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DEVELOPING COORDINATION TECHNIQUES BETWEEN PUBLIC INTERESTS AND INTERNATIONAL INVESTMENT LAW

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1. Introduction

This paper examines the influence that international human rights Law and international environmental Law have, both when entering into international investment agreements and when these conventional rules are applied in investment arbitration. Moreover, by examining the interactions between these subsystems, the study provides an excellent opportunity to reflect not only on the different techniques of legal coordination envisaged to articulate relations between them, but also on the

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consequences generated by the phenomenon of sectorialisation and proliferation of tribunals dedicated to the settlement of international disputes.¹

A few preliminary considerations of a conceptual and methodological nature should be underlined. In the first place, the concept of public interest is limited to human rights and the environment, in order to define the object of our study. Secondly, the paper centres on the interaction between these legal subsystems by studying international practice, in particular, bilateral investment treaties (BITs), multilateral economic and free trade agreements, as well as awards rendered in the field of investment arbitration.

The structure of this study distinguishes between the interaction that takes place during the formation of international investment agreements (Section 2), and the interplay that occurs when these are applied in investment arbitration (Section 3). Finally, Section 4 recaps various ideas of a substantive and formal nature on the protection of public interest in international investment Law.

2. Coordination Techniques Developed by Conventional Practice

In this Section both conventional practice in the protection of foreign investments and that stipulated by commercial and economic free trade agreements are studied, with the North American and European regional subsystems selected for analysis.

2.1. A Consolidated Conventional Practice in North America

2.1.1. Bilateral Investment Treaties

During the last decade, various amendments were introduced into the model-BITs² of Canada³ and the United States of America (USA),⁴ as issues related to the protection of certain human rights (labour rights⁵ or public health⁶) and the environment (waste treatment⁷) arose in several investment arbitrations initiated under the North American

¹ W. BEN HAMIDA, *L'arbitrage État-investisseur face à un désordre procédural: la concurrence des procédures et les conflits de juridictions*, in *Ann. fr. droit int.*, vol. LI, 2005, p. 564 ss.; A. REINISCH, *The Proliferation of International Dispute Settlement Mechanisms: The Threat of Fragmentation vs. the Promise of a More Effective System? Some Reflections From the Perspective of Investment Arbitration*, in I. BUFFARD, J. CRAWFORD, A. PELLET, S. WITTICH (eds.), *International Law between Universalism and Fragmentation. Festschrift in Honour Gerhard Hafner*, Leiden, 2008, p. 107 ss.; and J. CRAWFORD, *Chance, Order, Change: the Course on International Law*, in *Recueil des cours*, vol. 365, 2013, p. 9 ss., pp. 205-229.

² The model-BITs cited in this paper are available at <http://www.italaw.com/> (accessed on 7 April 2014).

³ Published in 2004: see C. LÉVESQUE, A. NEWCOMBE, *Canada*, in CH. BROWN (ed.), *Commentaries on Selected Model Investment Treaties*, Oxford, 2012, p. 53 ss.

⁴ Published in 2004 and revised in 2012: see L.M. CAPLAN, J.K. SHARPE, *United States*, in CH. BROWN (ed.), *Commentaries on Selected*, cit., p. 755 ss.; and M. KANTOR, *Little Has Changed in the New US Model Bilateral Investment Treaty*, in *Fordh. Invest. Law Jour.*, vol. 27-2, 2012, p. 335 ss.

⁵ Award of 24 May 2007, UNCITRAL, *United Postal Service, Inc. v. Canada*.

⁶ Award of 3 August 2005, UNCITRAL, *Methanex Corporation v. United States of America*.

⁷ Award of 21 October 2002, UNCITRAL, *S.D. Myers, Inc. v. Canada*.

Free Trade Agreement⁸ (NAFTA). These have come to recognise an interaction between public interests and policies of promotion and protection of foreign investments.⁹

Accordingly, both model-BITs accept the possibility of developing measures with a view to protecting human health and the environment, as long as they do not constitute any restriction on investments¹⁰ and are applied in a non-arbitrary and justified way. This precision enables States to adopt measures that, justified by public interest, will not be considered as a breach of their international obligations to protect foreign investments.¹¹ Moreover, these models rule out the introduction of measures aimed at promoting foreign investment that are detrimental to the protection standards for human health, labour rights and the environment.¹²

Apart from these provisions, the Canadian and US model-BITs deal with more specific issues related to the protection of human rights and the environment, of both a procedural and substantive nature. From a procedural standpoint, an arbitral tribunal is empowered to appoint an expert to report to it on issues disputed by the parties in the field of the protection of human health and the environment, on request by a disputing party or even on its own initiative.¹³

From a substantive standpoint, both models restrict the notion of indirect expropriation by excluding the concept of non-discriminatory regulatory measures adopted

⁸ Signed on 17 December 1992.

⁹ The preamble of the US model-BIT makes a general reference to the achievement of the objectives set out in its dispositions through promotion of health, the environment, and as a novelty compared to the Canadian model, it also refers to labour rights. Indeed, it states «Desiring to achieve these objectives in a manner consistent with the protection of health, safety, and the environment, and the promotion of internationally recognized labour rights.»

¹⁰ With regard to the performance requirements, Article 8.3 of the US model-BIT envisages that «(a) Nothing in paragraph 2 shall be construed to prevent a Party from conditioning the receipt or continued receipt of an advantage, in connection with an investment in its territory of an investor of a Party or of a non-Party, on compliance with a requirement to locate production, supply a service, train or employ workers, construct or expand particular facilities, or carry out research and development, in its territory. (...) c) Provided that such measures are not applied in an arbitrary or unjustifiable manner, and provided that such measures do not constitute a disguised restriction on international trade or investment, paragraphs 1(b), (c), (f), and (h), and 2(a) and (b), shall not be construed to prevent a Party from adopting or maintaining measures, including environmental measures: (i) necessary to secure compliance with laws and regulations that are not inconsistent with this Treaty; (ii) necessary to protect human, animal, or plant life or health; or (iii) related to the conservation of living or non-living exhaustible natural resources.» As a general exception, Article 10.1 of the Canadian model-BIT sets forth: «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.»

¹¹ With no clause of this nature included in the BIT concluded between Switzerland and Uruguay (signed on 7 October 1988), the tribunal in *Philip Morris* considered that the references made to public health in the promotion obligation did «not create an exception to the BIT's substantive obligations with respect to investments that have already been admitted in accordance with Uruguayan law. (...) Article 2(1) concerned solely with admission, although it subject to the subsequent regulation of investments in ways consistent with the BIT»: see Decision on Jurisdiction of 2 July 2013, ICSID Case No. ARB/10/7, *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Uruguay*, para. 174.

¹² See Article 12 of the US model-BIT and Article 11 of the Canadian model-BIT.

¹³ See Article 32 of the US model-BIT and Article 42 of the Canadian model-BIT.

in good faith for public policy purposes.¹⁴ Although this formula presents practical difficulties as regards its systematisation,¹⁵ it has come to be partially accepted in arbitral case-law.¹⁶ Accordingly, both models indicate that as long as measures are adopted by a State in a non-discriminatory way and in good faith to protect health and the environment, these will not be considered as indirect expropriation, except for in exceptional (or «rare») circumstances.¹⁷

Finally, it should be borne in mind that these provisions have been incorporated into the most recent BITs concluded by Canada with Peru,¹⁸ Jordan,¹⁹ Kuwait²⁰ and Tanzania²¹ whereas the BIT concluded with China²² only refers to the protection of human health and the environment in the clause that establishes a general exception (Article 33.2) and in its definition of the concept of indirect expropriation [(Annex B.10.3)]. As for the USA, these provisions have been set out in the BITs concluded with Uruguay²³ and Rwanda.²⁴

¹⁴ R. DOLZER, F. BLOCH, *Indirect Expropriation: Conceptual Realignments?*, in *Int. Law Forum*, vol. 5-3, 2003, p. 155 ss.; K. YANNACA-SMALL, “*Indirect Expropriation*” and the “*Right to Regulate*” in *International Investment Law*, in *OECD – Working Papers*, No. 4, 2004, p. 1 ss.; and V.A. TITI, *The Right to Regulate in International Investment Law*, Baden Baden, 2013.

¹⁵ U. KRIEBAUM, *Privatizing Human Rights. The Interface between International Investment Protection and Human Rights*, in A. REINISCH, U. KRIEBAUM (eds.), *The Law of International Relations – Liber Amicorum Hanspeter Neuhold*, Utrecht, 2007, p. 165 ss., pp. 181-183.

¹⁶ In *Methanex* the tribunal declared that «an intentionally discriminatory regulation against a foreign investor fulfils a key requirement for establishing expropriation. But as 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»: see Award of 3 August 2005, UNCITRAL, *Methanex Corporation v. United States of America*, Part IV – Chapter D, para. 7. In *Saluka*, the tribunal found 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 power of States” forms part of customary international law today. There is ample case law in support of this proposition»: see Partial Award of 17 March 2006, UNCITRAL, *Saluka Investments B.V. v. Czech Republic*, para. 262.

¹⁷ Annex B.13(1) of the Canadian model-BIT is less generic, as it indicates various examples of measures that could constitute a «rare circumstance»: «The parties confirm their shared understanding that: (...) c) Except in rare circumstances, such as when a measure or series of measures are so severe in the light of their purpose that they cannot be reasonably viewed as having been adopted and applied in good faith, non-discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriation». In fact, Annex B of the US model-BIT envisages that «Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations»: see S. EL BOUDOUHI, *L'intérêt général et les règles substantielles de protection des investissements*, in *Ann. fr. droit int.*, vol. LI (2005), p. 452 ss., p. 556.

¹⁸ Signed on 14 November 2006.

¹⁹ Signed on 28 June 2009.

²⁰ Signed on 22 September 2011.

²¹ Signed on 16 May 2013.

²² Signed on 9 September 2012.

²³ Signed on 4 December 2005.

²⁴ Signed on 19 February 2008.

2.1.2. *Free Trade Agreements*

The interactions between international investment Law and the protection of public interests have also been included in free trade agreements. The treaties concluded by the USA with Chile,²⁵ Central America and the Dominican Republic²⁶ (CAFTA-DR), Oman²⁷ or Peru²⁸ stand out from others.

In contrast to the instruments analysed in the previous section, the substantive content of these treaties is more general and encompasses obligations of a different legal nature (activity and result) dedicated to the protection of foreign investments, the environment and labour rights. Such a complex structure generates legal consequences of both a material and procedural character.

From a material perspective, and taking the CAFTA-DR as an example, references are made to the environment in the chapter related to foreign investments –not, however, to labour rights–, particularly as regards the possibility of maintaining and establishing measures that submit foreign investments to environmental protection standards, as well as delimiting the concept of indirect expropriation.²⁹ Nevertheless, apart from these references, environmental and labour protection are included in an individual chapter on free trade agreements,³⁰ generally adopting the formula of obligations of activity, as opposed to obligations of protection of foreign investments, which are mainly obligations of result.

The CAFTA-DR establishes that in the case of any conflict between the different chapters of the agreement, any other chapter prevails over the one dedicated to the protection of investments, to ensure its systematic interpretation.³¹ Article 1112 of the NAFTA provides the same solution. Accordingly, both treaties establish the *lex superior* principle as the legal coordination technique to resolve a material conflict between the different chapters of the agreement.

