the protection of *cacti* and simply disregarded the purpose of the measure.[26] In S.D. *Myers v. Canada* the tribunal went a step further, explicitly noting that '[t]he evidence establishe[d] that Canada's policy was shaped to a very great extent by the desire and intent to protect and promote the market share of [Canadian] enterprises'[27] and that 'there was no legitimate environmental reason for introducing the ban'.[28] Similarly, in *Tecmed v. Mexico*, the tribunal considered that the measure challenged had been adopted on the basis of political (and not environmental) reasons.[29] This common feature of the initial context is significant because environmental measures were thus perceived in a somewhat negative light, as a sort of disguise for the pursuit of protectionist or political purposes.

Such suspicion is still present in some policy instruments. By way of illustration, the Organization for Economic Co-operation and Development ('OECD') has recently referred to the risks of 'green protectionism' as a justification for the need to 'harness freedom of investment for green growth'. One of the draft papers circulated by the OECD staff as part of the consultation process defines 'green protectionism' as follows:

'Investment protectionism occurs when government policies and practices restrict the free flow of capital across the global economy and when such restrictions do not have a solid justification in safeguarding essential security interests and public order. Green investment protectionism occurs when environmental

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[21] See e.g. Th. Waelde, A. Kolo, 'Environmental Regulation, Investment Protection and "Regulatory Taking" in International Law' (2001) 50 *ICLQ* 811, at 837-839 (discussing Ethyl corp v. Canada, Metalclad v. Mexico, and S.D. Myers v. Canada); J. Abouchar, 'Environmental Laws as Expropriation under NAFTA' (1999) 8 *RECIEL* 209-215 (discussing the same three cases).

[22] *Ethyl Corporation v. Government of Canada*, NAFTA (UNCITRAL), Preliminary Award on Jurisdiction (24 June 1998)

[23] *Metalclad v. Mexico*, above n. 2.

[24] *S.D. Myers v. Canada*, above n. 3.

[25] *Tecmed v. Mexico*, above n. 2.

[26] *Metalclad v. Mexico*, above n. 2, para 109-111.

[27] *S.D. Myers v. Canada*, above n. 3, para 162.

[28] *Ibid*., para 195.

[29] *Tecmed v. Mexico*, above n. 2, para 128.

policies have this same effect and when the restrictions cannot be justified as advancing well-founded public-policy goals'[30]

It is therefore unsurprising that the 'OECD Statement on Harnessing Freedom of Investment for Green Growth', adopted in April 2011, impliedly subordinates environmental measures to investment protection standards when it states, in its fourth paragraph, that 'governments should review their new proposed environmental measures for compliance with investment law obligations'.[31] This latter point raises another question, namely the hierarchy between environmental and investment protection.

B. 'Subordinated' environmental measures

Even in those cases where it is undisputed that the measure pursues a genuine environmental purpose, environmental law remains, as a matter of practice, constrained by the bounds set to it by investment disciplines. From a legal perspective, this is mostly the result of the superiority of international law over domestic law. In practice, such superiority depends on the tribunal addressing the conflict as well as of the characterization of the conflict. The traditional approach is for investment tribunals to characterize conflicts between environmental and investment protection as 'legitimacy conflicts', even in clear disregard of the incidence of IEL.

Perhaps the clearest illustration of the operation of the traditional approach in this regard is provided by *CDSE v. Costa Rica*.[32] The dispute concerned the amount of compensation due by Costa Rica for the direct expropriation of a biodiversity-rich land that the investor had acquired to develop a resort. We know from an article written by counsel for Costa Rica that, in its pleadings, the respondent referred to the impact of certain environmental treaties on the assessment of compensation.[33] The tribunal disposed of Costa Rica's argument without even analyzing the contents of these treaties, stating that:

'the purpose of protecting the environment for which the Property was taken does not alter the legal character of the taking for which adequate compensation must be paid. The international source of the obligation to protect the environment makes no difference'[34]

It then added, in a footnote, that '[f]or this reason, the Tribunal does not analyze the detailed evidence submitted regarding what Respondent refers to as its international legal obligation to preserve the unique ecological site that is the Santa Elena Property'.[35] In other words, according to this tribunal, IEL would be completely irrelevant for the determination

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30 K. Gordon, 'Green-Investment Protectionism: What it is it and how prevalent is it ?', 2011 ('OECD paper'), para 16, available at: www.oecd.org/dataoecd/8/3/46905672.pdf (accessed on 5 September 2011).

31 OECD, *Harnessing Freedom of Investment for Green Growth*, Freedom of Investment Roundtable, 14 April 2011.

32 *CDSE v. Costa Rica*, above n. 3.

33 *See* C. Brower, J. Wong, 'General Valuation Principles: The Case of Santa Elena', in T. Weiler (ed.) *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law* (2005) 764.

34 *CDSE v. Costa Rica*, above n. 3, para 71.

35 *Idem*.

of quantum. This assertion is flawed. In the context of human rights, compliance with an international norm is recognized as a ground for reducing compensation. [36] Moreover, a previous investment tribunal chaired by the former president of the International Court of Justice had also reduced compensation on the basis of the application of IEL.[37] However, for present purposes, the most important point is that, in downplaying the role of IEL, the tribunal in *CDSE v. Costa Rica* framed the issue as a 'legitimacy conflict' and not as a 'normative conflict'. This is particularly significant in the context of this dispute. The main point of contention was indeed whether the valuation of property was governed by the laws of Costa Rica (as argued by Costa Rica) or by international investment law (as argued by the investor). The tribunal gave reason to the investor on the grounds that international (investment) law prevailed over domestic (environmental) law. Yet, had the situation been characterized as a conflict between two norms of international law (one of IIL and another of IEL), the priority of international law over domestic law as a conflict norm would not have been applicable.[38]As this case suggests, confining environmental considerations at the domestic level (i.e. characterizing a conflict as a 'legitimacy conflict' instead of a

[36] In *Turgut v. Turkey*, a case concerning the reclassification of certain lands as State forests, the European Court of Human Rights reasoned that 'economic imperatives and even some fundamental rights, such as the right to property, should not be accorded primacy against considerations of environmental protection'. See *Turgut v. Turkey*, ECtHR Application No. 1411/03, Judgment – Merits (8 July 2008)('*Turgut – Merits*'), para 90 (unofficial translation of the French text). Fair compensation must be paid but, in practice, this means less than the full value of the property. *Ibid*., Judgment – Just Satisfaction (13 October 2009), para 14. This case has influenced the outcomes of several other related cases. *See*, most recently, *Sarisoy v. Turkey*, Application No. 19641/05, Judgment (13 September 2011); *Ali Kilic and others v. Turkey*, Application No. 13178/05 Judgment (13 September 2011); *Erkmen and others v. Turkey*, Application No. 6950/05, Judgment – Merits (16 March 2010), Just Satisfaction (13 September 2011). Another example with an environmental component is *Theodoraki v. Greece*, ECtHR Application No. 9368/06, Judgment (2 December 2010). In this case, two hotel developers claimed that their right to property (art 1 of Protocol 1 to the ECHR) had been breach by reason of the measures adopted by Greek to protect endangered loggerhead turtles, pursuant to the Bern Convention. The ECtHR concluded that the measures amounted indeed to a deprivation of the right to property of the plaintiffs but accorded only EUR 3.7 million as fair compensation, instead of the EUR 47 million requested.

[37] In *SPP v. Egypt*, the tribunal excluded from the amount of compensation the damage corresponding to the period after the emergence of Egypt's obligations under the World Heritage Convention, noting that '[f]rom that date forward, the Claimant's activities on the Pyramids Plateau would have been in conflict with the Convention and therefore in violation of international law, and any profits that might have resulted from such activities are consequently noncompensable', *SPP v. Egypt*, above n. 3, para 191.

[38] The tribunal reasoned as follows: '[t]his leaves the Tribunal in a position in which it must rest on the second sentence of Article 42(1) ('In the absence of such agreement …') and thus apply the law of Costa Rica and such rules of international law as may be applicable. No difficulty arises in this connection. The Tribunal is satisfied that the rules and principles of Costa Rican law which it must take into account, relating to the appraisal and valuation of expropriated property, are generally consistent with the accepted principles of public international law on the same subject. *To the extent that there may be any inconsistency between the two bodies of law, the rules of public international law must prevail. Were this not so in relation to takings of property, the protection of international law would be denied to the foreign investor and the purpose of the ICSID Convention would, in this respect, be frustrated … [t]he parties' divergent positions lead, in substance, to the same conclusion, namely, that, in the end, international law is controlling.* The Tribunal is satisfied that, under the second sentence of Article 42(1), the arbitration is governed by international law', *CDSE v. Costa Rica*, above n. 3, para 64-65 (italics added).

'normative conflict') is therefore not an innocuous step. Quite to the contrary, it may have decisive legal consequences. The use of the 'traditional approach' adds an important constraint on environmental regulation, namely the need to evolve within the bounds set by international investment law. The main legal basis underlying this constraint, as applied by investment tribunals, is the priority of international law over domestic law.

There are, however, some limits to such constraints. Even under the traditional approach, environmental regulation may be shielded through the operation of the police powers doctrine, according to which:

'[a] state is not responsible for loss of property or for other economic disadvantage resulting from bona fide general taxation, regulation, forfeiture for crime, or other action of the kind that is commonly accepted as within the police power of states, if it is not discriminatory […] and is not designed to cause the alien to abandon the property to the state or sell it at a distress price.'[39]

The first application of the police powers doctrine in an environmental context[40] was in *Methanex v. United States*. The case concerned an environmental measure adopted by the Californian authorities banning a fuel additive (methyl tertiary-butyl ether or MTBE) which had been found to be a groundwater pollutant. The claimant, a producer of a feedstock used in the production of MTBE, argued that it had be expropriated as a result of the measure. The tribunal rejected this claim considering that the measure had been a valid exercise of the State's police powers:

'[A]s a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, inter alios, a foreign investor or investment is not deemed expropriatory and compensable unless specific commitments had been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation.'[41]

As will be discussed in the section IV(B)(3) below, the police powers doctrine has been applied in at least two other investment cases (including one with environmental components) to shield governmental measures. It must be noted that the effect of this

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[39] American Law Institute ('ALI'), *Restatement (Third) of the Law of Foreign Relations of the United States*, 1986, section 712, commentary, letter (g). On the sources of the this doctrine see, more generally, S. Friedman, *Expropriation in International Law* (London: Stevens, 1953) 51; L. B. Sohn, R. R. Baxter, 'Draft Convention on the International Legal Responsibility of States for Injuries to Aliens' (1961) 55 *AJIL* 545 ('Harvard Draft 1961') art 10(5); G. C. Christie, 'What Constitutes a Taking of Property under International Law' (1962) 38 *British Yearbook of International Law* 307; ALI, *Restatement (Second) of the Law of Foreign Relations of the United States*, 1965, section 197(1)(a); G. H. Aldrich, 'What Constitutes a Compensable Taking of Property? The Decisions of the Iran-United States Claims Tribunal' (1994) 88 *AJIL* 585; M. Kinnear, A. K. Bjorklund, J. F. G. Hannaford, *Investment Disputes under NAFTA. An Annotated Guide to NAFTA Chapter 11* (The Hague: Kluwer Law International, 2006), commentary ad Article 1110, 49-55; I. Brownlie, *Principles of Public International Law* (Oxford: Oxford University Press, 2008) 535-536.