This solution does not imply the prevalence of public interests over investment protection in arbitral practice. It is only when the application of both chapters of the

²⁵ Signed on 6 June 2003.

²⁶ Signed on 5 August 2004.

²⁷ Signed on 19 January 2006.

²⁸ Signed on 12 April 2006.

²⁹ Article 10.11 of the CAFTA-DR sets forth «Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.» Moreover, Annex 10-C of the CAFTA-DR deals with the concept of indirect expropriation by declaring that «4. The second situation addressed by Article 10.7.1 is indirect expropriation, where an action or series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure. (a) The determination of whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a case-by-case, fact-based inquiry that considers, among other factors: (i) the economic impact of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred; (ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and (iii) the character of the government action. (b) Except in rare circumstances, nondiscriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations.»

³⁰ See Chapters 16 (labour) and 17 (environment) of the CAFTA-DR.

³¹ Article 10.2.1 of the CAFTA-DR sets forth that «In the event of any inconsistency between this Chapter and another Chapter, the other Chapter shall prevail to the extent of the inconsistency.»

agreement overlaps –usually at the inter-State level– when this prevalence must be taken into account. However, arbitral tribunals should consider the importance given by the parties to the protection of public interests as a general trend.

The division into different chapters also conditions the procedural perspective, as it diversifies the nature of the enforcement mechanisms provided for by the agreement. In effect, whereas the settlement of disputes foreseen in the chapter on investment protection takes place under investment arbitration (hybrid procedure), the other chapters are protected through classic inter-State formulas, which limit the protagonism of the individual in procedures to a much greater extent.

The examples examined in this section emphasise the difficulty involved in integrating into the same international agreement rules that not only have their origin in different legal structures, but also are destined to fulfil different functions in the international legal order. The technical challenges are overcome by incorporating coordination techniques into these agreements and establishing dispute-settlement mechanisms that are appropriate to the nature of the treaty-based rights, as well as the legal status of the international subjects or actors who hold these rights.

2.2. *An Emerging Conventional Practice in the European Union*

2.2.1. *Bilateral Investment Treaties*

Conventional practice of the European Union (EU) Member States in the field of foreign investment protection has not experienced the same degree of normative precision as in North America and, on a general basis, the BITs entered into by those States do not include specific references to the protection of public interests.

In Spain, Article 8 of the BIT concluded between Spain and Libya³² includes a provision that seeks to make the promotion of investments compatible with the protection of environmental standards,³³ which is very similar to that foreseen in Article 11 of the Canadian model-BIT. Nevertheless, this BIT is an isolated precedent in Spanish practice.

Austria is another EU Member State that has nurtured the relations between the different legal regimes under consideration in its conventional practice. Accordingly, the preambles of the BITs concluded by Austria with Armenia³⁴ or Yemen³⁵ refer to the need to observe the internationally recognised labour standards. While the BIT concluded between Austria and Kosovo³⁶ not only sets forth a specific paragraph in its preamble,³⁷ but

³² Signed on 17 December 2007.

³³ This provision envisages that «4. Recognizing the right of each of the Contracting parties to establish its own levels of national environmental protection and its policies and priorities in environmental development, nothing in this agreement shall be construed to prevent the Contracting Parties from amending or adopting measures compatible with this Agreement to ensure that investment activity takes place with due consideration to environmental concerns, provided that such measures are not applied in an arbitrary or unjustifiable manner and that they do not undermine the essence of the rights established in this Agreement. Therefore, each Contracting Party will endeavor to guarantee that their legislation establishes high levels of environmental protection and to continue to improve its laws. 5. The Contracting Parties recognize that it is inappropriate to promote investment to the detriment of national environmental legislation. Accordingly, each Contracting Party will endeavour to ensure that it does not waive such laws or establish exceptions to their application, or offer to waive such laws or establish such exceptions, in order to promote investment in its territory or encourage their maintenance or expansion.» (Own translation).

³⁴ Signed on 17 October 2001.

³⁵ Signed on 30 May 2003.

³⁶ Signed on 22 January 2010.

also establishes two provisions related to the environment³⁸ and labour rights³⁹ similar to those proposed both in Article 8 of the BIT concluded between Spain and Libya, and in Article 11 of the Canadian model-BIT. In addition, this BIT restricts the notion of indirect expropriation, in line with North American conventional practice.⁴⁰

Moreover, BITs concluded by Belgium with the United Arab Emirates,⁴¹ Sudan,⁴² Tajikistan,⁴³ Panama,⁴⁴ Barbados⁴⁵ or Togo⁴⁶ also include general provisions regarding the environment⁴⁷ and labour.⁴⁸ References to human health and the environment are also

³⁷ The Preamble of the BIT concluded between Austria and Kosovo states «that investment agreements and multilateral agreements on the protection of environment, human rights or labour rights are meant to foster global sustainable development and that any possible inconsistencies there should be resolved without relaxation of standards of protection.»

³⁸ Article 4 of the BIT concluded between Austria and Kosovo envisages that «The Contracting Parties recognise that it is inappropriate to encourage an investment by weakening domestic environmental laws.»

³⁹ Article 5 of the BIT concluded between Austria and Kosovo sets forth that «(1) The Contracting Parties recognise that it is inappropriate to encourage an investment by weakening domestic labour laws. (2) For the purposes of this Article, “labour laws” means each Contracting Party’s statutes or regulations, that are directly related to the following internationally recognised labour rights: (a) the right of association; (b) the right to organise and to bargain collectively; (c) a prohibition on the use of any form of forced or compulsory labour; (d) labour protections for children and young people, including a minimum age for the employment of children and the prohibition and elimination of the worst forms of child labour; (e) acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety.»

⁴⁰ Article 7.4 of the BIT concluded between Austria and Kosovo envisages that «Except in *rare circumstances*, such as when a measure or series of measures are so severe in the light of their purpose that they cannot be reasonably viewed as having been adopted and applied in good faith, non-discriminatory measures of a Contracting Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriation.» (Emphasis added).

⁴¹ Signed on 8 March 2004: see Articles 5 and 6.

⁴² Signed on 7 November 2005: see Articles 5 and 6.

⁴³ Signed on 10 February 2009: see Articles 5 and 6.

⁴⁴ Signed on 26 March 2009: see Articles 5 and 6.

⁴⁵ Signed on 29 May 2009: see Articles 11 and 12.

⁴⁶ Signed on 6 June 2009: see Articles 5 and 6.

⁴⁷ This provision, in most of the above-mentioned BITs, sets out that «1. Recognizing the right of each Contracting Party to establish its own levels of national environmental protection and environmental development policies and priorities, and to adopt or modify accordingly its environmental legislation, each Contracting Party shall strive to ensure that its legislation provide for high levels of environmental protection and shall strive to continue to improve this legislation. 2. The Contracting Parties recognize that it is inappropriate to encourage investment by relaxing national environmental legislation. Accordingly, each Contracting Party shall strive to ensure that it does not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such legislation as an encouragement for the establishment, maintenance or expansion in its territory of an investment. 3. The Contracting Parties reaffirm their commitments under the international environmental agreements, which they have accepted. They shall strive to ensure that such commitments are fully recognized and implemented by their national legislation. 4. The Contracting Parties recognize that co-operation between them provides enhanced opportunities to improve environmental protection standards. Upon request by either Contracting Party, the other Contracting Party shall accept to hold expert consultations on any matter falling under the purpose of this Article.»

⁴⁸ This provision, in most of these BITs, envisages that «1. Recognizing the right of each Contracting Party to establish its own national labour standards, and to adopt or modify accordingly its labour legislation, each Contracting Party shall strive to ensure that its national legislation provide for labour standards consistent with the internationally recognized labour rights and shall strive to improve those standards in that light. 2. The Contracting Parties recognize that it is inappropriate to encourage investment by relaxing national labour legislation. Accordingly, each Contracting Party shall strive to ensure that it does not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such legislation as an encouragement for the establishment, maintenance or expansion in its territory of an investment. 3. The Contracting Parties reaffirm

present in the preambles of BITs concluded by Finland with Algeria,⁴⁹ Guatemala,⁵⁰ Serbia⁵¹ and Nigeria.⁵² Interestingly, the French model-BIT sets out a provision aimed at preserving and promoting cultural and linguistic diversity.⁵³ Conversely, the German and the Italian model-BITs are completely silent on this issue.

The conventional practice of the EU Member States can ultimately be considered as precarious and asymmetrical as regards the incorporation of explicit references to the protection of public interests in BITs.⁵⁴ Only Article 19.1 of the Energy Charter Treaty,⁵⁵ a multilateral mixed-agreement in which the EU and its Member States participate, amongst other parties, establishes a mechanism that enables environmental issues to be incorporated on a transversal basis,⁵⁶ obliging party States to strive «to minimize in an economically efficient manner harmful Environmental Impacts occurring either within or outside its Area from all operations within the Energy Cycle in its Area, taking proper account of safety.»⁵⁷

Once competence in the area of foreign direct investment was attributed to the EU by Article 207 of the Treaty on the Functioning of the European Union (TFEU), the BIT regime designed by the EU Member States remains in force on a transitional basis,⁵⁸ whilst the EU defines the scope and nature of its competence through the conventional instruments that it has available in the context of its external action.⁵⁹ In this vein, it is

their obligations as members of the International Labour Organization and their commitments under the International Labour Organization Declaration on Fundamental Principles and Rights at Work and its Follow-up. The Contracting Parties shall strive to ensure that such labour principles and the internationally recognized labour rights are recognized and protected by national legislation. 4. The Contracting Parties recognize that co-operation between them provides enhanced opportunities to improve labour standards. Upon request by either Contracting Party, the other Contracting Party shall accept to hold expert consultations on any matter falling under the purpose of this Article.»

⁴⁹ Signed on 13 January 2005.

⁵⁰ Signed on 14 April 2005.

⁵¹ Signed on 23 May 2005.

⁵² Signed on 22 June 2005.

⁵³ Article 1.6 of the French model-BIT sets forth that «Nothing in this agreement shall be construed to prevent any contracting party from taking any measure to regulate investment of foreign companies and the conditions of activities of these companies in the framework of policies designed to preserve and promote cultural and linguistic diversity.»

⁵⁴ The conventional practice of several EU Member States, such as Germany (pp. 289-319); Austria (pp. 15-51); France (pp. 245-288); Italy (pp. 321-346); the Netherlands (pp. 535-591); and the United Kingdom (pp. 697-754) is studied in the book edited by CH. BROWN, cited *supra* in footnote 3.

⁵⁵ Signed of 17 December 1994.

⁵⁶ A.J. RODRIGO HERNÁNDEZ, *El principio de integración de los aspectos económicos, sociales y medioambientales del desarrollo sostenible*, in *Rev. esp. der. int.*, vol. LXIV-2, 2012, p. 133 ss., pp. 144-145.

⁵⁷ This provision also envisages that «In its policies and actions each Contracting Party shall strive to take precautionary measures to prevent or minimize environmental degradation. The Contracting Parties agree that the polluter in the Areas of Contracting Parties, should, in principle, bear the cost of pollution, including transboundary pollution, with due regard to the public interest and without distorting Investment in the Energy Cycle or international trade.»