[40] In *Tecmed v. Mexico*, the police powers doctrine was considered by the tribunal but eventually rejected. The tribunal noted, however, that '[t]he principle that the State's exercise of its sovereign powers within the framework of its police power may cause economic damage to those subject to its powers as administrator without entitling them to any compensation whatsoever is undisputable', *Tecmed v. Mexico*, above n. 2, para 119.

[41] *Methanex v. United States*, above n. 2, part IV, ch. D, para

doctrine is not simply to exclude compensation but, more specifically, to exclude liability altogether. As such, the police powers doctrine introduces an important limit to the constraint imposed by IIL on environmental regulation.

The impact of the approach described in the foregoing paragraphs is still apparent in the drafting of investment treaties. Although, as noted by a recent report of the OECD, the space devoted to environmental considerations in investment treaties and free-trade agreements ('IIAs') has been significantly expanded in recent years,[42] most of these 'environmental clauses' focus on legitimacy conflicts and seek to carve out some space for environmental regulation within investment disciplines.[43] One may consider that such provisions could also accommodate normative conflicts between IIAs and environmental treaties. While this may be accurate to some extent (although I am not aware of any case discussing the operation of such clauses), their formulation is premised on the assumption that conflicts between environmental and investment protection take the form of 'legitimacy conflicts'. This is clear when one compares these clauses to another – much rarer – type of clauses that specifically envision the possibility of normative conflicts. The clearest illustration is Article 104 of the NAFTA, which provides:

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

a) the Convention on International Trade in Endangered Species of Wild Fauna and Flora, done at Washington, March 3, 1973, as amended June 22, 1979,

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

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

d) the agreements set out in Annex 104.1,

such obligations shall prevail to the extent of the inconsistency, provided that where a Party has a choice among equally effective and reasonably available means of complying with such obligations, the Party chooses the alternative that is the least inconsistent with the other provisions of this Agreement.[44]

Other comparable provisions have been included in the CARIFORUM—European Union Economic Partnership Agreement (EPA),[45] the EU-Russia Agreement on Partnership and

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[42] K. Gordon, J. Pohl, 'Environmental Concerns in International Investment Agreements: a survey' (2011) *OECD Working Papers on International Investment* No. 2011/1 ('OECD Report'), 8.

[43] The seven main categories of environmental provisions in IIAs identified by the OECD Report are the following: '[1]General language in preambles that mentions environmental concerns and establishes protection of the environment as a concern of the parties to the treaty […][2] Reserving policy space for environmental regulation […][3] Reserving policy space for environmental regulation for more specific, limited subject matters (performance requirements and national treatment) […][4] [P]rovisions that clarify the understanding of the parties that non-discriminatory environmental regulation does not constitute "indirect expropriation" […][5] [P]rovisions that discourage the loosening of environmental regulation for the purpose of attracting investment […][6] [P]rovisions related to the recourse to environmental experts by arbitration tribunals […][7] [P]rovisions that encourage strengthening of environmental regulation and cooperation', *Ibid*., 11 (numbering added)

[44] North American Free Trade Agreement, 17 December 1992, 32 I.L.M. 296 ('NAFTA'), art 104.

Cooperation,[46] the Belgium/Luxembourg model BIT,[47] the CAFTA-DR,[48] or the US-Singapore FTA.[49] The fact that such clauses are much rarer than the previous ones suggests that the prevailing understanding in investment treaty practice is still based on the traditional approach, but also that some attention is (increasingly) being paid to the incidence of MEAs.

IV. ADJUSTING THE TRADITIONAL APPROACH

As discussed in the previous section, the traditional approach to solving conflicts between environmental and investment protection has been significantly influenced by the factual context of some early disputes. Environmental measures are often suspected of covert protectionism and, even when their purpose is not in doubt, they are deemed to be subject to investment disciplines. This approach, which has considerably influenced both IIAs and policy instruments, can be summarized by reference to the concept of 'legitimacy conflicts' between a purely domestic environmental measure and international investment law.

Yet, this approach is not always legally accurate. In some of the early disputes, e.g. *S.D. Myers v. Canada*[50] or *CDSE v. Costa Rica*,[51] as well as in a number of subsequent disputes that will be discussed in the following paragraphs, there was a link between the measure challenged and IEL that, if spelled out, could have (had) a strong incidence on the reasoning of investment tribunals. This incidence can be explored taking as a starting point the concept of 'normative conflict'. After some observations on this incidence (A), I analyze the relevant investment case-law to determine whether a new approach is emerging. The main conclusion of the analysis is that, in practice, references to IEL may reduce the suspicion surrounding the real purposes of environmental measures as well as ease the constraints to which they are subject under IIL, but the full recognition of the implications of normative conflicts is still to be achieved.

A. The incidence of IEL on 'suspicion' and 'constraints'

The incidence of IEL on the 'suspicion' and 'constraint' components of the traditional approach can be summarized as follows: (1) to reduce or eliminate suspicions of covert protectionism; and (2) to place internationally-induced environmental measures at the same

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45 Economic Partnership Agreement between the Cariforum States and the European Community and its Member States, 15 October 2008, OJ 30/10/2008 – L 289/I/3, art 72(c).

46 Agreement on partnership and cooperation establishing a partnership between the European Communities and their Member States, of one part, and the Russian Federation, of the other part, 26 June 1994, art 69, reproduced in OECD, *International Investment Law: Understanding Concepts and Tracking Innovation* (2008)('OECD 2008 Study'), 223-224.

47 Belgian/Luxembourg Model BIT, art 5(3), reproduced in *Ibid*., 177.

48 Dominican Republic—Central America—United States Free Trade Agreement, 5 August 2004, 43 I.L.M. 514 ('CAFTA-DR'), art 17.12.1.

49 US-Singapore FTA, art 18.8, reproduced in *OECD 2008 Study*, above n. 46, 212.

50 *S.D. Myers v. Canada*, above n. 3.

51 *CDSE v. Costa Rica*, above n. 3.

level as investment disciplines, thus excluding the application of the rule giving priority to international (investment) law over domestic (environmental) law. Both effects flow from the concept of 'normative conflict', which, in turn, depends on the existence *and* the recognition of a link between the environmental measure and the State's obligations under IEL.

(1) Internationally-induced measures are less suspicious

Regarding the first effect, the underlying rationale is that an internationally-induced measure, by contrast to a unilateral one, is less likely to be based on predominantly protectionist purposes. This issue has been widely discussed in connection with so-called 'trade-related environmental measures' or 'TREMs'.[52] Although it has not been spelled out in this manner, the discussion in the trade context can also be analyzed by reference to the distinction between 'legitimacy' and 'normative' conflicts. The dispute settlement bodies in the trade context (as investment tribunals) frame conflicts between trade disciplines and environmental measures as legitimacy conflicts, i.e. environmental measures are constrained by the bounds set to them by trade disciplines. These bounds include some environmental exceptions, most notably Article XX, letters (b) and (g) of the GATT.[53]

However, when an environmental restriction to trade is required by a MEA, a conflict arises between two norms of international law, one arising from a MEA and the other from a trade treaty. In the absence of a specific conflict norm, such as Article 104 of the NAFTA, trade tribunals address this situation by reference to general exceptions in trade treaties, such as Article XX of the GATT. Irrespective of whether such exceptions may be sufficient or not to manage the conflict (as would be the case of the environmental provisions included in IIAs), the fact that – technically – they do not differentiate between unilateral and internationally-induced environmental measures is problematic. This explains why the Doha Ministerial Declaration contemplated the need to conduct negotiations on 'the relationship between existing WTO rules and specific trade obligations set out in multilateral environmental agreements (MEAs)'.[54] One of the proposals – put forward by the European Union – to address this problem introduced a presumption that TREMs are consistent with Article XX unless the contrary is established.[55] A pragmatic alternative to this approach would be to consider, in practice, that environmental measures adopted pursuant to a MEA are consistent with the chapeau of Article XX of the GATT

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[52] See WTO/CTE, Matrix on Trade Measures pursuant to Selected Multilateral Environmental Agreements, 14 March 2007, WT/CTE/W/160/Rev.4, TN/TE/S/5/Rev.2 ('*CTE MEA Matrix*'), Section II.

[53] General Agreement on Tariffs and Trade, 1947, incorporated into the General Agreement on Tariffs and Trade, of 15 April 1994 ('GATT'), Article XX(b) and (g). See S. Zleptnig, *Non-Economic Objectives in WTO Law* (The Hague: Kluwer, 2010).

[54] WTO Ministerial Conference Fourth Session, Ministerial Declaration, para. 31 WT/MIN(01)/DEC/1 (Nov. 20, 2001) ('Doha Declaration'), para 31(i).

[55] Committee on Trade and Environment, Resolving the Relationship Between the WTO Rules and Multilateral Environmental Agreements, communication by the European Communities of 19 October 2000, WT/CTE/W/170, para 10, 15.

which excludes from the scope of the exception measures 'applied in a manner that that would constitute arbitrary or unjustifiable discrimination […] or a disguised restriction on international trade'.[56] Whether one follows the first or the second alternative, the key consideration for present purposes is that IEL reduces the suspicion of protectionism for most, if not all, practical effects.

A similar effect of IEL can be detected in the investment context. An apposite illustration is provided by a NAFTA case, *Chemtura v. Canada*.[57] The dispute concerned certain measures adopted by the Canadian environmental agency that resulted in the suspension and subsequent cancellation of the lindane-based pesticides produced and commercialized by the investor. The investor argued that the measures challenged (specifically the conduct of a scientific re-examination of the risks posed by lindane) had been triggered by a trade irritant and not as a result of a genuine environmental concern. The tribunal rejected this argument noting that 'the evidence on the record […] show[ed] that the Special Review was undertaken by the PMRA [Canada's environmental agency] in pursuance of its mandate and as a result of Canada's international obligations [under the POP Protocol to the LRTAP Convention]'.[58]

(2) Dormant environment clauses

The second effect of IEL 'should' be to change the characterization of the conflict and, thereby, the set of rules applicable to solve it. When the challenged domestic measure has been adopted in pursuance of a MEA, a potential conflict with an investment discipline should be framed as a 'normative conflict'. The view that environmental measures can only evolve within the bounds set by investment disciplines would no longer apply because the rule according to which international (investment) law prevails over domestic (environmental) law would not apply. The set of rules applicable to normative conflicts would include principles such as *lex superior*,[59] *lex specialis*,[60] *lex posterior*,[61] some

[56] GATT, art XX, chapeau. See e.g. *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the Appellate Body, WT/DS58/AB/R (12 October 1998), para 166ff (suggesting that measures adopted pursuant to MEAs would a priori be justified under the chapeau of art XX).

[57] *Chemtura v. Canada*, above n. 3.

[58] *Ibid*, para 138.

[59] On the hierarchical effects that could be attached to certain IEL norms see: E. Kornicker, 'State Community Interests, jus cogens and Protection of the Global Environment: Developing Criteria for Peremptory Norms' (1998–1999) 11 *Georgetown International Environmental Law Review* 101 (arguing that certain norms of IEL could be characterized as jus cogens); J. E. Vinuales, 'La proteccion del medio ambiente y su jerarquia normativa en derecho internacional' (2008) 13 *International Law. Revista Colombiana de Derecho Internacional* 11 (arguing that the principle of prevention has not attained jus cogens status but could deploy some hierarchical effects as an obligation erga omnes or in assisting the identification of essential interests for purposes of the necessity defence).