⁵⁸ Regulation (EU) No. 1219/2012 of the European Parliament and the Council of 12 December 2012, establishing transitional arrangements for bilateral investment agreements between Member States and third countries (OJ L 351, of 20 December 2012, p. 40).

⁵⁹ COM (2010) 343 final, of 7 July 2010; and COM (2012) 335 final, of 21 June 2012.

important to note that the EU has already proposed to start negotiations for its first BIT,⁶⁰ to be concluded with China.

2.2.2. *Association and Free Trade Agreements*

As regards trade and economic association agreements entered into by the EU before it was invested with the exercise of competence over the protection of foreign direct investments, certain interactions between the protection of public interests and foreign investments can be detected, in particular with regard to the exercise of basic economic freedoms (services and capitals).⁶¹

The economic partnership agreement entered into with the States of the Caribbean Forum (Cariforum) contains general provisions destined to establish a balance between the protection of the environment, labour relations and the protection of investments, by establishing measures designed to protect human health and the environment, provided that these are not arbitrary and unjustified,⁶² and excluding the introduction of measures aimed at encouraging foreign investments to the detriment of standards of protection for human health, labour rights and the environment.⁶³

The preamble of the free trade agreement concluded with Korea recognises the need to «strengthen the development and enforcement of labour and environmental laws and policies, promote basic workers' rights and sustainable development and implement this Agreement in a manner consistent with these objectives», in line with the wording of the US model-BIT. In contrast to other agreements previously entered into by the EU and its Member States, the protection of labour and environmental standards is proclaimed to be one of the objectives of the agreement.⁶⁴ Moreover, several provisions related to the protection of public interests are also set forth in a chapter entitled «trade and sustainable development.»⁶⁵

Nevertheless, the effectiveness of all of these provisions is very limited outside EU Law. First of all, because the agreements mentioned do not contemplate

⁶⁰ «Commission proposes to open negotiations for an investment agreement with China», IP/13/458, of 23 May 2013. As for the negotiations: see <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1013> (accessed on 7 April 2014).

⁶¹ However, these interactions present very little uniformity in practice: see C. NOWAK, *Legal Arrangements for the Promotion and Protection of Foreign Investments Within the Framework of the EU Association Policy and European Neighbourhood Policy*, in M. BUNGENBERG, J. GRIEBEL, S. HINDELANG (eds.), *Eur. YB. Int. Ec. Law*, 2011, p. 105 ss.

⁶² See Article 224 of the Economic Partnership Agreement between the Cariforum States, of the one part, and the European Community and its Member States, of the other part (OJ L 289, of 30 October 2008, p. 3).

⁶³ See Articles 73, 188 and 194 of the Economic Partnership Agreement between the Cariforum States, of the one part, and the European Community and its Member States, of the other part.

⁶⁴ Article 1.1.2.h) of the Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part (OJ L 127, of 14 May 2011, p. 6) sets forth as one of its objectives «to promote foreign direct investment without lowering or reducing environmental, labour or occupational health and safety standards in the application and enforcement of environmental and labour laws of the Parties.»

⁶⁵ See Articles 13.2, 13.5, 13.7 and 13.9 of the Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part.

investment arbitration as a procedural avenue for the settlement of disputes.⁶⁶ Secondly, because arbitral tribunals merely apply the Law agreed on by the parties, or, failing this, the Law that is indicated by the relevant procedural rules.

Bearing in mind contemporary practice, it seems unlikely that an arbitral tribunal would apply a free trade agreement entered into by the EU and its Member States with a third party to resolve an investment dispute based on a BIT,⁶⁷ unless the parties had expressly agreed to do so or the tribunal itself were to decide to invoke such agreement according to the rule of interpretation set out in Article 31.1.c) of the Vienna Convention on the Law of Treaties⁶⁸ (VCLT).

Ever since the EU was attributed competence in the field of foreign direct investment protection in 2009, it has been able to make this competence effective by entering into association and/or free trade agreements that include a chapter dedicated to the protection of foreign investments.⁶⁹ These latter agreements seek to incorporate the proposals made by the European Parliament in its Resolution of 25 November 2010, on human rights and social and environmental standards in international trade agreements. The Resolution called on the Commission to «include systematically in all free trade agreements negotiated with non-EU countries a series of social and environmental standards.»⁷⁰

The EU and its Member States will likely conclude the first of these agreements with Canada.⁷¹ In view of the negotiations that have taken place until now, it would appear that it will contain provisions relating to the protection of investments,⁷² as well as labour and environmental rights, albeit in separate chapters and subject to the material and procedural limitations already examined in the North American conventional practice.

In the first place, because this agreement should continue and deepen the legal *acquis* established by the free trade agreements already entered into by the EU with the Cariforum States and Korea. Secondly, it could be expected that the parties would

⁶⁶ A. DIMOPOULOS, *EC Free Trade Agreements: An Alternative Model for Addressing Human Rights in Foreign Investment Regulation and Dispute Settlement?*, in P.-M. DUPUY, F. FRANCONI, E.-U. PETERSMANN (eds.), *Human Rights in International Investment Law and Arbitration*, Oxford, 2009, p. 565 ss., pp. 588-590.

⁶⁷ F.J. PASCUAL VIVES, *Shaping the EU Investment Regime: Choice of Forum and Applicable Law in International Investment Agreements*, in *Cuad. der. trans.*, vol. 6-1, 2014, p. 269 ss, pp. 278-291.

⁶⁸ Signed on 23 May 1969.

⁶⁹ The EU is currently negotiating these agreements, among others, with Canada, Singapore, India, Morocco, Thailand and Japan: see UNCTAD, «The Rise of Regionalism in International Investment Policymaking: Consolidation or Complexity», 2013, pp. 2-3. The negotiation of a Transatlantic Trade and Investment Partnership with the United States of America is also under way: see «European Union and United States to launch negotiations for a Transatlantic Trade and Investment Partnership», MEMO/13/95, of 13 February 2013. On this negotiation process: see <http://trade.ec.europa.eu/doclib/press/index.cfm?id=943> (accessed on 7 April 2014).

⁷⁰ *OJ C* 99E, of 3 April 2012, p. 31, para. 15.

⁷¹ «EU and Canada start negotiations for economic and trade agreement», IP/09/896, of 10 June 2009. Information concerning the negotiation process is available at <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/eu-ue/negotiations-negociations.aspx?lang=eng> (accessed on 7 April 2014).

⁷² The Directorate General of Trade of the European Commission has published a general overview of the investment protection provisions to be found in the forthcoming Comprehensive Economic and Trade Agreement between the European Union and Canada: see «Fact sheet on Investment Provisions in the EU-Canada free trade agreement»: see http://trade.ec.europa.eu/doclib/docs/2013/december/tradoc_152016.pdf (accessed on 23 May 2014).

establish the above-mentioned legal framework in order to avoid any conflict arising from successive conventional obligations, due to the fact that BITs concluded by Canada with Latvia,⁷³ the Czech Republic,⁷⁴ Romania⁷⁵ and Slovakia⁷⁶ already regulate all of these issues.

These association and free trade agreements may contribute to making the obligations of promotion and protection of investments more homogeneous within the EU, as well as to introducing certain legal coordination techniques between investment and public interests protection either by invoking the principle of systemic integration or that of *lex superior* or some other more specific formulas, such as those examined *infra* in Section 3.

An evolution can therefore be perceived in the conventional practice of the USA and Canada, as well as in the EU and its Member States, which is characterised by the institutionalisation of agreements on the protection of foreign investment and the broadening of their material scope of application.⁷⁷ This phenomenon modifies the relational paradigm around which international investment Law has been developing, but it still presents a limited character.

It is worth recalling that public interests have been incorporated into agreements on protection of foreign investments hastily, as a result of their progressive appearance in investment arbitration. In order to assess the extent to which the regime of protection of foreign investments is permeable to public interests, it is necessary to study how all of these international agreements have been applied in the context of investment arbitration and the different legal coordination techniques created thereunder.

⁷³ Signed on 5 May 2009: see Article II.5, Article XVII and Annex B.

⁷⁴ Signed on 6 May 2009: see Article II.4, Article IX.1 and Annex A.

⁷⁵ Signed on 8 May 2009: see Article II.5, Article XVII.3 and Annex B.

⁷⁶ Signed on 20 July 2010: see Article II.4, Article IX.1 and Annex A.

⁷⁷ It is important to mention that some of the issues examined in this section are now extending to other regions. First of all, in 2007 the Common Market for Eastern and Southern Africa (COMESA) adopted an «Investment Agreement for the COMESA Common Investment Area» that contains some aspects studied in the previous pages: see Article 5.e) (obligation not to waive or otherwise derogate from or offer to waive or otherwise derogate from measures concerning labour, public health, safety or the environment as an encouragement for the establishment, expansion or retention of investments); Article 20.8 (regulatory measures and expropriation); and Article 22 (general exceptions designed to protect public health, human rights, and the environment). Secondly, Article 22 of the BIT concluded between Japan and Irak (signed on 7 June 2012) also fosters the interplay between the protection of foreign investments and public interests by affirming that «Each Contracting Party recognises that it is inappropriate to encourage investment by investors of the other Contracting Party and of a non-Contracting Party by relaxing its health, safety or environmental measures, or by lowering its labour standards. To this effect each Contracting Party should not waive or otherwise derogate from such measures and standards as an encouragement for the establishment, acquisition or expansion of investments in its Area by investors of the other Contracting Party and of a non-Contracting Party.» Thirdly, paragraph 3.b) of Annex 10-A of the Comprehensive Economic Partnership Agreement concluded between South Korea and India on 7 August 2009 envisages a restricted definition of indirect expropriation by setting forth that «*Except in rare circumstances*, such as, for example, when a measure or series of measures is extremely severe or disproportionate in light of its purpose or effect, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, the environment, and real estate price stabilisation (through, for example, measures to improve the housing conditions for low-income households), do not constitute indirect expropriations.» (Emphasis added).

3. Coordination Techniques Developed by Arbitral Practice

The interaction between public interests (human rights⁷⁸ and environment⁷⁹) and international investment Law in investment arbitration has generated interesting developments of both a substantive and procedural nature.⁸⁰

3.1. Substantive Formulas Promoting Legal Coordination

As these legal subsystems come together, all the obligations present are presumed to be compatible, a presumption that has been endorsed by both the Inter-American Court of Human Rights (IACtHR)⁸¹ and an arbitral tribunal.⁸² If this presumption of compatibility is taken as a starting point, it is important to study the different techniques that have been set up to coordinate the relations among all the legal subsystems from a substantive perspective.

3.1.1. The Cautious Approach Taken with Regard to the Principle of Systemic Integration

3.1.1.1. The Principle of Systemic Integration as Part of the International Investment Regime

Determination of the applicable Law to arbitration depends, in the first place, on the principle of party autonomy, and can be defined in a general way (through BITs), or in a specific manner (in an investment contract). In the absence of an express declaration, Article 42.1 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention)⁸³ refers to the «law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.»