[60] Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law (2006), Doc. A/61/10/ ('Conclusions-Fragmentation'), para 5-16 (defining this principle as follows 'special law, being more concrete, often takes better account of the particular features of the context in which it is to be applied than any applicable general law. Its application may also often create a more equitable result and it may often better reflect the

interpretation techniques[62] or a limited number of specific conflict norms mentioned in the previous section.[63] However, there are some difficulties in establishing a link between IEL and a domestic environmental measure.

Perhaps the main difficulty arises from the broad formulation of environmental clauses in MEAs. To develop this point it seems useful to provide some illustrations. Some provisions in MEAs are formulated in fairly precise terms. For instance, Article 4(5) of the Basel Convention provides that '[a] Party shall not permit hazardous wastes or other wastes to be exported to a non-Party or to be imported from a non-Party.'[64] This obligation would clearly require a source State to adopt and implement measures prohibiting exports to a developing country which is not a party to the Basel Convention. This provision can be compared with the much broader provisions contained in MEAs concerning the protection of biological resources, climate change or water resources. For example, Article 6 of the Convention on Biological Diversity provides that:

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

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

(b) Integrate, as far as possible and as appropriate, the conservation and sustainable use of biological diversity into relevant sectoral or cross-sectoral plans, programmes and policies.'[65]

It would be unclear whether a measure aimed at integrating 'the conservation and sustainable use of biological diversity' is required or, even simply authorized, by this provision. Similarly, Article 3(1) of the Kyoto Protocol provides that:

'The Parties included in Annex I shall, individually or jointly, ensure that their aggregate anthropogenic carbon dioxide equivalent emissions of the greenhouse gases listed in Annex A do not exceed their assigned

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intent of the legal subjects', at para 7) ; *See* also the Report of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law, finalized by Marti Koskenniemi, 13 April 2006, Doc. A/CN.4/L.682 ('Report-Fragmentation'), para 46-222.

61 See Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331 ('VCLT'), art 30; Conclusions-Fragmentation, above n. 60, para 24-30; Report-Fragmentation, above n. 60, para 223-323.

62 See R. Pavoni, 'Mutual Supportiveness as a Principle of Interpretation and Law-Making: A Watershed for the 'WTO-and-Competing-Regimes' Debate?' (2010) 21 *European Journal of International Law* 649 (discussing 'mutual supportiveness' between trade and environment); C. McLachlan, 'The Principle of Systemic Integration and Article 31 3) c) of the Vienna Convention' (2005) 54 *International and Comparative Law Quarterly* 279 (discussing the principle of systemic integration); *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, I.C.J. Reports 1997, p. 7, Weeramanty—Separate Opinion, at 114 (discussing the principle of contemporaneity in the application of environmental law). On this latter principle see also: *Iron Rhine (IJzeren Rijn) Railway (Belgium/Netherlands)*, PCA Case, Award (24 May 2005), para 59-60; *Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, Judgment of 13 July 2009, *General list No. 133*, para 64; *Case concerning Pulp Mills in the River Uruguay (Argentina v. Uruguay)*, Judgment of 20 April 2010, General List No 135, para 204.

63 See above sub-section III.B.

64 Basle Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, of 22 March 1989, 1673 U.N.T.S. 57 ('Basel Convention'), art. 4(5).

65 Convention on Biological Diversity, 5 June 1992, 1760 U.N.T.S. 79 ('CBD'), art 6.

amounts, calculated pursuant to their quantified emission limitation and reduction commitments inscribed in Annex B and in accordance with the provisions of this Article, with a view to reducing their overall emissions of such gases by at least 5 per cent below 1990 levels in the commitment period 2008 to 2012.'[66]

It would again be unclear whether a measure such as the requirement imposed on airlines operating flights from or to Europe to present a certain amount of carbon offsets[67] is required or fully authorized by this provision. Still another example, this time in the area of water regulation, is provided by the right to water derived from Articles 11(1) and 12(2)(b) of the ICESCR.[68] General Comment 15 of the Committee on Economic, Social and Cultural Rights defines this right as follows: '[t]he human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses'.[69] These and other provisions[70] are of particular relevance from a practical perspective, and they have been invoked in a number of investment proceedings.[71] For present purposes, it will be sufficient to make two observations concerning the *existence* and the *recognition* of the link between IEL and environmental measures, respectively.

Regarding the existence of the link, if one concentrates on the clauses of MEAs that have arisen in the practice of investment tribunals (i.e. in essence, those identified in this section), they share a number of features: (i) they were adopted between the 1970s and the 1990s; (ii) they are broadly stated; and (iii) their implementation is progressive and, to some extent, unclear. Perhaps to the exception of chemicals and waste regulation, which tends to be more precise, in most cases it is very difficult to assess in advance the impact of such environmental clauses on the situation of foreign investors. Such impact becomes clearer when some specific implementation measures have been adopted at the domestic level but, at this point, it is often too late to conduct a useful assessment. Yet, at the same time, the very existence of such clauses provides a signal that the host State will take

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66 Kyoto Protocol to the United Nations Framework Convention on Climate Change, Kyoto, 11 December 1997, 2303 U.N.T.S. 148 ('Kyoto Protocol'), art. 3(1).

67 See Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/E, OJ 2003 L 0087 — EN — 25.06.2009 — 004.001 (consolidated version) ('ETS Directive'). *Air Transport Association of America and others v. Secretary of State for Energy and Climate Change*, CJEU Case C-366/10, Judgment (21 December 2011).

68 International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 993 U.N.T.S. 3 ('ICESCR').

69 Committee on Economic, Social and Cultural Rights, General Comment No. 15 (2002), The Right to Water (Articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights), 26 November 2002, UN ESCOR Doc. E/C.12/2002/11 ('GC 15'), para 2.

70 See e.g. Protocol on Persistent Organic Pollutants to the LRTAP Convention, 24 June 1998, 37 I.L.M .513 ('POP Protocol'), Annex II; Convention on Wetlands of International Importance especially as Waterfowl Habitat, 2 February 1971, 996 U.N.T.S. 245, art. 2(1) and (4); Treaty between the United States of America and Mexico relating to the utilization of the Waters of the Colorado and Tijuana Rivers and of the Rio Grande, 3 February 1944, 3 U.N.T.S. 314 ('1944 Water Utilisation Treaty'), art 4; Convention on Nature Protection and Wild Life Preservation in the Western Hemisphere, of 12 October 1940, 56 Stat. 1354, TS 981 ('Western Hemisphere Convention'), art. II(1) and V(1); Convention for the Protection of the World Cultural and Natural Heritage, 16 November 1972, 1037 U.N.T.S. 151 ('WHC'), 4, 5(d) and 11.

71 See above n. 3.

certain regulatory action in the future, and foreign investors cannot safely disregard such a possibility. Thus, the main question posed by such dormant environment clauses is one of allocation of the regulatory risk between the investor and the State.

The second observation follows from this latter point. In practice, such allocation is carried out by investment tribunals, which, through the lens of the traditional approach, tend to see environmental measures as subordinated by investment disciplines. As discussed next, tribunals are increasingly adjusting the traditional approach to make room for internationally-induced environmental measures through the (re)interpretation of investment disciplines. In doing so, they seem increasingly amenable to recognize the link between IEL and domestic measures.

B. An intermediate stage – the 'adjusted' traditional approach

Investment tribunals are increasingly recognizing the impact of IEL. This recognition is, however, not explicit. Investment tribunals seem reluctant to frame tensions between environmental and investment protection as 'normative conflicts'. They continue to approach such tensions as 'legitimacy conflicts' but they increasingly carve out some additional space for environmental considerations. This approach is intermediate because, while conflicts are still approached as 'legitimacy conflicts' (i.e. the link between IEL and domestic measures is not formally recognized), an additional measure of legitimacy is given to the environmental measure challenged (i.e. the link between IEL and domestic law is informally recognized).

In the following paragraphs I analyze certain avenues through which the traditional approach is being adjusted, namely: (1) environmental differentiation; (2) the level of 'reasonableness' expected from investors in the fair and equitable treatment standard; (3) the police powers doctrine; and (4) the scope of emergency/necessity clauses. In analyzing these concepts, I will draw, as much as possible, a parallel with the operation of each concept in a purely domestic context.

(1) Environmental differentiation

The starting point of the discussion of environmental differentiation is the debate, mentioned earlier, over the possibility of 'green protectionism' or, in other words, the suspicion surrounding the adoption of environmental measures. However, as noted in one of the papers prepared by the OECD as background for its 2011 Statement on Harnessing Freedom of Investment for Green Growth, at present, green investment protectionism is not a problem in practice.[72] The fear of green protectionism comes rather from the early investment decisions discussed above as well as from the tendency to extrapolate trade reasoning[73] into the investment realm. Yet, it is important not to conflate these two contexts.

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[72] OECD Paper, above n. 30, para 19.

[73] On the debate of green protectionism in the trade context see Ph. Sands, *Principles of International Environmental Law* (Cambridge: Cambridge University Press, 2003) 946 et seq.; D. Bodansky, 'What's

Trade disciplines are directly concerned with cross-border movements of goods/services and only indirectly concerned with production processes (e.g. through actionable subsidies, etc.). The prevailing – albeit slowly eroding – understanding in the trade context is that similar products should be treated similarly at the border, irrespective of their (environmentally friendly or unfriendly) processes and production methods ('PPMs').[74] Conversely, investment disciplines are directly concerned with the treatment of foreign producers based in the same territory and only indirectly with cross-border movements (e.g. export restraints, etc.). Differentiation based on PPMs is not only possible but central to investment regulation, as discussed next.

In the investment context, one important consideration in assessing whether two investors are in similar circumstances for purposes of non-discrimination standards is whether they face similar regulatory frameworks or, in other words, whether they have to evolve under the same overall constraints. This provides an important entry point for environmental differentiation. As noted already in an early case, *S.D. Myers v. Canada*:

'the interpretation of the phrase "like circumstances" in Article 1102 must take into account the general principles that emerge from the legal context of the NAFTA, including both its concern with the environment and the need to avoid trade distortions that are not justified by environmental concerns. The assessment of "like circumstances" must also take into account circumstances that would justify governmental regulations that treat them differently in order to protect the public interest.'[75]

From a technical standpoint, this statement can be seen as an application of the systemic integration interpretive technique for the determination of the meaning of 'like circumstances' in Article 1102 of the NAFTA. It thus opens the door to related and even separate environmental instruments in the assessment of likeness.[76] Another reference to the assessment of constraints was made in a later case, *Methanex v. United States*, where the tribunal reasoned that local methanol producers (and not ethanol producers, as argued by the investor) were the proper comparator precisely because they evolved under the same regulatory constraints as the claimant.[77]

So Bad about Unilateral Action to Protect the Environment?' (2000) 11 *European Journal of International Law* 339.

74 On the issue of 'non-product related PPMs' (i.e. differentiation on the basis of different PPMs that result in similar end-products) see R. Howse, D. Regan, 'The Product/Process Distinction – An Illusory Basis for Disciplining "Unilateralism" in Trade Policy' (2000) 11 *EJIL* 249; S. Charnovitz, 'The Law of Environmental "PPMs" in the WTO: Debunking the Myth of Illegality' (2002) 27 *Yale Journal of International Law* 59; J. Potts, *The Legality of PPMs under the GATT: Challenges and Opportunities for Sustainable Trade Policy* (Winnipeg: International Institute for Sustainable Development, 2008) 9-27; D. H. Regan, 'How to think about PPMs (and climate change)', in T. Cottier, O. Nartova, S. Z. Bigdelli (eds.), *International Trade Regulation and the Mitigation of Climate Change* (Cambridge: Cambridge Universtiy Press, 2009) 97-123.