⁷⁸ ICSID Case No. ARB/01/3, *Enron Corporation and Ponderosa Assets, L.P. v. Argentina*; ICSID Case No. ARB/02/3, *Aguas del Tunari, S.A. v. Bolivia*; ICSID Case No. ARB/05/22, *Bivater Gauff (Tanzania) Ltd. v. Tanzania*; ICSID Case No. ARB(AF)/07/01, *Piero Foresti, Laura de Carli and others v. South Africa*; or ICSID Case No. ARB/07/17, *Impregilo S.p.A. v. Argentina*.

⁷⁹ ICSID Case No. ARB/84/3, *Southern Pacific Properties (Middle East) Limited v. Egypt*; UNCITRAL, *S.D. Myers, Inc. v. Canada*; ICSID Case No. ARB(AF)/00/3, *Waste Management, Inc. II v. United Mexican States*; UNCITRAL, *Glamis Gold, Ltd. v. United States of America*; or PCA Case No. 2009-23, *Chevron Corporation Texaco Petroleum Corporation v. Ecuador*.

⁸⁰ In fact, in *El Paso* the arbitral tribunal concluded that «a balanced interpretation is needed, taking into account both State sovereignty and the State's responsibility to create an adapted and evolutionary framework for the development of economic activities, and the necessity to protect foreign investment and its continuing flow»: see Decision on Jurisdiction of 27 April 2006, ICSID Case No. ARB/03/15, *El Paso Energy International Company v. Argentina*, para. 70. Whereas in *Bivater* the arbitral tribunal acknowledged that «Water and sanitation services are vitally important, and the (State) ha(d) more than a right to protect such services in case of a crisis: it ha(d) a moral and perhaps even a legal obligation to do so»: see Award of 24 July 2008, ICSID Case No. ARB/05/22, *Bivater Gauff (Tanzania) Ltd. v. Tanzania*, para. 436.

⁸¹ Judgment of 29 March 2006, IACtHR, Merits, Reparations and Costs, Series C, No. 146, *Case of the Sombayamaya Indigenous Community v. Paraguay*, para. 140.

⁸² Award on Responsibility of 30 July 2010, ICSID Case No. ARB/03/19, *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. Argentina*, para. 262.

⁸³ Signed on 18 March 1965.

This provision, when referring to the rules of international Law, paves the way to the application of the principle of systemic integration.⁸⁴ Some BITs also contain a similar wording for the clause dealing with the applicable Law to the arbitration. In Spanish treaty practice, various BITs envisage a provision that designates the applicable Law as not only being the rules and principles of international Law,⁸⁵ repeating the formula of Article 42.1 of the ICSID Convention, but also other international agreements entered into by the parties.

Therefore, human rights and environmental protection treaties could be included under the legal framework set up by the above-mentioned provisions.⁸⁶ Following the reasoning of the tribunal in *Phoenix*,⁸⁷ nothing would impede arbitral tribunals from making use of conventional and customary rules of international Law to incorporate the protection of public interests into investment arbitration through an interpretation of the legal obligations contained in BITs in light of human rights and environmental protection treaties. In fact, in *Asian Agricultural Products Limited* the tribunal recognised that BITs do not form a self-contained regime and therefore they need to be nourished by other normative sectors of the international legal order.⁸⁸

However, in practice, arbitral tribunals are seen to take a very cautious approach towards the principle of systemic integration. In the universal sphere, the application of the Convention Concerning the Protection of the World Cultural and Natural Heritage⁸⁹ was discussed in *Southern Pacific Properties* by the respondent State, although the arbitral tribunal essentially used Egyptian Law as the principal Law applicable to the arbitration.⁹⁰ In *Antoine Goetz*, invoking the principle of non-discrimination set forth in Article 2.2 of the International Covenant on Civil and Political Rights (New York Covenant)⁹¹ was also rejected by the tribunal, which considered itself competent only to decide on a breach of

⁸⁴ As for the «anti-fragmenting potential» of this principle: see J. D'ASPROMONT, *Articulating International Human Rights and International Humanitarian Law: Conciliatory Interpretation under the Guise of Conflict of Norms-Resolution*, in M. FITZMAURICE, P. MERKOURIS (eds.), *The Interpretation and Application of the European Convention on Human Rights. Legal and Practical Implications*, Leiden/Boston, 2013, p. 3 ss., pp. 6-16.

⁸⁵ I. GARCÍA RODRÍGUEZ, *Spanish Practice on Investment Treaties*, in C. JIMÉNEZ PIERNAS (ed.), *The Legal Practice in International Law and European Community Law. A Spanish Perspective*, Leiden, 2007, p. 567 ss., pp. 591-597: see, as examples, Article 11.3 of the BIT concluded between Spain and Cuba (signed on 27 May 1994); or Article 12.3 of the BIT concluded between Spain and Nigeria (signed on 9 July 2002).

⁸⁶ However, this assertion must be read cautiously, since Article 42.1 of the ICSID Convention cannot be construed so as to incorporate all existing rules of international Law into investment arbitration. In this respect, it is interesting to compare the different approach taken by the panel of the World Trade Organisation with regard to the principle of systemic integration and the applicable Law in *European Communities - Measures Affecting the Approval and Marketing of Biotech Products*: see M. FORTEAU, *The Diversity of Applicable Law before International Tribunals as a Source of Forum Shopping and Fragmentation of International Law*, in R. WOLFRUM, I. GÄTZECHMANN (eds.), *International Dispute Settlement: Room for Innovations?*, Heidelberg, 2012, p. 417 ss., pp. 436-441.

⁸⁷ Award of 15 April 2009, ICSID Case No. ARB/06/5, *Phoenix Action, Ltd. v. Czech Republic*, para. 78.

⁸⁸ The tribunal found that «it should be noted that the Bilateral Investment Treaty is not a self-contained closed legal system limited to provide for substantive material rules of direct applicability, but it has to be envisaged within a wider juridical context in which *rules from other sources are integrated through implied incorporation methods, or by direct reference to certain supplementary rules*, whether of international law character or of domestic law nature.» (Emphasis added): see Award of 27 June 1990, ICSID Case No. ARB/87/3, *Asian Agricultural Products Limited (AAPL) v. Sri Lanka*, para. 21.

⁸⁹ Signed on 23 November 1972.

⁹⁰ Award of 20 May 1992, ICSID Case No. ARB/84/3, *Southern Pacific Properties (Middle East) Limited v. Egypt*, para. 78.

⁹¹ Adopted on 16 December 1966.

the obligations contained in the BIT concluded between Belgium-Luxembourg and Burundi,⁹² but not those established in the New York Covenant.⁹³ In the same way, the application of the Convention for the Protection of Human Rights and Fundamental Freedoms (EConHR)⁹⁴ was not accepted by the arbitral tribunal in *Oostergetel*,⁹⁵ an investment litigation solely decided in light of the BIT concluded between the Netherlands and Czech and Slovak Federal Republic.⁹⁶

Arbitral bodies, using a cautious conception of the principle of systemic integration, have excluded invocation of international obligations situated beyond the limits of international investment Law and have cultivated the presumption of compatibility between the different international legal subsystems.

3.1.1.2. *Reconciling the Principle of Systemic Integration and Arbitral Practice*

Investment tribunals have basically opted to use BITs and the Law of the host State to settle investment disputes, despite having also been invested with legal tools enabling them to apply treaty-based and customary rules from general international Law. This position, confirmed in *Rompetrol*,⁹⁷ makes the incorporation and safeguarding of public interests into investment arbitration difficult and can be explained on formal and material grounds.

As for the formal reasons, it is worth recalling that Article 25.1 of the ICSID Convention limits the jurisdiction of the arbitral tribunals to «any legal dispute arising directly out of an investment». In the same vein, most BITs also narrow the jurisdiction of the investment tribunals down to eventual breaches of their obligations. Arbitral tribunals could reject claims arising from the application of other rules of international Law by interpreting plainly their jurisdiction *ex* Article 41.1 of the ICSID Convention.⁹⁸

In fact, this possibility was discussed in *Grand River Enterprises*, where the arbitral tribunal endorsed the cautious approach and found that the principle of systemic integration presented certain limits in the field of international investment Law.⁹⁹

⁹² Signed on 13 April 1989.

⁹³ Award of 10 February 1999, ICSID Case No. ARB/95/3, *Antoine Goetz and others v. Burundi*, paras. 121-122.

⁹⁴ Signed on 4 November 1950.

⁹⁵ Award of 23 April 2012, UNCITRAL, *Jan Oostergetel and Theodora Laurentius v. Slovakia*.

⁹⁶ Signed on 29 April 1991.

⁹⁷ As for the application of the EConHR, the arbitral tribunal found that «much of the detailed argument about the application of specific provisions of the ECHR in the jurisprudence of the European Court of Human Rights, interesting and illuminating as it has been, is beside the point when it comes to the issues under the Netherlands-Romania BIT which form the subject of the dispute before the Tribunal»: see Award of 6 May 2013, ICSID Case No. ARB/06/3, *The Rompetrol Group N.V. v. Romania*, para. 172.

⁹⁸ C. REINER, CH. SCHREUER, *Human Rights and International Investment Law*, in P.-M. DUPUY, F. FRANCONI, E.-U. PETERSMANN (eds.), *Human Rights*, cit., p. 82 ss., p. 83; and E. DE BRABANDERE, *Human Rights Considerations in International Investment Arbitration*, in M. FITZMAURICE, P. MERKOURIS (eds.), *The Interpretation and Application*, cit., p. 183 ss., p. 199.

⁹⁹ The tribunal concluded that the obligation to «take into account» other rules of international law required it «to respect the Vienna Convention's rules governing treaty interpretation. However, the Tribunal does not understand this obligation to provide a license to import into NAFTA legal elements from other treaties, or to allow alteration of an interpretation established through the normal interpretive processes of the Vienna Convention. This is a Tribunal of limited jurisdiction; it has no mandate to decide claims based on treaties other than NAFTA»: see Award of 12 January 2011, UNCITRAL, *Grand River Enterprises Six Nations, Ltd., and others v. United States of America*, para. 71 (Emphasis added).

As for the material reasons behind the cautious approach, it is clear that arbitral bodies have opted to preserve the consensual nature of investment arbitration, and avoided having to decide in terms of normative hierarchy,¹⁰⁰ such as the relations between BITs and the fundamental freedoms recognised in States' constitutions and the relations between BITs and the international rules on the protection of human rights and the environment. In this way, the risk of the applicable norm being displaced by the integrated external norm – one of the problems raised by the application of the principle of systemic integration – is eliminated.

Instead of integrating public interests into investment arbitration and, when appropriate, giving these priority over the obligations of protection of foreign investments in accordance with the principle of *lex superior*, arbitral tribunals, as occurred in *Suez*, adopt a more pragmatic position and recognise the presumption of compatibility of international obligations. Likewise, this position is also maintained by regional human rights courts, as the IACtHR indicated in *Sawhoyamasa*.

The application of the principle of *lex superior*, as was shown *supra* when referring to the North American conventional practice, would be the most effective technique for resolving conflicts between two provisions that belong to different normative sectors. However, the practical implementation of the *lex superior* throughout the acceptance of the principle of systemic integration remains difficult as a result of the decentralised and complex nature of the international investment regime. Indeed, contrary to the CAFTA-DR framework, in which States have explicitly envisaged the application of the principle of *lex superior* in the treaty, BITs do not provide such recognition.

Thus, it is neither surprising nor odd that arbitral tribunals have adopted a cautious approach with regard to the above-mentioned principle, having the States – acting as owners of the treaty – avoided any reference to it.¹⁰¹ Even the arbitral tribunals settling CAFTA-DR disputes have not explored that option yet, which seems to be confined to the inter-State dispute settlement.

At this stage of the development of international investment Law, one cannot expect from investment tribunals such application of the principle of systemic integration in order to give public interest prevalence over investment-related issues.¹⁰²

Interestingly, the agricultural land reforms undertaken by Zimbabwe provide an excellent testing ground for the application of the principle of systemic integration. Landowners directly affected by these reforms, brought an action before the Southern Africa Development Community Tribunal (SADC Tribunal), claiming breaches of the obligations to non-discrimination and not to deny access to justice.

Whereas the former is explicitly envisaged¹⁰³ in the Treaty of the Southern Africa Development Community (SADC Treaty),¹⁰⁴ the latter duty was «integrated» by the SADC

¹⁰⁰ A. PELLET, *Notes sur la «fragmentation» du droit international: droit des investissements internationaux et droits de l'homme*, in D. ALLAND, V. CHETAIL, O. DE FROUVILLE, J.E. VIÑUALES (eds.), *Unité et diversité du droit international. Ecrits en l'honneur du professeur Pierre-Marie Dupuy*, Leiden/Boston, 2014, p. 757 ss., pp. 771-775.

¹⁰¹ F. HORCHANI, *Les droits de l'homme et le droit des investissements internationaux*, in L. BOY, J.-B. RACINE, F. SIIRIAINEN (coords.), *Droit économique et droits de l'homme*, Bruxelles, 2009, p. 139 ss., pp. 157-158.

¹⁰² Award of 14 March 2011, ICSID Case No. ARB/09/17, *Commerce Group Corp. and San Sebastian Gold Mines, Inc. v. El Salvador*; Award of 29 June 2012, ICSID Case No. ARB/07/23, *Railroad Development Corporation v. Guatemala*; and Award of 19 December 2013, ICSID Case No. ARB/10/23, *TECO Guatemala Holdings, LLC v. Guatemala*.

Tribunal in light of two legal grounds. First, the reference made in Article 4.c) of the SADC Treaty to the general and broad obligation to «act in accordance with (...) human rights, democracy and the rule of law.» And, second, the applicable Law clause set out in Article 21.b) of the SADC Treaty, which instructed the tribunal to apply «the general principles and rules of public international law».¹⁰⁵

The solution reached by the SADC Tribunal in *Mike Campbell (Pvt)* shows the path through which the principle of systemic integration could become operative in investment arbitration.

Conversely, an ICSID tribunal hearing similar facts opted to follow a more cautious approach in *Bernhard von Pezold*, in accordance with the line of reasoning already put forward by the tribunal in *Grand River Enterprises*, finding that the reference made by BITs to the applicable rules of international Law «does not incorporate the universe of international law into the BITs or into disputes arising under the BITs».¹⁰⁶

Once compatibility between the primary norms has been established, it is no longer necessary to apply any kind of legal coordination technique to solve the conflict between them (*lex specialis* or *lex superior*).¹⁰⁷

In addition, the arbitral tribunal reserves the right to consider the impact of human rights and the environment on the secondary rules, in particular when deciding on the damages to be paid by the host State to the foreign investor.

¹⁰⁵ Article 6.2 of the SADC Treaty provides as follows «SADC and Member States shall not discriminate against any person on grounds of gender, religion, political views, race, ethnic origin, culture, ill health, disability or such other ground as may be determined by the Summit.»

¹⁰⁴ Signed on 17 August 1992.

¹⁰⁵ The SADC Tribunal went on to find that «In deciding this issue, the Tribunal first referred to Article 21 (b) which, in addition to enjoining the Tribunal to develop its own jurisprudence, also instructs the Tribunal to do so “having regard to applicable treaties, general principles and rules of public international law” which are sources of law for the Tribunal. That settles the question whether the Tribunal can look elsewhere to find answers where it appears that the Treaty is silent. In any event, we do not consider that there should first be a Protocol on human rights in order to give effect to the principles set out in the Treaty, in the light of the express provision of Article 4 (c) of the Treaty which states as follows: SADC and Member States are required to act in accordance with the following principles (...) (c) human rights, democracy and the rule of law”. It is clear to us that the Tribunal has jurisdiction in respect of any dispute concerning human rights, democracy and the rule of law, which are the very issues raised in the present application»: see Judgment of 28 November 2008, SADC (T) Case No. 2/2007, *Mike Campbell (Pvt) Ltd. and others v. Zimbabwe*, pp. 24-25.

¹⁰⁶ The arbitral tribunal held that «the reference to “such rules of general international law as may be applicable” in the BITs does not incorporate the universe of international law into the BITs or into disputes arising under the BITs. Moreover, neither Party has put the identity and/or treatment of indigenous peoples, or the indigenous communities in particular, under international law, including international human rights law on indigenous peoples, in issue in these proceedings. The Petitioners provided no evidence or support for their assertion that international investment law and international human rights law are interdependent such that any decision of these Arbitral Tribunals, which did not consider the content of international human rights norms would be legally incomplete. The Petitioners contend that the Arbitral Tribunals’ mandate derives from “powers delegated to it by Contracting Parties with concrete human rights obligations under international law”. (...). The Petitioners refer in particular to Article 26 of the UN Declaration on the Rights of Indigenous Peoples, which they say requires States to give legal recognition and protection to lands, territories and resources possessed by indigenous peoples by reason of traditional ownership or other traditional occupation or use, and other unspecified customary international law norms which they claim are binding.»: see Procedural Order No. 2 of 26 June 2012, ICSID Case No. ARB/10/15, *Bernhard von Pezold and Others v. Zimbabwe* and ICSID Case No. ARB/10/25, *Border Timbers Limited, Border Timbers International (Private) Limited, and Hangan Development Co. (Private) Limited v. Zimbabwe*, paras. 57-59.

¹⁰⁷ J. CARDONA LLORENS, *Le rôle des traités*, in R. HUESA VINAIXA, K. WELLENS (eds.), *L’influence des sources sur l’unité et la fragmentation du droit international*, Bruxelles, 2006, p. 25 ss., pp. 45-46.

This solution – at least – means implicit recognition¹⁰⁸ of the interaction between these legal regimes and could evolve as a result of the progressive institutionalisation affecting international investment Law and the expansionary trend of international human rights Law in the international legal system.¹⁰⁹ Apart from the reconciliation of public interest and investment Law in the field of secondary rules, other means of legal coordination have been deployed in contemporary practice.

3.1.2. *The Direct Integration of Undetermined Legal Concepts*

Undetermined legal concepts and categories used not only in public international Law, but also in international human rights Law as well as international environmental Law have been invoked thoughtfully in investment arbitration with varying success.

3.1.2.1. *Safeguarding Procedural Provisions*

In the first place, arbitral tribunals do not admit arguments that merely seek to import a procedural solution implemented in a different sector of the international legal system, especially when specific mechanisms have already been established in international investment Law.

Accordingly, the *ad hoc* Committee appointed to decide the annulment in *Azurix* did not accept the arguments presented by Argentina to have European Court of Human Rights (ECtHR) case-law applied in the arbitration,¹¹⁰ with regard to the limited access of the shareholders of a company to international adjudication.

Moreover, although the arbitral tribunal declared that it did not have jurisdiction to hear the dispute for other legal grounds and did not need to consider this question in *ICS Inspection*, Argentina unsuccessfully advocated for the prescription of the right to present a claim, backing its argument with the sectorial practice established by human rights treaties and other international investment agreements such as NAFTA and CAFTA-DR.¹¹¹

¹⁰⁸ A. KULICK, *Global Public Interest in International Investment Law*, Cambridge, 2012, pp. 303-304.

¹⁰⁹ P. NIKKEN, *Balancing of Human Rights and Investment Law in the Inter-American System of Human Rights*, in P.-M. DUPUY, F. FRANCONI, E.-U. PETERSMANN (eds.), *Human Rights*, cit., p. 246 ss. In contrast, the hierarchical superiority of *ius cogens* norms should not raise major problems, as the impact of these mandatory norms «seems unlikely to have much relevance for the vast run of investment treaty disputes»: see CH.H. BROWER, *Obstacles and Pathways to Consideration of the Public Interest in Investment Treaty Disputes*, in K. SAUVANT (ed.), *Yearbook of International Investment Law & Policy 2008-2009*, Oxford, 2009, p. 347 ss., p. 369.

¹¹⁰ The tribunal found that «Argentina also has referred by analogy to the European Convention on Human Rights and NAFTA. As the extent of the protections afforded by an investment protection treaty depends in each case on the specific terms of the treaty in question, the Committee regards comparisons with differently - worded treaties as of limited utility, especially treaties outside the field of investment protection. It is noted that the European Court of Human Rights has held that (subject to possible exceptions) a shareholder in a company does not have standing to bring a claim for a violation of the company's right's under Article 1 of Protocol No. 1 of the European Convention on Human Rights, and that the mere fact that there has been a violation of the company's right's under Article 1 of Protocol No. 1, does not of itself mean that there has been a violation of the shareholder's rights under that provision»: see Decision of the *ad hoc* Committee of 1 September 2009, ICSID Case No. ARB/01/12, *Azurix Corp. v. Argentina*, para. 128.

¹¹¹ Award on Jurisdiction of 10 February 2012, PCA Case No. 2010-9, *ICS Inspection and Control Services Limited (United Kingdom) v. Argentina*, para. 204.

To sum up, the differences between the procedural mechanisms established in both sectors are notable¹¹² and cannot be used indistinctly and automatically.

3.1.2.2. *Legal Responses to Emergency Situations*

Public interests can also interact with investment protection by invoking a situation of emergency, based on the need to protect human rights and/or the environment, as grounds to accept the adoption of general non-discriminatory regulatory measures that could affect foreign investments.

The recourse to both the defense of necessity and emergency clauses to enforce public interests has also been considered with caution in case-law. The arbitral tribunals appointed to hear disputes initiated by foreign investors, as a result of the economic crisis that took place in Argentina during 2001-2003, have neither maintained a uniform position as regards the application of the defense of necessity set forth in Article 25 of the Draft Articles on Responsibility of States for internationally wrongful acts¹¹³ nor have they followed a similar approach concerning the material scope of the emergency clause¹¹⁴ envisaged in Article XI of the BIT concluded between Argentina and the USA,¹¹⁵ which allows both States, amongst other options, to adopt measures destined to safeguard their «own essential security interests.»¹¹⁶

In this way, in *Suez*, Argentina unsuccessfully argued the defense of necessity so as to guarantee the human right to water,¹¹⁷ based on the General Comment No. 15 of the Committee on Economic, Social and Cultural Rights.¹¹⁸ The tribunal recalled the presumption of compatibility between both legal subsystems, and expeditiously concluded

¹¹² U. KRIEBAUM, *Is the European Court of Human Rights an Alternative to Investor-State Arbitration?*, in P.-M. DUPUY, F. FRANCONI, E.-U. PETERSMANN (eds.), *Human Rights*, cit., p. 219 ss.