75 *S.D. Myers v. Canada*, above n. 3, para 250.

76 See *Ibid*., para 247-248 (referring inter alia to the North American Agreement on Environmental Cooperation, 17 December 1992, 32 I.L.M. 1519, or the Rio Declaration on Environment and Development, 13 June 1992, U.N. Doc. A/CONF.151/26).

77 *Methanex v. United States*, above n. 2, part IV, ch. B, para 18-19.

It is in this context that the contribution of the recent investment case-law must be assessed. I refer here to three cases: the first illustrates the impact of IEL on the assessment of likeness; the second shows that, even when two situations are deemed to be similar, IEL may play a role in justifying differential treatment; the third offers a more nuanced picture, highlighting the limits to the import of external legal elements into an investment treaty.

In the first case, *Parkerings v. Lithuania*, the investor claimed that it had been discriminated against because its project for the construction of a car park in the area of the old town of Vilnius had been treated less favorably than the one of another foreign investor. Lithuania argued that the two projects were not alike because the claimant's project had a higher impact on Vilnius' old town, a site included in the World Heritage List established by the WHC.[78] The tribunal accepted Lithuania's argument concluding that:

'[t]he historical and archaeological preservation and environmental protection could be and in this case were a justification for the refusal of the project' and that, as a result, the claimant's project 'was not similar with the MSCP [multi-story car park] constructed by Pinus Propius [the comparator]'.[79]

In this case, the incidence of IEL (i.e. the WHC) is to legitimize differentiation. Environmental differentiation affects here the interpretation of likeness or similarity, despite the fact that the tribunal seems to conflate it with the issue of justification. This is consistent with the approach followed by some investment treaties, which explicitly refer, as part of the assessment of 'like circumstances' or 'similarity' to the 'effects on third persons and the local community' or 'effects on the local, regional or national environment, including the cumulative effects of all investments within a jurisdiction on the environment'.[80]

Even when two situations are explicitly considered as similar, IEL may play a role in justifying differential treatment. This hypothesis can be illustrated by the *Arcelor* case, before the European Court of Justice.[81] Arcelor, a large steel producer, claimed that the ETS Directive[82] and the French implementing measures discriminated between similar sectors (the cap on emissions applied to steel production but not to chemical and aluminum production) in violation of the equal treatment standard.[83] Whether the ETS Directive is considered as international law (community law is international law) or as a measure implementing the UNFCCC[84] and Kyoto Protocol[85] is less important here than the

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78 Convention for the Protection of the World Cultural and Natural Heritage, 16 November 1972, 1037 U.N.T.S. 151 ('WHC').

79 *Parkerings v. Lithuania,* above n. 3, para 392.

80 *See* COMESA Common Investment Area Agreement (COMESA CIAA)(2007), art 17(2), referred to in S. A. Spears, 'The Quest for Policy Space in a New Generation of International Investment Agreements' (13) 4 *Journal of International Dispute Settlement* 1037, at 1058.

81 *Société Arcelor Atlantique et Lorraine et al. V. Premier Ministre, Ministre de l'Economie, des Finances et de l'Industrie, Ministre de l'Ecologie et du Développement Durable*, ECJ Case C-127/07, Judgment (16 December 2008) ('*Arcelor reference*').

82 ETS Directive, above n. 67.

83 *Arcelor reference*, above n. 81, para 23.

84 United Nations Framework Convention on Climate Change, 9 May 1992, 31 I.L.M. 849 ('UNFCCC').

85 *Arcelor reference*, above n. 81, para 3-19 .

reasoning of the ECJ (now the Court of Justice of the European Union). The ECJ considered indeed that the steel, chemical and aluminum sectors were 'in a comparable position'[86] and had been treated differently, but it found that the differentiation was justified[87] as an exercise of the EC's 'broad discretion'[88] on the basis of 'objective criteria appropriate to the aim pursued by the legislation […] taking into account all the facts and the technical and scientific data available at the time of adoption of the act in question'[89] and 'all the interests involved'.[90] To support its conclusion, the ECJ referred *inter alia* to the administrative difficulties involved in including the chemical sector, made of some 34000 companies, in the initial phase of the scheme,[91] as well as to the substantial 'difference in the levels of direct emissions between the two sectors concerned'.[92] For present purposes, this case suggests that IEL may be relevant to justify differential treatment of two similar situations.

The third case, *Grand River v. United States*,[93] takes a different angle. In this case, a group of people belonging to first nations claimed that, as a result of certain human rights/environmental treaties and customary norms, the investment disciplines of the NAFTA granted them a higher level of protection than that accorded to regular investors.[94] Thus, unlike the two previous cases, the environmental differentiation sought here by reference to IEL was not aimed to limit the scope of investment disciplines but to expand it. The tribunal rejected this claim. The case is relevant, however, for at least two reasons. First, the tribunal considered 'the identity of the legal regime(s) applicable to a claimant and its purported comparators to be a compelling factor in assessing whether like is indeed being compared to like for purposes of Articles 1102 and 1103 [of the NAFTA]'.[95] Second, the tribunal noted, in connection with the investors' claims for breach of the international minimum standard of treatment, that '[w]hile other legal rules may shape the context in which Article 1105 is applied, they do not alter the content of the customary international law minimum standard of treatment'.[96] The room left to IEL in this approach is unclear. The statement seems to draw a distinction between the application of the treaty provision

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86 *Ibid.*, para 38.
87 *Ibid*., para 69 and 72.
88 *Ibid*, para 57.
89 *Ibid*., para 58.
90 *Ibid*., para 59.
91 *Ibid*., para 68.
92 *Ibid*., para 72.
93 *Grand River v. United States*, above n. 3.
94 The claimants referred inter alia to the American Convention on Human Rights, 22 November 1969, 1144 U.N.T.S. 123 (art 21), the International Labour Organisations' Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries, 27 June 1989, 28 I.L.M. 1382 (1989) (art 6(1)(a)), and the United Nations Declaration on the Rights of Indigenous Peoples (art 17). *Ibid*., para 182(3).
95 *Ibid*., para 167.
96 *Ibid*., para 181. This statement is located in the section presenting the position of the claimant but it expresses the view of the tribunal.

and the content of the customary norm. IEL cannot affect this latter, but may affect the former. The tribunal seems to confirm this understanding when it notes that:

'[e]ven if one were to indulge a supposition that a customary rule required consultations directly with an individual First Nations investor under the circumstances of this case, it would be difficult to construe such a rule as part of the customary minimum standard of protection that must be accorded to every foreign investment pursuant to Article 1105. The notion of specialized procedural rights protecting some investors, but not others, cannot readily be reconciled with the idea of a minimum customary standard of treatment due to all investments'[97]

It is because this specific customary norm is a 'minimum' standard that its 'content' cannot be redefined to offer special protection to certain minorities. In all events, the reasoning of the tribunal concerns an expansion of an investment discipline to accommodate special interests and not a restriction to accommodate environmental regulation.

(2) Adjusting the level of 'reasonableness' expected from investors

IIL provides some measure of protection to the 'legitimate' or 'reasonable' expectations of foreign investors, most notably under the fair and equitable treatment ('FET') standard. To be protected, these expectations must meet a number of conditions that have been identified by investment tribunals. According to one tribunal, such expectations have to be:

'based on the conditions offered by the host state at the time of the investment; they may not be established unilaterally by one of the parties; they must exist and be enforceable by law; in the event of infringement by the host state, a duty to compensate the investor for damages arises except for those caused in the event of state of necessity; however, the investor's fair expectations cannot fail to consider parameters such as business risk or industry's regular patterns'[98]

Other tribunals have referred to a largely overlapping set of conditions.[99] Irrespective of the potential differences that may exist among tribunals with respect to these conditions, it is undisputed that the investor's expectations must be 'reasonable'.[100]

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97 *Ibid*., para 213.

98 *LG&E v. Argentina*, ICSID Case No. ARB/02/1, Decision on Liability (13 October 2006) ('*LG&E v. Argentina*'), para 130.

99 In *Parkerings v. Lithuania*, the tribunal reasoned that ''[t]he expectation is legitimate if the investor received an explicit promise or guaranty from the host-State, or if implicitly, the host-State made assurances or representation that the investor took into account in making the investment. Finally, in the situation where the host-State made no assurance or representation, the circumstances surrounding the conclusion of the agreement are decisive to determine if the expectation of the investor was legitimate. In order to determine the legitimate expectation of an investor, it is also necessary to analyse the conduct of the State at the time of the investment', *Parkerings v. Lithuania*, above n. 3, para 331. Similarly, in *Duke v. Ecuador*, the tribunal considered that '[t]o be protected, the investor's expectations must be legitimate and reasonable at the time when the investor makes the investment. The assessment of the reasonableness or legitimacy must take into account all circumstances, including not only the facts surrounding the investment, but also the political, socioeconomic, cultural and historical conditions prevailing in the host State. In addition, such expectations must arise from the conditions that the State offered the investor and the latter must have relied upon them when deciding to invest', *Duke Energy Electroquil Partners and Electroquil SA v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award (18 August 2008) ('*Duke v. Ecuador*'), para 340.

100 *Waste Management Inc. v. Mexico*, ICSID Case No. ARB(AF)/00/3, Award (30 April 2004), para 98.

Reasonableness is a broad concept that must be assessed in the light of a variety of circumstances, including 'business risk or industry's regular patterns'[101] or 'the political, socioeconomic, cultural and historical conditions prevailing in the host State'.[102] The definition of reasonableness thus offers another significant entry point for IEL.

Two investment cases concerning purely domestic environmental measures provide the backdrop against which the incidence of IEL must be assessed. In *MTD v. Chile*,[103] a foreign investor claimed that the refusal by the Chilean urban planning authorities of a zoning permit was inconsistent with the previous authorization to invest granted by another Chilean authority. Importantly, the investor had not conducted a due diligence regarding the need for a zoning permit. The tribunal took into account both the inconsistent behavior of the State and the lack of the diligence of the investor. It concluded that Chile had breached the applicable BIT[104] but that the compensation due to the investor had to be reduced to account for this latter's negligence.[105] In *Plama v. Bulgaria*[106] the dispute concerned a change in the domestic environmental law as a result of which the investment vehicle was made liable for past environmental damages. The investor argued that this change contradicted its reasonable expectations and was therefore in breach of the FET clause of the Energy Chapter Treaty ('ECT').[107] The tribunal rejected this claim. It noted that 'the ECT does not protect investors against any and all changes in the host country's laws. Under the fair and equitable treatment standard the investor is only protected if (at least) reasonable and justifiable expectations were created in that regard.'[108] Significantly, the tribunal considered, in connection with the claimant's argument that the regulatory change was still being discussed by the Bulgarian parliament at the time the investment was made, that the 'parliamentary debates were in the public record and should have been known by [the investor's] Bulgaria advisors'.[109]

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[101] *LG&E v. Argentina*, above n. 98, para 130; *Glamis v. United States*, above n. 2, para 767.
[102] *Duke v. Ecuador*, above n. 99, para 340.
[103] *MTD v. Chile*, above n. 2.
[104] It noted that ''[T]he Tribunal agrees that it is the responsibility of the investor to assure itself that it is properly advised, particularly when investing abroad in an unfamiliar environment. However, in the case before us, Chile is not a passive party and the coherent action of the various officials through which Chile acts is the responsibility of Chile, not of the investor. Whether the Claimants acted responsibly or diligently in reaching a decision to invest in Chile is another question … Chile claims that it had no obligation to inform the Claimants and that the Claimants should have found out by themselves what the regulations and policies of the country were. The Tribunal agrees with this statement as a matter of principle, but Chile also has an obligation to act coherently and apply its policies consistently, independently of how diligent an investor is. Under international law (the law that this Tribunal has to apply to a dispute under the BIT), the State of Chile needs to be considered by the Tribunal as a unit', *Ibid*., para 164-165.
[105] *Ibid*., para 242-243.
[106] *Plama v. Bulgaria*, above n. 2.
[107] Energy Charter Treaty, 17 December 1994, 2080 U.N.T.S. 95 ('ECT').
[108] *Plama v. Bulgaria*, above n. 2, para 219.
[109] *Ibid*., para 221.