¹¹³ Article 25 of the Draft Articles on Responsibility of States for internationally wrongful acts envisages that «1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act: (a) Is the only way for the State to safeguard an essential interest against a grave and imminent peril; and (b) Does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole. 2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if: (a) The international obligation in question excludes the possibility of invoking necessity; or (b) The State has contributed to the situation of necessity.»

¹¹⁴ Award of 12 May 2005, ICSID Case No. ARB/01/8, *CMS Gas Transmission Company v. Argentina*, paras. 315-331 and 353-377; Decision on Liability of 3 October 2006, ICSID Case No. ARB/02/1, *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Argentina*, para. 261; Award of 22 May 2007, ICSID Case No. ARB/01/3, *Enron Corporation and Ponderosa Assets, L.P. v. Argentina*, paras. 294-313 and 322-339; and Award of 28 September 2007, ICSID Case No. ARB/02/16, *Sempra Energy International v. Argentina*, paras. 346-355 and 365-391.

¹¹⁵ Signed on 14 November 1991.

¹¹⁶ Article XI of the BIT concluded between Argentina and the USA envisages that «This Treaty 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.»

¹¹⁷ A. TANZI, *Public Interest Concerns in International Investment Arbitration in the Water Services Sector. Problems and Prospects for an Integrated Approach*, in T. TREVES, F. SEATZU, S. TREVISANUT (eds.), *Foreign Investment, International Law and Common Concerns*, New York, 2014, p. 318 ss.

¹¹⁸ «The right to water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)», E/C.12/2002/11, of 20 January 2003.

that there was no conflict of obligations, in just one paragraph.¹¹⁹ A similar result was reached in *Saur*, where the tribunal found that the human right to water and investor rights operated in different legal spheres and, thus, no hierarchical analysis could be drawn.¹²⁰

3.1.2.3. *National Margin of Appreciation*

Moreover, as regards the questions of a substantive nature, there is a tendency to incorporate categories of public Law into investment arbitration.¹²¹ One of these is the national margin of appreciation, a notion created in a praetorian manner in the European subsystem of human rights protection. The national margin of appreciation offers the judicial body a standard that is very deferent to national sovereignty. The application of this notion by the ECtHR depends on an examination of three aspects, appropriateness, necessity and the proportionality of the measure which, moreover, varies according to the nature and scope of the protected right, as well as other extrinsic factors, such as a *consensus* among the party States to the EConHR.¹²²

The reception of this category in arbitral case-law has not been uniform up until now. Argentina has used it in different litigations, both to apply for a reduction of compensation,¹²³ as well as to make an analogical interpretation of Article 5.3 of the BIT concluded with France¹²⁴ in light of Article XI of the BIT concluded with the United States,¹²⁵ or to justify the application of the emergency clause contained in the latter provision,¹²⁶ and even the circumstance of a state of necessity.¹²⁷

¹¹⁹ The tribunal noted that «Argentina and the *amicus curiae* submissions received by the Tribunal suggest that Argentina's human rights obligations to assure its population the right to water somehow trumps its obligations under the BITs and that the existence of the human right to water also implicitly gives Argentina the authority to take actions in disregard of its BIT obligations. The Tribunal does not find a basis for such a conclusion either in the BITs or international law. Argentina is subject to both international obligations, i.e. human rights and treaty obligation, and must respect both of them equally. Under the circumstances of these cases, Argentina's human rights obligations and its investment treaty obligations are not inconsistent, contradictory, or mutually exclusive. Thus, as discussed above, Argentina could have respected both types of obligations»: see Award on Responsibility of 30 July 2010, ICSID Case No. ARB/03/19, *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. Argentina*, para. 262.

¹²⁰ Decision on Jurisdiction and Liability of 6 June 2012, ICSID Case No. ARB/04/4, *SAUR International SA v. Argentina*, paras. 330-331.

¹²¹ W. BURKE-WHITE, A. VON STADEN, *The Need for Public Law Standards of Review in Investor-State Arbitration*, in S.W. SCHILL (ed.), *International Investment Law and Comparative Public Law*, Oxford, 2010, p. 689 ss.; and S.W. SCHILL, *Public or Private Dispute Settlement? The Culture Clash in Investment Treaty Arbitration and its Impact on the Role of the Arbitrator*, in T. WEILER, F. BAETENS (eds.), *New Directions in International Economic Law. In Memoriam Thomas Wälde*, Leiden, 2011, p. 23 ss.

¹²² In order of publication: see R.ST.J. MACDONALD, *The Margin of Appreciation*, in R.ST.J. MACDONALD, F. MATSCHER, H. PETZOLD (eds.), *The European System for the Protection of Human Rights*, Dordrecht, 1993, p. 83 ss.; Y. ARAI-TAKAHASHI, *The Margin of Appreciation and the Principle of Proportionality in the Jurisprudence of the ECHR*, Antwerp, 2002; and J.A. SWEENEY, *Margin of Appreciation: Cultural Relativity and the European Court of Human Rights in the Post-Cold War Era*, in *Int. Comp. Law Quart.*, vol. 54, 2005, p. 459 ss.

¹²³ ICSID Case No. ARB/02/8, *Siemens A.G. v. Argentina*.

¹²⁴ Signed on 3 July 1991.

¹²⁵ ICSID Case No. ARB/03/23, *EDF International S.A., SAUR International S.A., and León Participaciones Argentinas S.A. v. Argentina*.

¹²⁶ ICSID Case No. ARB/03/9, *Continental Casualty Company v. Argentina*.

¹²⁷ UNCITRAL, *National Grid plc v. Argentina*.

In *Siemens* the tribunal rejected its application, underlining its sectorial character and declaring that it did not form part of international customary Law.¹²⁸ It was also unsuccessfully invoked in *National Grid* and in *EDF*, where it was not even considered.¹²⁹ Conversely, the tribunal used this concept in *Continental Casualty* to accept the application of the emergency clause established by Article XI of the BIT concluded between Argentina and the USA, and admit the exceptional derogation of the protection obligations that the agreement imposed on the host State.¹³⁰ However, the examination carried out by the tribunal only centred on whether the measure was appropriate and necessary, relegating the proportionality test that, in the doctrine of the ECtHR, forms the third and final element of evaluation.

On a general basis, it is worth underlining that the adaptation of the national margin of appreciation in investment arbitration does not adjust accurately to its conception in ECtHR case-law, as long as it must be assessed in light of all three above-mentioned conditions and it can also be made dependent on elements of an extrinsic nature (*consensus*). Therefore it is inadvisable to incorporate this notion directly into investment arbitration.¹³¹

3.1.2.4. Building Gateways Between Different Subsystems

Finally, these reflections do not prevent gateways being built from international human rights Law that enrich the legal *acquis* of the international regime of foreign

¹²⁸ The tribunal declared that «Argentina has pleaded that, when a State expropriates for social or economic reasons, fair market value does not apply because otherwise this would limit the sovereignty of a country to introduce reforms in particular of poor countries. Argentina has not developed this argument, nor justified on what basis Argentina would be considered a poor country, nor specified the reforms it sought to carry out at the time. Argentina in its allegations has relied on *Teemed* as an example to follow in terms of considering the purpose and proportionality of the measures taken. The Tribunal observes that these considerations were part of that tribunal's determination of whether an expropriation had occurred and not of its determination of compensation. The Tribunal further observes that Article I of the First Protocol to the European Convention on Human Rights permits a margin of appreciation not found in customary international law or the Treaty»: see Award of 17 January 2007, ICSID Case No. ARB/02/8, *Siemens A.G. v. Argentina*, para. 354.

¹²⁹ Award of 3 November 2008, UNCITRAL, *National Grid plc v. Argentina*, para. 247; and Award of 11 June 2011, ICSID Case No. ARB/03/23, *EDF International S.A., SAUR International S.A., and León Participaciones Argentinas S.A. v. Argentina*, para. 489.

¹³⁰ The tribunal held that «It may well be that in drafting the model text for Art. XI, the U.S. intended to protect first of all its own security interests in the light of geopolitical, strategic and defense concerns, typical of a world power, so as to be able to reserve the right to freeze assets of foreigners in the U.S. and to resort to unilateral economic sanctions that may conflict with its BIT obligations. This intention would not exclude from the protection provided by Art. XI different measures taken by the other Contracting Party in relation to emergency situations affecting essential security interests of a different nature of such other Contracting Party. These interests such as “ensuring internal security in the face of a severe economic crisis with social, political and public order implications” may well raise for such a party, notably for a developing country like Argentina, issues of public order and essential security interest objectively capable of being covered under Art. XI. An interpretation of a bilateral reciprocal treaty that accommodates the different interests and concerns of the parties in conformity with its terms accords with an effective interpretation of the treaty. Moreover, in the Tribunal's view, this objective assessment must contain a significant margin of appreciation for the State applying the particular measure: a time of grave crisis is not the time for nice judgments, particularly when examined by others with the disadvantage of hindsight»: see Award of 5 September 2008, ICSID Case No. ARB/03/9, *Continental Casualty Company v. Argentina*, para. 181.

¹³¹ The incorporation of this concept into investment arbitration is discussed in the doctrine: see W. BURKE-WHITE, A. VON STADEN, *The Need for Public Law*, cit., pp. 708-710; and A. KULICK, *Global Public Interest*, cit., pp. 193-195.

investment protection. In this regard, arbitral case-law has been permeable to some more general concepts used in public Law, such as the principles of legitimate expectations and proportionality.

In *Tecmed*, in line with ECtHR case-law relating to the protection of the right to private property,¹³² the arbitral tribunal analysed the proportionality of the measures adopted by the Mexican authorities and whether they were reasonable in light of the legitimate expectations of the foreign investor,¹³³ concluding that they were of a discriminatory and expropriatory nature.¹³⁴ In *Yukos*, the ECtHR considered that the process of liquidation of the oil company's assets, although legal, had been disproportionate;¹³⁵ a conclusion that was similar to the one reached by the arbitral tribunals that heard this case, yet again under the principle of proportionality.¹³⁶

These categories of public Law admit transverse application in different legal subsystems such as international investment Law, international human rights Law and even EU Law, provided that arbitral tribunals are capable of applying them without passing on any «self-contained element» created specifically for a legal subsystem.¹³⁷ In contrast, categories of a specific character (national margin of appreciation), are more complicated to fit into other subsystems, since their scope is strongly conditioned by the characteristics of the normative sector where they usually operate.

3.1.3. *The Indirect Integration of Legal Contents*

Along with the phenomenon of direct integration of categories and undetermined legal concepts into international investment Law, the indirect integration of legal contents is also noteworthy. This takes place when the conclusions reached regarding compliance with a specific primary rule of international Law in a normative sector, can be extrapolated indirectly and by analogy to another normative sector.

The duty to provide investors with fair and equitable treatment constitutes an undetermined legal concept,¹³⁸ violation of which is decided by way of actions that are attributable to a State which, on occasions, come face to face with some of the categories recognised by international human rights Law, such as the right to due process enshrined in

¹³² Award of 23 May 2003, ICSID Case No. ARB (AF)/00/2, *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, para. 122.

¹³³ The notion of legitimate expectations was discussed in the Separate Opinion prepared by Th. Wälde in *International Thunderbird*: see Separate Opinion of 1 December 2005, UNCITRAL, *International Thunderbird Gaming Corporation v. United Mexican States*.

¹³⁴ Award of 23 May 2003, ICSID Case No. ARB (AF)/00/2, *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, para. 149.

¹³⁵ ECtHR 2011, No. 14902/04, *OAO Neftyanaya Kompaniya Yukos v. Russia*, §§ 646-655.

¹³⁶ Award of 12 September 2010, SCC Case No. V079/2005, *RosInvestCo UK Ltd. v. Russia*, para. 524; and Award of 20 July 2012, SCC Case No. 24/2007, *Quasar de Valores SICAV S.A., Orgor de Valores SICAV S.A., GBI 9000 SICAV S.A. and ALOS 34 S.L. v. Russia*, paras. 102, 105, 116, 125 and 171.

¹³⁷ It is worth recalling the challenges arising from the direct integration of undetermined legal concepts such as «proportionality»: see S.H. NIKIEMA, *L'expropriation indirecte en droit international des investissements*, Paris, 2012, pp. 261-265.

¹³⁸ K. YANNACA-SMALL, *Fair and Equitable Treatment Standard: Recent Developments*, in A. REINISCH (ed.), *Standards of Investment Protection*, Oxford, 2008, p. 111 ss., pp. 118-129; and N.J. CALAMITA, *International Human Rights and the Interpretation of International Investment Treaties: Constitutional Considerations*, in F. BAETENS (ed.), *Investment Law within International Law. Integrationist Perspectives*, Cambridge, 2013, p. 164 ss., pp. 168-171.

Article 6.1 of the EConHR.¹³⁹ Accordingly, in *Mondev* the arbitral tribunal considered whether the concession of immunity from jurisdiction to the *Boston Redevelopment Authority* before the courts of the State of Massachusetts was contrary to the standard of fair and equitable treatment, taking into account the interpretation made by the ECtHR of the right to effective legal protection.¹⁴⁰ However, in *Oostergetel* the delays in the administration of justice experienced by foreign investors were not considered to be a breach of the standard of denial of justice, with case-law of the Strasbourg court as one of the factors that was taken into account.¹⁴¹ Finally, in *Rompotrol*, the arbitral tribunal accepted that, in certain exceptional cases, determination of the standard of fair and equitable treatment could be made by reference to concepts from other normative sectors such as international human rights Law developed in the context of the European regional subsystem.¹⁴²

The indirect integration of legal contents is a coordination method that is especially useful for dealing with challenges that arise from disputes such as *Yukos* or *Chevron*, which are conducted before different adjudication bodies in separate normative sectors. The proliferation of international judicial bodies and the lack of mechanisms that enable the principle of *lis pendens* to be applied between different legal subsystems¹⁴³ favour the phenomenon of parallel litigation, that is, legal proceedings arising from the same causes that are conducted in international investment Law, as well as in other sectors of the

¹³⁹ Article 6.1 of the EConHR envisages that «In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.»

¹⁴⁰ However, the tribunal maintained a very cautious approach when deciding on the analogical application of the ECtHR case-law, and recalled that its decisions «concern the “right to a court”, an aspect of the human rights conferred on all persons by the major human rights conventions and interpreted by the European Court in an evolutionary way. They emanate from a different region, and are not concerned, as Article 1105(1) of NAFTA is concerned, specifically with investment protection. At most, they provide guidance by analogy as to the possible scope of NAFTA’s guarantee of “treatment in accordance with international law, including fair and equitable treatment and full protection and security”»: see Award of 11 October 2002, ICSID Case No. ARB(AF)/99/2, *Mondev International Ltd. v. United States of America*, para. 144.

¹⁴¹ When assessing if the delays in the administration of justice could constitute a breach of the investment treaty, the tribunal held that «Possible delays appear to have been explained by the complexity of the case due to the large number of creditors, as well as by BCT’s (the investor) own conduct. Indeed, BCT lodged many unsubstantiated complaints with which the Court had to deal. This meant that the file was often not available to the judge. Moreover, the Claimants did not avail themselves of the procedural opportunity to complain about the delays that the Respondent’s expert identified. Finally, *the length of the proceedings (two years), cannot be deemed a denial of justice under international law, as the practice of investment tribunals and the ECHR shows.*»: see Award of 23 April 2012, UNCITRAL, *Jan Oostergetel and Theodora Laurentius v. Slovakia*, para. 208 (Emphasis added).

¹⁴² The tribunal found that «The category of materials for the assessment in particular of fair and equitable treatment is not a closed one, and may include, in appropriate circumstances, the consideration of common standards under other international regimes (including those in the area of human rights), if and to the extent that they throw useful light on the content of fair and equitable treatment in particular sets of factual circumstances; the examination is however very specific to the particular circumstances, and defies definition by any general rule»: see Award of 6 May 2013, ICSID Case No. ARB/06/3, *The Rompotrol Group N.V. v. Romania*, para. 172.

¹⁴³ The doctrine of *lis pendence* was considered by the Permanent Court of International Justice (PCIJ) as a principle «generally accepted (...) the object of which is to prevent the possibility of conflicting judgments»: see Judgment of 25 August 1925, PCIJ, Series A, No. 6, *Case Concerning Certain German Interests in Polish Upper Silesia*, p. 20.

international legal order related to the protection of public interests. This question is one of the main contributions of a procedural character that stands out and, together with the intervention of non-State actors in investment arbitration, one that will be reviewed in the following pages.

3.2. *Procedural Formulas Fostering Legal Coordination*

3.2.1. *Parallel Proceedings and International Adjudication*

In this section we analyse some of the problems arising from parallel proceedings in international adjudication.¹⁴⁴ In particular, we focus on the interactions between different international tribunals (horizontal perspective), as well as the interplay between international tribunals and domestic courts (vertical perspective).

3.2.1.1. *Parallel Litigation and Horizontal Dialogue Between Jurisdictions*

The expropriation of the oil company *Yukos* by the Russian government during 2003-2007 has given rise to one of the most active legal sagas in the contemporary international legal order. In the first place, *Yukos*¹⁴⁵ and its major individual shareholder¹⁴⁶ filed several applications against the Russian Federation before the ECtHR, alleging violation of various rights recognised by the ECHR. Secondly, the majority shareholders,¹⁴⁷ as well as some of the minority shareholders,¹⁴⁸ initiated investment arbitrations in order to obtain compensation for the losses they had suffered after the expropriation and subsequent liquidation of *Yukos*. The decisions and awards issued until now by the ECtHR and investment tribunals make an excellent testing ground to evaluate the impact of parallel litigation in the international legal order.¹⁴⁹

Analysis of this body of case-law produces a couple of considerations that highlight the technical complexity involved in maintaining dialogue between jurisdictions established in different normative sectors and that are, therefore, competent to interpret international treaties containing legal obligations of a diverse nature and scope.

Firstly, all of the judicial entities have been aware of the substantive limits established by the respective international treaties and the sectorial scope of their decisions. As a consequence, they have examined the facts presented by the parties using the categories and standards that pertain to each normative sector only.

¹⁴⁴ For a general overview of the challenges and problems arising from parallel litigation in international adjudication: see A. DEL VECCHIO, *International Courts and Tribunals between Globalization and Localism*, The Hague, 2013, pp. 186-215.

¹⁴⁵ ECtHR 2011, No. 14902/04, *OAO Neftyanaya Kompaniya Yukos v. Russia*.

¹⁴⁶ ECtHR 2011, No. 5829/04, *Khodorkovskiy v. Russia*; and ECtHR 2013, No. 11082/06 and No. 13772/05, *Khodorkovskiy and Lebedev v. Russia*.

¹⁴⁷ PCA Case No. AA 226, *Hulley Enterprises Limited (Cyprus) v. Russia*; PCA Case No. AA 227, *Yukos Universal Limited (Isle of Man) v. Russia*; and PCA Case No. AA 228, *Veteran Petroleum Limited (Cyprus) v. Russia*.

¹⁴⁸ SSC Case No. V079/2005, *RosInvestCo UK Ltd. v. Russia*; and SSC Case No. 24/2007, *Quasar de Valores SICAV S.A., Orgor de Valores SICAV S.A., GBI 9000 SICAV S.A. and ALOS 34 S.L. v. Russia*.

¹⁴⁹ Parallel litigation was also at stake in *Libananco*, where two litigations were brought before the ECtHR and an investment tribunal, respectively. However, neither the ECtHR nor the arbitral body accepted their jurisdictions: see ECtHR 2011 (dec.), No. 18240/03, *Kemal Uzam and others v. Turkey*; and Award of 2 September 2011, ICSID Case No. ARB/06/8, *Libananco Holdings Co. Limited v. Turkey*.

The violations of private property rights alleged before the ECtHR were considered in light of the concept of the national margin of appreciation which, as was mentioned in the previous section, is a flexible standard and which, in the case of Article 1 of Protocol I to the Convention for the Protection of Human Rights and Fundamental Freedoms (Protocol I),¹⁵⁰ has been interpreted in a manner that is very deferent to the principle of state sovereignty.¹⁵¹

For this reason, when the fine imposed on *Yukos* and the liquidation process undertaken by the Russian authorities were examined for conformity with the EConHR, some of the actions carried out by the Russian Federation that the arbitral tribunals had considered contrary to the BITs¹⁵² were included by the ECtHR in the national margin of appreciation and, accordingly, were declared in conformity with the EConHR. In particular, the ECtHR confirmed the interpretation made by the Russian authorities of its domestic Law in all matters relating to the procedure followed to calculate the fines and declared that it was of a non-discriminatory nature.¹⁵³ This result was rejected by the arbitral tribunals in *RosInvestCo* and *Quasar de Valores*, which centred their analysis on the harmful effects produced by these measures on foreign investment and arrived at the opposite conclusion.¹⁵⁴

Secondly, a completely different methodological approach can be appreciated in the analysis made by these judicial bodies. Whereas the ECtHR declared that, in general, it could not be concluded that the expropriation was aimed at the intentional destruction of the company itself¹⁵⁵ and made an individual analysis of Articles 6, 14 and 18 of the EConHR and Article 1 of Protocol I, the arbitral tribunals decided that the obligations envisaged in the BITs had not been fulfilled due to the «cumulative effect»¹⁵⁶ of the different actions carried out by the Russian Federation.

¹⁵⁰ Signed on 20 March 1952.

¹⁵¹ ECtHR Judgment of 23 September 1982, Series A, No. 52, *Sporrong and Lönnroth v. Sweden*, §§ 69-73; ECtHR Judgment of 8 July 1986, Series A, No. 102, *Lithgow and others v. United Kingdom*, § 122; and ECtHR 2010 [GC], No. 24768/06, *Perdigao v. Portugal*, § 67.

¹⁵² *RosInvestCo* was based on the BIT concluded between the United Kingdom and the Russian Federation (signed on 6 April 1989) and *Quasar de Valores* in the BIT concluded between Spain and the Russian Federation (signed on 26 October 1990).

¹⁵³ ECtHR 2011, No. 14902/04, *OAO Neftyanaya Kompaniya Yukos v. Russia*, §§ 598-599 and §§ 613-616.