This latter point is important because the incidence of dormant environment clauses is very difficult to assess in advance. Thus, the question is rather how the regulatory risk will be distributed. Whereas the decision in *MTD v. Chile* suggests that the risk should be split between the State and the investor, the *Plama* award places the burden entirely on the investor, perhaps because, in this latter case, no 'lack of due diligence in Respondent's treatment of Claimant and its investment with regard to the environmental amendments' could be identified.[110] In this context, the role played by IEL can be illustrated by reference to the *Chemtura v. Canada*[111] case. As already noted, the dispute concerned a re-examination of lindane that eventually led to the cancellation of the investor's authorization to produce certain pesticides. One important line of argument pursued by the investor was that Canada had acted disingenuously in launching *and* conducting the review of lindane. IEL had an incidence on both issues. Regarding the launching of the review, the tribunal considered that Canada had acted in pursuance of its international obligations under the POP Protocol.[112] As to the conduct of the review, the tribunal started from the premise that its task was not to settle the scientific debate over the consequences of lindane[113] but added that 'irrespective of the state of the science […] the Tribunal [could] not ignore the fact that lindane ha[d] raised increasingly serious concerns both in other countries and at the international level since the 1970s'.[114] One significant element in this regard was that, in May 2009, lindane had been introduced in the list of banned substances of the POP Convention.[115] Moreover, the tribunal set a demanding standard of 'reasonableness' applicable to sophisticated investors. It noted indeed that 'as a sophisticated registrant experienced in a highly-regulated industry, the Claimant could not reasonably ignore the PMRA's practices and the importance of the evaluation of exposure risks within such practices'[116] This test is fully consistent with the previous case-law, which referred *inter alia* to the need to anticipate changes[117] as well as to the industry's regular patterns.[118] Taken together, this body of case-law suggests measures adopted pursuant to a MEA would normally be part of a sophisticated investor's business risk.

There are, of course, several techniques to manage regulatory risk, such as stabilization or adjustment clauses[119] or, more generally, other types of specific

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[110] *Ibid*., para 220, 222.
[111] *Chemtura v. Canada*, above n. 3.
[112] *Ibid*., para 138.
[113] *Ibid*., para 134.
[114] *Ibid*., para 135.
[115] Stockholm Convention on Persistent Organic Pollutants, 22 May 2001, 40 I.L.M. 532 (2001) ('POP Convention').
[116] *Chemtura v. Canada*, above n. 3, para 149.
[117] *Plama v. Bulgaria*, above n. 2, para 221.
[118] *LG&E v. Argentina*, above n. 98, para 130; *Glamis v. United States*, above n. 2, para 767.
[119] On stabilization and adjustment clauses see generally: E. Paasivirta, 'Internationalisation and Stabilisation of Contracts versus State Sovereignty' (1989) 60 *British Yearbook of International Law* 315; P. Bernardini, 'The Renegotiation of the Investment Contract' (1998) 13 *ICSID Review* 411; A. Shemberg, *Stabilization Clauses and Human Rights : A Research Project Conducted for IFC and the United Nations Special*

assurances.[120] Yet, such techniques are not without limits.[121] An often disregarded limitation stems from international environmental soft-law. The OECD Guidelines for Multinational Enterprises specifically preclude covered companies, including foreign investors, from 'seeking or accepting exemptions not contemplated in the statutory or regulatory framework related to human rights, environmental, health, safety, labour, taxation, financial incentives, or other issues.'[122] Although the observance of these standards is 'voluntary and not legally enforceable',[123] they may become so if 'regulated by national law or international commitments'.[124] In all events, and perhaps most importantly, irrespective of their legally binding nature, nothing prevents an investment tribunal from taking such standards into account when assessing the level of reasonableness of an investor's expectations.

(3) The use of the police powers doctrine

As discussed in section III(B) above, the police powers doctrine is a well established limitation to the constraints imposed by IIL on environmental regulation. To understand the incidence of IEL on the use of this instrument, it is however necessary to introduce a distinction between environmental regulation and targeted environmental measures. This distinction is rather intuitive. Whereas regulations are generally applicable, targeted measures concern one specific company. By way of illustration, the introduction of a tax or

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Representative to the Secretary General on Business and Human Rights, 11 March 2008, available at : http://www.ifc.org (accessed on 31 December 2011); T. Wälde, G. N'Di, 'Stabilising international investment commitments' (1996) 31 *Texas International Law Journal* 215; P. Cameron, *International Energy Investment Law* (Oxford: Oxford University Press, 2010) 68-83.

[120] The characterization of specific assurances varies somewhat from one tribunal to the other. See *Methanex v. United States*, above n. 2, part IV, ch. D, para 7 (identifying five stringent conditions for the protection of specific assurances in the context of an expropriation claim); *CMS Gas Transmission Company v. Argentina*, ICSID Case No. ARB/01/08, Decision on Annulment (25 September 2007), para 95 (referring to similarly restrictive conditions in the context of the review of a claim for breach of an umbrella clause); *LG&E v. Argentina*, above n. 98, para 133 (providing a broader characterization – including the domestic regulatory framework – in the context of a claim for breach of the FET standard); *Continental Casualty v. Argentina*, ICSID Case No. ARB/03/9, Award (5 September 2008), para 261 (adopting a restrictive characterization of specific assurances in the context of a claim for breach of the FET standard).

[121] *See* L. Cotula, 'Reconciling regulatory stability and evolution of environmental standards in investment contracts: Towards a rethink of stabilization clauses' (2008) 1 *Journal of World Energy Law and Business* 158 (arguing by analogy with human rights law that States cannot legally undertake not to adopt environmental regulation); K. Tienhaara, 'Unilateral Commitments to Investment Protection: Does the Promise of Stability Restrict Environmental Policy Development' (2006) 17 *Yearbook of International Environmental Law* 139 (discussing from a pro-environment perspective the issue of regulatory chill arising from investment disciplines).

[122] OECD, Guidelines for Multinational Enterprises, Annex I to the Declaration on International Investment and Multinational Enterprises, 25 May 2011 ('OECD Guidelines'), Chapter II, para 5. This standard was at stake in a 'specific instance' brought before the UK National Contact Point. *See* 'Letter from Friends of the Earth to Wesley Scholz, Director, Office of Investment Affairs and National Contact Point for the OECD Guidelines for Multinational Enterprises, Department of State 3-8', 29 April 2003.

[123] OECD Guidelines, above n. 122, Chapter I, para 1.

[124] *Idem*.

the prohibition to produce or commercialize certain substances is a regulation, whereas the refusal or the non-renewal of a permit is a targeted measure. Although both regulations and targeted measures can have expropriatory effects,[125] the overwhelming majority of the cases of indirect expropriation concern targeted measures.[126] In this context, an important question is whether the police powers doctrine could shield a targeted environmental measure.

Until recently, investment tribunals had only admitted the applicability of the police powers doctrine to cover environmental regulations. In *S.D. Myers v. Canada*, the tribunal noted indeed that '[t]he general body of precedent does not treat *regulatory action* as amounting to expropriation'.[127] Similarly, in *Methanex v. United States*, the tribunal noted that 'a non-discriminatory *regulation* for a public purpose, which is enacted in accordance with due process and, which affects, inter alios, a foreign investor or investment is not deemed expropriatory and compensable'.[128] Still another illustration (although not concerning an environmental regulation) is the case *Saluka v. Czech Republic*, where the tribunal noted, by reference to the *Methanex* award, that:

'the principle that a State does not commit an expropriation and is thus not liable to pay compensation to a dispossessed alien investor *when it adopts general regulations* that are "commonly accepted as within the police powers of States" forms part of customary law today'.[129]

It is against this background that one must assess the contribution of *Chemtura v. Canada*. In this case, for the first time, an investment tribunal applied the police powers doctrine to shield a targeted environmental measure (i.e. the suspension and subsequent cancellation of the investor's registered pesticides):

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[125] *See S.D. Myers v. Canada*, above n. 3, para 281 *in fine*.

[126] Out of the ten hypotheses of indirect expropriation, only one (taxation) concerns general regulations. M. Sornarajah, *The International Law of Foreign Investment* (Cambridge: Cambridge University Press, 2010) at 375. A similar pattern can be detected in the case-law of the Iran-US Claims Tribunal. Aldrich distinguishes cases that amounted to an expropriation (aside from formal nationalisations, these are all targeted measures) from cases where no taking was found (including 'lawful regulations'). *See* G. H. Aldrich, *The Jurisprudence of the Iran-United States Claims Tribunal* (Oxford: Oxford University Press, 1996), chapter 5. See also *SPP v. Egypt*, above n. 3; *Metalclad v. Mexico*, above n. 2; *Tecmed v. Mexico*, above n. 2; *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award (20 August 2007) (*'Vivendi II*'); *Biwater Gauff (Tanz.) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award (24 July 2008) ('*Biwater v. Tanzania*'); *Middle East Cement Shipping and Handling Co SA v. Egypt*, ICSID Case No. ARB/99/6, Award (12 April 2002).

[127] *S.D. Myers v. Canada*, above n. 3, para 281 (italics added). However, the term regulatory action here is somewhat unclear. The case concerned a targeted measure and, *in casu*, the tribunal did not apply the police powers doctrine. In Tecmed v. Mexico, the formulation of the police powers doctrine was also somewhat broader: '[t]he principle that the State's *exercise of its sovereign powers* within the framework of its police power may cause economic damage to those subject to its powers as administrator without entitling them to any compensation whatsoever is undisputable.', *Tecmed v. Mexico*, above n. 2, para 119 (italics added). The case also concerned a targeted measure and, again, in casu the tribunal did not actually apply the doctrine.

[128] *Ibid*., part IV, ch. D, para 7.

[129] *See Saluka Investments B.V. v. The Czech Republic*, UNCITRAL, Partial Award (17 March 2006)('*Saluka v. Czech Republic*'), para 262 (italics added).

'[T]he Tribunal considers in any event that the measures challenged by the Claimant constituted a valid exercise of the Respondent's police powers. As discussed in detail in connection with Article 1105 of NAFTA, the PMRA took measures within its mandate, in a non-discriminatory manner, motivated by the increasing awareness of the dangers presented by lindane for human health and the environment. A measure adopted under such circumstances is a valid exercise of the State's police powers and, as a result, does not constitute an expropriation'.[130]

The reference in this paragraph to the discussion of the investor's claim for breach of Article 1105 of the NAFTA is important because, as noted in the previous sub-section, the tribunal considered that both the launching and the conduct of the review of lindane leading to the cancellation of the investor's registrations could be justified *inter alia* by reference to IEL.[131]

The application of the police powers doctrine to targeted environmental measures is confirmed by the practice of other jurisdictions. In *Pine Valley v. Ireland*, already in 1991, the European Court of Human Rights ('ECtHR') considered that a judicial decision enforcing a zoning plan (and thereby depriving the applicant of certain uses of its land 'so as to preserve a green belt') was not a 'disproportionate measure' and therefore did not amount to a violation of the right to property accorded by Article 1 of Protocol I to the European Convention on Human Rights ('Article 1 P-I').[132] Similarly, in another early case, *Fredin v. Sweden*, the revocation of a permit to exploit gravel was considered as a legitimate measure to control the use of property consistent with Article 1 P-I.[133] Although these two cases do not refer to IEL to legitimize the measure (rather, they apply the exception contained in Article 1 P-I) they are relevant for present purposes because they suggest that, in applying the police powers doctrine to shield a targeted environmental measure, the *Chemtura* tribunal was simply coming closer to a well established principle in the field of human rights, i.e. that rights (or, by analogy, investment disciplines) can be limited through general and targeted measures without necessarily being violated.

(4) A broader scope for emergency/necessity clauses

The incidence of IEL on the operation of emergency/necessity clauses arising from either treaties or international customary law can be detected at two levels. First, the scope of certain clauses included in IIAs is explicitly or implicitly defined, among others, by reference to IEL. Second, the type of interests protected by the customary necessity defense may include the protection of the environment. In both cases, IEL plays a catalyzing role. The emergence of international environmental norms protecting certain interests adds legitimacy to the claim that such interests must be protected under emergency/necessity clauses.

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[130] *Chemtura v. Canada*, above n. 3, para 266.
[131] *Ibid*., para 138, 135.
[132] *Pine Valley Developments Ltd and Others v. Ireland*, ECtHR Application no. 12742/87, Judgment (29 November 1991)('*Pine Valley v. Ireland*'), para 9, 55-60.
[133] *Fredin v. Sweden*, ECtHR Application no. 12033/86, Judgment (18 February 1991)('*Fredin v. Sweden*'), para 41-56.

The trend to include environmental provisions in IIAs has been briefly discussed in section III(B). Although such provisions are technically not emergency clauses, they carve out some room for environmental regulation, sometimes by reference to IEL. For example, Article 72(c) of the CARIFORUM-EPA provides that: '[i]nvestors do not manage or operate their investments in a manner that circumvents international environmental or labour obligations arising from agreements to which the EC Party and the Signatory CARIFORUM States are parties.' [134] Similarly, under Article 5(3) of the Belgian/Luxembourg model BIT: '[t]he Contracting Parties reaffirm their commitments under the international environmental agreements, which they have accepted. They shall strive to ensure that such commitments are fully recognized and implemented by their domestic legislation.'[135] Still another illustration is provided by Article 17.12.1 of CAFTA-DR, according to which:

'[t]he Parties recognize that multilateral environmental agreements to which they are all party play an important role in protecting the environment globally and domestically and that their respective implementation of these agreements is critical to achieving the environmental objectives of these agreements. The Parties further recognize that this Chapter and the ECA [side environmental agreement] can contribute to realizing the goals of those agreements. Accordingly, the Parties shall continue to seek means to enhance the mutual supportiveness of multilateral environmental agreements to which they are all party.'[136]

Some other provisions do not explicitly refer to IEL but are nevertheless interesting because they would likely have to be interpreted in the light of IEL. For example, certain IIAs concluded by Canada contain a general exception clause similar to Article XX of the GATT:

'1. Subject to the requirement that such measures are not applied in a manner that would constitute arbitrary or unjustifiable discrimination between investments or between investors, or a disguised restriction on international trade or investment, nothing in this Agreement shall be construed to prevent a Party from adopting or enforcing measures necessary :

(a) to protect human, animal or plant life or health ;

(b) to ensure compliance with laws and regulations that are not inconsistent with the provisions of this Agreement ; or

(c) for the conservation of living or non-living exhaustible natural resources'[137]

The interpretation of this provision would likely be guided by the way WTO panels and the Appellate Body have interpreted Article XX of the GATT, i.e. by reference to IEL.[138]

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[134] CARIFORUM-EPA, above n. 45, art 72(c).

[135] Belgian/Luxembourg Model BIT, above n. 47, art 5(3).

[136] CAFTA-DR, above n. 48, art 17.12.1.

[137] Reproduced in A. Newcombe, 'General Exceptions in International Investment Agreements', in M.-C. Cordonnier Segger, M. W. Gehring, A. Newcombe (eds), *Sustainable Development in World Investment Law* (The Hague: Kluwer, 2011) 355, at 359.

[138] On the interpretation of art XX of GATT see S. Charnovitz, 'Exploring the Environmental Exceptions in GATT Article XX' (1991) 25 *Journal of World Trade* 37; A. Mattoo, P. Mavroidis, 'Trade, Environment and the WTO: The Dispute Settlement Practice Relating to Article XX of GATT', in E.-U. Petersmann (ed.), International Trade Law and the GATT/WTO Dispute Settlement System (The Hague: Kluwer, 1997) 327-343; D. M. McRae, 'GATT Article XX and the WTO Appellate Body', in M. Bronckers, R.

Another example, of significant practical importance,[139] is Article XI of the Argentina—United States BIT, according to which:

'shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security or the protection of its own essential security interests'.[140]

The terms 'essential security interests' were interpreted by the tribunal in *Continental Casualty v. Argentina* by reference to the work of the International Law Commission on the necessity defense. Citing the commentary to the ILC Articles on State Responsibility,[141] the tribunal noted that 'States have invoked necessity "to protect a wide variety of interests, including safeguarding the environment"'.[142] To better understand the link between necessity and IEL, it is necessary to take a step back and look at the case-law of the International Court of Justice ('ICJ').

The ICJ recognized for the first time that the protection of the environment could be an 'essential interest' of the State under the customary necessity defense in the *Gabčíkovo-Nagymaros* case.[143] This step must be appraised in the light of its normative context. The year before, the ICJ had taken a fundamental step for the development of IEL. Indeed, in paragraph 29 of its *Advisory Opinion on the Legality of Nuclear Weapons*, the Court had stated that '[t]he existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment'.[144] There is a link between this statement and the recognition of environmental protection as an essential interest. While an interest is conceptually different

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Quick (eds), *New Directions in International Economic Law. Essays in Honour of John H. Jackson* (The Hague: Kluwer Law International, 2000) 228–36; Zleptnig, above n. 53, chapter 6.

139 This provision has played a major role in a number of investment disputes against Argentina: *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/08, Award (12 May 2005), Decision on Annulment (25 September 2007); *LG&E v. Argentina*, above n. 98; *Enron and Ponderosa Assets v. Argentine Republic*, ICSID Case No. ARB/01/3, Award (22 May 2007), Decision on Annulment (30 July 2010)('*Enron v. Argentina—Annulment*'); *Sempra Energy v. Argentine Republic*, ICSID Case No. ARB/02/16, Award (28 September 2007)('*Sempra v. Argentina—Award*'), Decision on Annulment (29 June 2010)('*Sempra v. Argentina—Annulment*'); *Continental Casualty v. Argentine Republic*, ICSID Case No. ARB/03/9, Award (5 September 2008) ('*Continental Casualty v. Argentina*').

140 Treaty between the United States of America and the Argentine Republic concerning the Reciprocal Encouragement and Protection of Investment, 14 November 1991, 31 I.L.M. 124 ('Argentina-US BIT').

141 Responsibility of States for Internationally Wrongful Acts, G.A. Res. 56/83, U.N. Doc A/RES/56/83, 12 December 2001 ('ILC Articles').

142 *Continental Casualty v. Argentina*, above n. 139, para 175.

143 *Gabčíkovo-Nagymaros*, above n. 62. The ICJ considered that 'the concerns expressed by Hungary for its natural environment in the region affected by the Gabčíkovo-Nagymaros Project related to an "essential interest" of that State, within the meaning given to that expression in Article 33 of the Draft of the International Law Commission', (para 53) but it rejected the necessity defense because other conditions were not met. On the so-called 'ecological necessity' *see* A. Bjorklund, 'The Necessity of Sustainable Development', in M.-C. Cordonnier Segger, M. W. Gehring, A. Newcombe (eds), *Sustainable Development in World Investment Law* (The Hague: Kluwer, 2011) 373.

144 *Legality of the Threat or Use of Nuclear Weapons*, I.C.J. Reports 1996, p. 226, at para 29.

from a norm aimed at protecting it, the very existence of a customary norm may suggest that international law attaches sufficient importance to the protection of such interest to justify its characterization as an 'essential' interest.[145] In the *Gabčíkovo-Nagymaros* case, the Court explicitly justified this characterization by reference to paragraph 29 of its *Advisory Opinion* of the previous year.[146] Thus, there is a link between the development of IEL and the operation of emergency/necessity clauses. This link can also be discerned in the specific context of investment disputes. In two cases against Argentina,[147] the respondent argued that the measures challenged could be justified under the customary necessity defense. To buttress its argument, it specifically referred to the human right to water recognized in several international instruments.[148] Although the defense was rejected, the tribunals had no difficulty in acknowledging that '[t]he provision of water and sewage services ... certainly was vital to the health and well-being of [the population] and was therefore an essential interest of the Argentine State'.[149] Although the tribunals' analysis of the necessity defense is rather cursory, the references to the human right to water in the sections presenting the arguments of both the respondent and the *amici curiae*[150] as well as the assertiveness of the tribunals (conveyed by the word 'certainly') provide two indications that the existence of a right to water in international law had a bearing on this point. This is, of course, not to say that any interest protected by a norm of IEL could be characterized as essential or be protected by an emergency clause. My point is only that references to IEL could provide – and, in practice, have provided – greater legitimacy to the protection of the environment through emergency/necessity clauses.

V. TOWARDS A PROGRESSIVE APPROACH – AWAKENING DORMANT CLAUSES

The foregoing analysis suggests that IEL does have an incidence on investment disputes, but only indirectly through 'adjustments' to the traditional approach. There seems to be considerable resistance to frame conflicts between environmental and investment protection as normative conflicts and treat them using a more accurate – albeit practically more challenging – approach. In this section, I discuss what I see as the main reasons explaining such resistance, as well as some avenues that could be pursued to help overcome it.

The first reason is the prevailing formulation of international environmental norms as broad, often merely exhortative or even vague clauses in MEAs. I have discussed this issue in section IV(A) above by reference to several illustrations. As noted then, due to their broad formulation, it may be very difficult to establish that a domestic environmental

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[145] J. E. Viñuales, 'The Contribution of the International Court of Justice to the Development of International Environmental Law: A Contemporary Assessment' (2008) 32 *Fordham International Law Journal* 232, at 249.

[146] *Gabčíkovo-Nagymaros*, above n. 62, para 53 *in fine*.

[147] See *Suez v. Argentina—03/17 and Suez v. Argentina—03/19*, both above n. 3.

[148] *Suez v. Argentina—03/17—Liability*, para 232; *Suez v. Argentina—03/19—Liability*, para 252.

[149] *Suez v. Argentina—03/17—Liability*, para 238; *Suez v. Argentina—03/19—Liability*, para 260.

[150] *Suez v. Argentina—03/19—Liability*, para 256.

measure is required, prohibited or fully permitted by a MEA. As a result, even when the link exists and is invoked in an investment dispute, it remains vulnerable on grounds of proportionality and/or due process. Several illustrations of such vulnerability can be provided. In *S.D. Myers v. Canada*, the investor successfully challenged the measure adopted by Canada (a trade ban) on grounds of proportionality. The tribunal considered indeed that irrespective of whether the ban was required by the Basel Convention or not, the measure had been disproportional:

'Even if the Basel Convention were to have been ratified by the NAFTA Parties, it should not be presumed that CANADA would have been able to use it to justify the breach of a specific NAFTA provision because *...where a party has a choice among equally effective and reasonably available alternatives for complying….with a Basel Convention obligation, it is obliged to choose the alternative that is ...least inconsistent… with the NAFTA*. If one such alternative were to involve no inconsistency with the Basel Convention, clearly this should be followed.'[151]

In *Chemtura v. Canada*, the investor also challenged the measures adopted by Canada on due process grounds, but the tribunal rejected the argument.[152] In the context of freshwater regulation, in *Suez v. Argentina* the investors argued that the different measures adopted by Argentina to tackle the 2001-2002 economic and social crisis could not be justified under the customary necessity defense because such measures, which according to Argentina were aimed inter alia to ensure access to water to its population, were disproportionally adverse to the investors' interests. The tribunal admitted this argument[153] noting that:

'Argentina could have attempted to apply more flexible means to assure the continuation of the water and sewage services to the people of Buenos Aires and at the same time respected its obligations of fair and equitable treatment. The two were by no means mutually exclusive'.[154]

Regarding the protection of cultural sites, an interesting illustration of the vulnerability of the link between IEL and domestic environmental measures is provided by *SPP v. Egypt*. In this case, the tribunal interpreted the obligation arising from articles 4, 5(d) and 11 of the World Heritage Convention in a manner that effectively neutralized the relevance of this treaty for the assessment of Egypt's liability. According to the tribunal, the obligation to protect a site had only arisen when the World Heritage Committee accepted the nomination of the site by Egypt.[155] As the measures challenged by the investor (the classification of the land as not suitable for touristic purposes and the revocation of the concession) had taken place between the date of nomination and that of acceptance, the tribunal considered that the measures adopted by Egypt to protect the pyramids site was not 'required' by the World Heritage Convention. These examples suggest that the rather broad formulation of environmental norms makes the link between such norms and domestic environmental

[151] *S.D. Myers v. Canada*, above n. 3, para 215 (italics original, referring to article 104 of the NAFTA).

[152] *Chemtura v. Canada*, above n. 3, para 153-162 (concerning the review of lindane), 184-193 (concerning the phase-out conditions applied to the investor), and 200-225 (concerning the alleged excessive delays in the registration of the claimant's replacement product).

[153] *Ibid*., para 239-243.

[154] *Ibid*., para 260.

[155] *SPP v. Egypt*, above n. 3, para 154.

measures vulnerable. This, in turn, prevents the characterization of conflicts as 'normative conflicts' between two norms of international law and favors the use of the traditional approach based on the concept of legitimacy conflicts. However, formulation alone cannot account for the persistence of the traditional approach, as adjusted in recent years. Other broadly stated clauses – one could think here of the dormant commerce clause in the Constitution of the United States or even to a norm as vague as the FET standard – have been successfully linked to more specific measures adopted at a lower legislative/regulatory level, either to justify such measures or to conclude to their inconsistency with the broad clause. One can thus say that this or that measure is (in)-consistent with the dormant commerce clause or the FET standard. What is then preventing this linking from happening in connection with IEL?

This question leads me to the second reason, namely the system for the implementation of IEL. Unlike the United States Constitution or IIL (and one could add international trade law, international human rights law, international criminal law, etc.), MEAs have no compulsory adjudication system capable of developing and refining the specific contents encompassed by broad clauses.[156] It thus has to rely, for its application, either on a variety of soft mechanisms (e.g. monitoring and reporting,[157] 'non-compliance procedures',[158] authoritative interpretations,[159] amicus intervention,[160] etc.) or on judicial forums often specialized in other branches of international law. Both avenues could be useful if their potential for strengthening the link between domestic measures and IEL is more fully explored and understood by investment practitioners and tribunals. Let me briefly discuss each of them in turn.

Regarding the first avenue, its relevance for present purposes lies in the potential contribution of some soft mechanisms to encourage investment tribunals to treat conflicts as 'normative conflicts' or, in other words, to treat IEL on an equal footing with IIL. This

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[156] However, there are a number of non compulsory adjudication systems focusing on environmental matters. A 'Chamber for Environmental Matters' was created in 1993 under article 26(1) of the Statute of the International Court of Justice (Press Release 93/20, Constitution of a Chamber of the Court for the Environmental Matters, 19 July 1993). This Chamber was never used and, in 2006, the Court decided not to reconstitute it. Another example is the 'Chamber for Marine Environmental Disputes' established by the ITLOS in 1997 pursuant to article 15(1) of its Statute (Press Release ITLOS/Press 5, 3 March 1997).

[157] On these mechanisms see K. Sachariew, 'Promoting Compliance with International Environmental Legal Standards: Reflections on Monitoring and Reporting Mechanisms' (1992) 2 *Yearbook of International Environmental Law* 31.

[158] T. Treves, A. Tanzi, C. Pitea, C. Ragni, L. Pineschi (eds), *Non-Compliance Procedures and Mechanisms and the Effectiveness of International Environmental Agreements* (The Hague: T.M.C. Asser Press, 2009).

[159] See e.g. Committee on Economic, Social and Cultural Rights, General Comment No. 15 (2002), The Right to Water (Articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights), 26 November 2002, UN ESCOR Doc. E/C.12/2002/11.

[160] *See* B. Stern, 'Civil Society's Voice in the Settlement of International Economic Disputes' (2007) 22 *ICSID Review* 280; F. Grisel, J. E. Viñuales, 'L'*amicus curiae* dans l'arbitrage d'investissement' (2007) 22 *ICSID Review* 380. On *amicus* intervention before other international tribunals see D. Shelton, 'The Participation of Nongovernmental Organizations in International Judicial Proceedings' (1994) 88 *AJIL* 611.

point can be illustrated by reference to three cases. The first is *Chevron v. Ecuador*, where a reference to the report of the ICommHR could be useful to strengthen the link between the judicial proceedings challenged by the investor and Ecuador's obligations under the ACHR.[161] The second illustration is provided by the considerable development of *amicus* intervention in investment proceedings in the last decade. Investment disputes with environmental components are particularly prone to such intervention[162] and *amici curiae* often discuss in detail the link between IEL and the measures challenged by the investor. An apposite example is the *amicus* brief submitted in *Suez v. Argentina*,[163] which elaborates on the link between the measures adopted by Argentina and a number of human rights treaties:

'This dispute involves measures taken by the government of Argentina, during a period of severe economic and social crisis, to protect human rights. *Inter alia*, Argentina's measures have been adopted in furtherance of its obligation to progressively realize its citizens' right to water, as well as to protect and promote its citizens' right to health. Those rights are protected by several human rights treaties that were in force in Argentina before the investment was established.'[164]

This argument had also been made by the respondent. In the award, the tribunal acknowledged that both IIL and the right to water were applicable but considered that these two bodies of law did not conflict with each other.[165] The third illustration is given by a

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[161] See above section II.

[162] See *Methanex v. United States*, above n. 2, Decision of the Tribunal on Petitions from Third Persons to Intervene as Amici Curaie (15 January 2001); *Aguas del Tunari S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Letter by Tribunal President (29 January 2003); *Suez v. Argentina – 03/19*, above n. 3, Order in Response to a Petition for Transparency and Participation as Amicus Curiae (19 May 2005), Order in response to amicus petition (12 February 2007); *Suez v. Argentina – 03/17*, above n. 3, Order in response to a Petition for Participation as *Amicus Curiae* (17 March 2006); *Biwater Gauff (Tanz.) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award (24 July 2008), Petition for amicus curiae status (27 November 2006); *Glamis v. United States*, above n. 2, Decision on application and submission by Quechan Indian Nation (16 September 2005), Letters to the National Mining Association, the Quechan Indian Nation, Sierra Club and Earthworks, and Friends of the Earth (15 February 2007); *Piero Foresti, Laura de Carli and others v. Republic of South Africa*, ICSID Case No. ARB(AF)/07/1, Letter from the Secretary of the Tribunal to the Non-Disputing Parties (5 October 2009).

[163] *Suez v. Argentina – 03/19*, above n. 3, Amicus Curiae Submission, 4 April 2007 ('Suez – Amicus Submission'), available at: www.ciel.org/Publications/SUEZ_Amicus_English_4Apr07.pdf (accessed on 13 January 2012).

[164] *Ibid*., at 14. In the footnote to this paragraph, the amicus briefs refers to the following instruments: 'the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador or San Salvador Protocol), the Convention on the Elimination of All Forms of Discrimination Against Women (Women's Convention), the Convention on the Rights of the Child (CRC), the International Covenant on Civil and Political Rights (ICCPR), and the American Convention on Human Rights (American Convention). These treaties require Argentina to protect the right to water.'

[165] The tribunal stated the following: 'Argentina [was] subject to both international obligations, i.e. human rights *and* treaty obligations, and [had to] respect both of them equally. Under the circumstances of these cases, Argentina's human rights obligations and its investment treaty obligations [were] not inconsistent, contradictory, or mutually exclusive'. *See Suez v. Argentina – 03/19*, above n. 3, para 262 (italics original). *See* also *Suez v. Argentina – 03/17*, above n. 3, para 240.

case brought against Slovakia before the NCP of the Aarhus Convention[166] in connection with the insufficient participation granted to civil society in the procedure leading to the authorization of a foreign investment scheme in the nuclear energy sector.[167] The Compliance Committee found that the legal framework of Slovakia was not in compliance with the participation standards of the Convention because it was 'not sufficient to provide for public participation only at the stage of the EIA [environmental impact assessment] procedure, unless it [was] also part of the permitting procedure'.[168] On this basis, it recommended that Slovakia 'review its legal framework so as to ensure that early and effective public participation is provided'.[169] According to some environmental groups, the fact that the European Union is a party to the Aarhus Convention would have the consequence that the European Commission is required to monitor that Slovakia suspends the scheme and conducts a new environmental impact assessment.[170] Should this situation (or another similar situation) give rise to an investment dispute, it would be difficult for the arbitral tribunal to ignore the link between the domestic measure and IEL.

This latter point is also important in connection with the second avenue. Judicial proceedings conducted in some international forums, such as human rights courts, could help strengthen the link between IEL and a domestic environmental measure. For example, the ICtHR stated in the *Yakye Axa* case[171] that the 'restriction of the right of private individuals to private property might be necessary to attain the collective objective of preserving cultural identities in a democratic and pluralist society' and added that such a restriction would be 'proportional, if fair compensation is paid to those affected pursuant to Article 21(2) of the Convention'.[172] In the *Sawhoyamaxa* case[173] the ICtHR further stated '[t]he restitution of traditional lands […] is the reparation measure that best complies with the *restitutio in integrum* principle' and directed the State to ensure that the ownership rights of indigenous community over their ancestral lands are respected.[174] Similarly, in *Turgut v. Turkey*, the ECtHR considered that 'economic imperatives and even some fundamental rights, such as the right to property, should not be accorded primacy against considerations of environmental protection'.[175] Were a dispossessed investor to bring an

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[166] Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, 25 June 1998, 2161 U.N.T.S. 447 ('Aarhus Convention')

[167] *Findings and Recommendations of the Compliance Committee with regard to Communication ACCC/C/2009/41 concerning compliance by Slovakia*, 17 December 2010 ('Committee Findings (Slovakia)', available at www.unece.org/env/pp/pubcom.htm (accessed on 13 January 2012).

[168] *Ibid*., para. 64.

[169] *Ibid*., para. 70.

[170] See 'Mochovce public participation insufficient', in Nuclear Monitor, n. 722, 21 January 2011, available at: www.nirs.org/mononline/nm722.pdf (accessed on 13 January 2012).

[171] *Indigenous Community Yakye Axa v. Paraguay*, ICtHR Series C No. 125 (17 June 2005)('*Yakye Axa*').

[172] *Ibid*., para 148.

[173] *Case of Sawhoyamaxa Indigenous Community v Paraguay*, ICtHR Series C No 146 (29 March 2006) ('*Sawhoyamaxa case*').

[174] *Ibid*., para 210.

[175] *See Turgut - Merits*, above n. 36, para 90 (unofficial translation of the French text).

investment claim as a result of a measure taken by the host State to comply with a judgment of the ICtHR or the ECtHR, the investment tribunal seized of the matter could not ignore the link between the measure and the ACHR or the ECHR.[176]

Assuming that an investment tribunal is willing to fully recognize the link between IEL and a domestic environmental measure, an important question would be whether, from a legal standpoint, the tribunal has sufficient room for maneuver. This question concerns both the scope of jurisdiction of investment tribunals and the law applicable to investment disputes. These issues have been analyzed in detail elsewhere.[177] The basic conclusion of that research is that there is significant room for investment tribunals to assert jurisdiction over claims with environmental components or to apply IEL. The direct application of IEL to assess the legality of host State's conduct was considered as self-evident by the tribunal in *SPP v. Egypt*. The tribunal noted indeed that there was no question that 'the UNESCO Convention [was] relevant: the Claimants themselves acknowledged during the proceedings before the French *Cour d'Appel* that the Convention obligated the Respondent to abstain from acts or contracts contrary to the Convention'.[178] Similarly, in *S.D. Myers v. Canada*, the tribunal had no difficulty in envisaging the application of the Basel Convention to review the conduct of Canada, although it concluded that such treaty could not justify the measure challenged.[179] Still another example is provided by *Chemtura v. Canada*. Here, the question was not whether the Aarhus Protocol to the LRTAP Convention was applicable to the dispute, which the tribunal considered self-evident, but only whether the conduct of Canada was adopted pursuant to such treaty.[180] Thus, the application of IEL in investment disputes is not controversial. Of course, this is not to say that an investor may use an investment treaty as the jurisdictional basis to bring a claim for breach of a MEA or that a State may do so to bring an environmental counter-claim. The possibility of bringing environmental claims or counter-claims through arbitration clauses will depend on a variety of factors, including the wording of the consent base (usually an arbitration clause in a contract or a treaty), the nature of the claim (contract or treaty-based) and the applicable substantive law (domestic and/or international).[181] But those are different questions. The important point to be stressed is that an investment tribunal may apply IEL to all the extent relevant for the resolution of an investment dispute. One important consideration in this regard is whether the measure challenged was adopted by the host State in pursuance of its international environmental obligations and, as explained above, nothing prevents an

[176] One may object that the ICtHR requires the payment of fair compensation and that, therefore, this case has no real relevance. However, this 'practical' objection would itself be too 'theoretical' if one takes into account that the amounts of compensation granted by investment tribunals are – in practice – much higher than what an investor could expect from a human rights court. *See* the cases referred to above n. 36.

[177] See J. E. Viñuales, 'Foreign Investment and the Environment in International Law: An Ambiguous Relationhsip' (2009) 80 *British Yearbook of International Law* 244.

[178] *SPP v. Egypt*, above n. 3, para 78.

[179] *S.D. Myers v. Canada*, above n. 3, para 209-215.

[180] *Chemtura v. Canada*, above n. 3, paras 139–141.

[181] See Viñuales, above n. 177, at 254-273.

investment tribunal from taking into account and, if necessary applying IEL to decide this issue.

It is therefore a change of mindset rather than a change of law that is required for the progressive approach to gain increasing acceptance. The legal tools to end the 'migrant' status accorded by investment tribunals to IEL are already available. The formulation of international environmental obligations may seem excessively broad, but it would be a mistake to conclude from this that they have no incidence on investment disputes. This incidence is becoming increasingly discernable in the use of what I have called an 'adjusted' traditional approach. This approach can be seen as an intermediate stage between the traditional approach and a more progressive one. Whether the integration of IEL in investment disputes pursues one or the other approach, the conclusion is fundamentally similar: dormant environmental clauses are waking up.

Appendix I

This appendix provides an exhaustive list, to the best of my knowledge, of the investment disputes with environmental components decided or pending as of 15 December 2011 in chronological order. By disputes with 'environmental components' I refer to disputes that arise from the operations of foreign investors (a) in environmental markets (e.g. land-filling, waste treatment, garbage collection, pesticides/chemicals, energy efficiency, emissions-reduction, biodiversity compensation, etc.) and/or (b) in other activities, where their impact on the environment or on certain minorities is an explicit part of the dispute (e.g. tourism, extractive industries, pesticides/chemicals; water extraction or distribution) and/or (c) to disputes where the application of domestic or international environmental law is explicitly at stake. A broader definition of environmental components would result in the inclusion of other disputes such as *Aguas del Tunari S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Objections to Jurisdiction (21 October 2005) or *Biwater Gauff (Tanz.) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award (24 July 2008). The list includes cases that proceeded to the merits but also cases that did not, either for lack of jurisdiction or for other reasons (e.g. non-payment of advances, discontinuance following settlement, etc.). I have endeavored to include not only cases that are public but also some cases that are confidential but the existence (and basic contents) of which has been disclosed through different channels.

International Bank of Washington v. OPIC (1972) 11 I.L.M. 1216

Southern Pacific Properties (Middle East) Limited (SPP) v. Arab Republic of Egypt, ICSID Case No. ARB/84/3, Award (20 May 1992)

Ethyl Corporation v. Government of Canada, NAFTA (UNCITRAL), Preliminary Award on Jurisdiction (24 June 1998)

Robert Azinian, Kenneth Davitian and Ellen Baca v. United Mexican States, ICSID Case No ARB(AF)/97/2, Award (1 November 1999)

Compañía del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica, ICSID Case No. ARB/96/1, Award (17 February 2000)

Metalclad Corp. v United Mexican States, ICSID Case No. ARB(AF)/97/1, Award (25 August 2000)

S.D. Myers Inc. v. Canada, NAFTA Arbitration (UNCITRAL Rules), Partial Award (13 November 2000)

Emilio Agustín Maffezini v. Kingdom of Spain, ICSID Case No. ARB/97/7, Award (13 November 2000)

Técnicas Medioambientales Tecmed S.A. v. United Mexican States, ICSID Case No. ARB(AF)/00/2, Award (29 May 2003)

Waste Management Inc. v. United Mexican States, ICSID Case No. ARB(AF)/00/3, Award (30 April 2004)

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

Empresa Lucchetti S.A. and Lucchetti Peru S.A. v. Republic of Peru, ICSID Case No. ARB/03/4, Award (7 February 2005)

Methanex Corporation v. United States of America, NAFTA (UNCITRAL), Award (3 August 2005)

Bayview Irrigation District v. United Mexican States, ICSID Case No. ARB(AF)/05/1, Award (19 June 2007)

Parkerings-Compagniet AS v. Republic of Lithuania, ICSID Case No. ARB/05/8, Award (11 September 2007)

Canadian Cattlemen for Fair Trade v. United States of America, NAFTA Arbitration (UNCITRAL Rules), Award on Jurisdiction (28 January 2008)

Plama Consortium Ltd. v. Republic of Bulgaria, ICSID Case No. ARB/03/24, Award (27 August 2008)

Glamis Gold Ltd. v. The United States of America, NAFTA Arbitration (UNCITRAL), Award (16 May 2009)

Georg Nepolsky v. The Czech Republic, UNCITRAL Arbitration, Award (February 2010)

Suez, Sociedad General de Aguas de Barcelona S.A. and InterAguas Servicios Integrales del Agua S.A. v. The Argentine Republic, ICSID Case No. ARB/03/17, Decision on liability (31 July 2010)

Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. The Argentine Republic, ICSID Case No. ARB/03/19, Decision on liability (31 July 2010)

Chemtura Corporation (formerly Crompton Corporation) v. Government of Canada, UNCITRAL, Award (2 August 2010)

Piero Foresti, Laura de Carli and others v. Republic of South Africa, ICSID Case No. ARB(AF)/07/1, Award (4 August 2010)

Grand River Enterprises Six Nations, Ltd, et al v. United States of America, NAFTA Arbitration (UNCITRAL Rules), Award (12 January 2011)

Vattenfall AB, Vattenfal Europe AG, Vattenfall Europe Generation AG v. Federal Republic of Germany, ICSID Case No. ARB/09/6 Award (11 March 2011)

Commerce Group Corp and San Sebastian Gold Mines, Inc v Republic of El Salvador, Award, ICSID Case No ARB/09/17, Award (14 March 2011)

Dow Agrosciences LLC v. Government of Canada, NAFTA Arbitration (UNCITRAL Rules)(settled on 25 May 2011)

Vito G. Gallo v. Government of Canada, NAFTA (UNCITRAL), Award (15 September 2011)

Marion Unglaube v. Republic of Costa Rica, ICSID Case No. ARB/08/1 (pending)

Reinhard Unglaube v. Republic of Costa Rica, ICSID Case No. ARB/09/20 (pending)

Burlington Resources Inc. and others v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (PetroEcuador), ICSID Case No. ARB/08/5 (pending)

Pac Rim Cayman LLC v. Republic of El Salvador, ICSID Case No. ARB/09/12 (pending)

William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton, and Bilcon of Delaware, Inc. v. Government of Canada, NAFTA (UNCITRAL) (pending)

Abengoa, S.A. y COFIDES, S.A. v. United Mexican States, ICSID Case No. ARB(AF)/09/2 (pending)

Chevron Corporation and Texaco Petroleum Company v. Republic of Ecuador, PCA Case No 2009-23 (UNCITRAL Rules) (pending)

Renco Group Inc. v. Republic of Peru, Notice of Intent to Commence Arbitration, 29 December 2010 (pending)

Niko Resources (Bangladesh) Ltd. v. People's Republic of Bangladesh, Bangladesh Petroleum Exploration and Production Company Limited ('Bapex') and Bangladesh Oil Gas and Mineral Corporation ('Petrobangla'), ICSID Cases No. ARB/10/11 and ARB/10/18 (pending)

Naftrac Limited v. National Environmental Investment Agency (Ukraine), PCA Arbitration (Optional Environmental Rules) (pending)

Accession Eastern Europe Capital AB and Mezzanine Management Sweden AB v. Republic of Bulgaria, ICSID Case No. ARB/11/3 (pending)