¹⁵⁴ Award of 12 September 2010, SCC Case No. V079/2005, *RosInvestCo UK Ltd. v. Russia*, para. 452; and Award of 20 July 2012, SCC Case No. 24/2007, *Quasar de Valores SICAV S.A., Orgor de Valores SICAV S.A., GBI 9000 SICAV S.A. and ALOS 34 S.L. v. Russia*, paras. 51-52, 55 and 81-82.

¹⁵⁵ The ECtHR held that «Regard being had to the case file and the parties' submissions, including the applicant company's references to the allegedly political motivation behind the prosecution of the applicant company and its owners and officials, the Court finds that it is true that the case attracted massive public attention and that comments of different sorts were made by various bodies and individuals in this connection. The fact remains, however, that those statements were made within their respective context and that as such they are of little evidentiary value for the purposes of Article 18 of the Convention. Apart from the findings already made earlier, the Court finds no indication of any further issues or defects in the proceedings against the applicant company which would enable it conclude that there has been a breach of Article 18 of the Convention on account of the applicant company's claim that the State had misused those proceedings with a view to destroying the company and taking control of its assets»: see ECtHR 2011, No. 14902/04, *OAO Neftyanaya Kompaniya Yukos v. Russia*, § 665.

¹⁵⁶ Award of 12 September 2010, SCC Case No. V079/2005, *RosInvestCo UK Ltd. v. Russia*, paras. 112 and 621; and Award of 20 July 2012, SCC Case No. 24/2007, *Quasar de Valores SICAV S.A., Orgor de Valores SICAV S.A., GBI 9000 SICAV S.A. and ALOS 34 S.L. v. Russia*, paras. 184-186.

Using the above-mentioned approach, the ECtHR considered that freezing the assets of *Yukos*, which had prevented the company from paying the tax sanctions imposed upon it and had given rise to a subsequent auction of its assets, was not contrary to Russian Law and therefore could not be considered in itself to be a violation of the EConHR.¹⁵⁷ In contrast, to establish non-compliance with BITs, arbitral tribunals did not take into consideration whether the measure was lawful or not (as did the ECtHR), they made an evaluation of all of its effects taken together. In *Quasar de Valores* where, unlike in *RosInvestCo*, the contents of the ECtHR «*Yukos* judgment» were already known, the arbitral tribunal insisted on the need to avoid a «compartmentalised»¹⁵⁸ approach like the one adopted by the Strasbourg Court.¹⁵⁹

In short, the saga of judicial decisions issued in *Yukos* illustrates the complex dialogue that is developing horizontally between the judicial bodies established by the different international legal subsystems. Arbitral tribunals, as well as the ECtHR, have assured the internal coherence of the subsystem where they operate, respecting their legal categories and maintaining an open and constructive position¹⁶⁰ towards the phenomenon of parallel litigation with remarkable prudence.¹⁶¹

¹⁵⁷ The ECtHR found that «As regards the lawfulness of the measures in question, the Court has no reason to doubt that throughout the proceedings the actions of various authorities had a lawful basis and that the legal provisions in question were sufficiently precise and clear to meet the Convention standards concerning the quality of law. The attachment, freezing and seizure orders were reviewed by the domestic courts and found to have been lawful. Likewise, the 7% enforcement fee was upheld by the domestic courts and cannot be said to have been selective, given the domestic case-law cited by the Government. As regards the decisions leading to the forced sale of OAO Yuganskneftegaz at auction and the auction process itself, the Court notes that they too were reviewed and upheld by the domestic courts as lawful (...) and there is nothing in the case file or the parties' submissions to cast doubt on these conclusions. The only question that remains is whether the enforcement measures were proportionate to the legitimate aim pursued»: see ECtHR 2011, No. 14902/04, *OAO Neftyanaya Kompaniya Yukos v. Russia*, § 647.

¹⁵⁸ The doctrine of «cumulative effect» has also been invoked in *Rompetrol*, where the arbitral tribunal considered that the host State had committed irregularities during the criminal proceedings instituted against certain individuals linked to the claimant company. This conduct qualified as a violation of the fair and equitable treatment standard, notwithstanding that no compensation was awarded to the claimant: see Award of 6 May 2013, ICSID Case No. ARB/06/3, *The Rompetrol Group N.V. v. Romania*, paras. 278-279.

¹⁵⁹ In *Quasar de Valores* the arbitral tribunal found that «the issue is not whether the rejection of the management restructuring plan, and the decision to liquidate, fully complied with Russian law or practice as a technical matter. Rather, the issue is how these events are fairly to be characterised. Judged in abstract, the Respondent's submissions to justify the preferences of the Yukos creditors (i.e. immediate liquidation and recovery of their claims) are understandable. But the Tribunal's enquiry cannot be compartmentalized in this way and, as set out later in this section, once set against the wider context, the choices and actions of Yukos' main creditors clearly appear part of an overall confiscatory scheme»: see Award of 20 July 2012, SCC Case No. 24/2007, *Quasar de Valores SICAV S.A., Orgor de Valores SICAV S.A., GBI 9000 SICAV S.A. and ALOS 34 S.L. v. Russia*, para. 147.

¹⁶⁰ Therefore, after recognising violation of some precepts of the EConHR in *Yukos*, the ECtHR left the matter of compensation open, which would allow the parties to reach an agreement in light of the pending decisions of the arbitral tribunals of the Permanent Court of Arbitration in *Hulley, Yukos* and *Veteran*: see ECtHR 2011, No. 14902/04, *OAO Neftyanaya Kompaniya Yukos v. Russia*, § 671.

¹⁶¹ The arbitral tribunal in *Southern Pacific Properties* embraced the «doctrine of comity» by declaring «When the jurisdictions of two unrelated and independent tribunals extend to the same dispute, there is no rule of international law which prevents either tribunal from exercising jurisdiction. However, in the interest of international judicial order, either of the tribunals may, in its discretion and as a matter of comity, decide to stay the exercise of its jurisdiction pending a decision by the other tribunal»: see Decision on Jurisdiction of 27 November 1985, ICSID Case No. ARB/84/3, *Southern Pacific Properties (Middle East) Limited v. Egypt*, para. 84.

3.2.1.2. Parallel Litigation and Vertical Conflict of Jurisdictions

At the opposite extreme is *Chevron*, a dispute that arose out of the implementation of the agreements for exploration and production of hydrocarbons between Ecuador and *Texaco* (property of *Chevron* since 2001) and the responsibility for the damage caused by an oil spill in the Amazon rainforest. A few issues from this complicated litigation that are relevant to the subject matter of this study are worth bearing in mind.

First of all, as for the relations between international Law and domestic Law, *Chevron* raises important challenges.¹⁶² Indeed, in an investment arbitration initiated against Ecuador, still pending, *Chevron* argues that the agreements reached in 1995 with the Ministry of Energy and Mines and with *Petroecuador* exonerate the company from responsibility for environmental damages.

In its decision of 17 September 2013, an arbitral tribunal administered by the Permanent Court of Arbitration (PCA) accepted this line of argument partially and on an interim basis.¹⁶³ In other words, the decision of the arbitral tribunal does not only quarantine the legal proceedings undertaken by private individuals in Ecuador against *Chevron* («Lago Agrio litigation»),¹⁶⁴ but could also even question their conformity with the principle of primacy of international Law over domestic Law.

Secondly, from the perspective of international human rights Law, it cannot be ruled out that part of this case may end up shifting towards the Inter-American subsystem of protection of human rights. Indeed, on 9 February 2012, the affected communities filed a petition for precautionary measures with the Inter-American Commission on Human Rights, requesting the adoption of measures intended to prevent Ecuador from complying with the interim measures awarded by the arbitral tribunal.¹⁶⁵

Development of parallel litigation presents challenges of a technical nature for international tribunals, from a material standpoint. In many cases, they have to deal with interim or final decisions invoked by the parties, awarded on the basis of the same conduct by other adjudication bodies operating in different normative sectors. This exercise of judicial revision requires pondering the legal impact of decisions rendered by international and national jurisdictions with prudence and caution. As is apparent from *Yukos*, this can take place successfully as long as judicial bodies remain true to the concepts, categories and standards created and developed in each legal subsystem.

Chevron, however, raises an additional problem, that of the vertical relations between international tribunals and domestic courts, notwithstanding that Article 41.1 of the ICSID

¹⁶² J.E. VIÑUALES, *The Environmental Regulation of Foreign Investment Schemes under International Law*, in P.-M. DUPUY, J.E. VIÑUALES (eds.), *Harnessing Foreign Investment to Promote Environmental Protection*, Cambridge, 2013, p. 273 ss., pp. 312-313.

¹⁶³ First Partial Award on Track I of 17 September 2013, PCA Case No. 2009-23, *Chevron Corporation and Texaco Petroleum Corporation v. Ecuador*, paras. 106-107.

¹⁶⁴ The Provincial Court of Sucumbíos issued a US\$19 billion judgment on 14 February 2011 against *Chevron* in favor of the applicants. The National Court of Justice of Ecuador ratified this decision, whose enforcement has been unsuccessfully attempted in Argentina, Brazil, Canada, and the USA, in November 2013, notwithstanding that the damages were cut in half to US\$9.5 billion.

¹⁶⁵ The petition was withdrawn a month later: see *Investment Arbitration Reporter*, vol. 5-5, 2012; and «How Chevron v. Ecuador is Pushing the Boundaries of Arbitral Authority», *Investment Treaty News*, of 13 April 2012, available at: <http://www.iisd.org/itn/2012/04/13/case-note-how-chevron-v-ecuador-is-pushing-the-boundaries-of-arbitral-authority/> (accessed on 7 April 2014).

Convention sets forth that the arbitral body is the sole judge of its competence and certain investment tribunals have already resisted attempts made by domestic courts to deny their jurisdiction.¹⁶⁶

In any event, this issue should be decided in light of the principle of primacy of public international Law, enshrined in Article 27 of the VCLT and which can ultimately be settled at the inter-State level, should the State of nationality of the investor exercise diplomatic protection against the host State that refuses to comply with the decisions rendered by an international tribunal, pursuant to Article 27.1 of the ICSID Convention. Investment arbitration and mechanisms to protect public interests are both autonomous and complementary instruments of protection.

As a result of the above, it does not seem that a response to parallel litigation must necessarily come by way of flexibilisation of the requirements to admit an exception to the *lis pendens* rule,¹⁶⁷ but rather because judicial bodies limit their jurisdiction and competence to the obligations recognised in each normative sector and, at the same time, can maintain a prudent and constructive dialogue with other international dispute settlement organs as well as with domestic jurisdictions.

3.2.2. *The Intervention of Non-State Actors in Investment Arbitration*

The interaction between public interests and the protection of foreign investments, from the procedural standpoint, has also been reinforced by the intervention of private individuals in investment arbitration as *amicus curiae*. Specialised Non-Governmental Organisations (NGO), national associations and communities affected by an investment project may provide an arbitral tribunal with relevant information about aspects and questions of public interest linked to the protection of human rights and the environment.¹⁶⁸ In any event, for various reasons that are analysed below, this type of intervention is limited.

In the first place, it has not been provided for in a general and express manner in investment protection agreements. It is a procedural practice introduced originally on a case-by-case basis, and only in the regional sphere of NAFTA,¹⁶⁹ even if it has been applied over the past few years in the framework of various arbitral proceedings initiated under the Rules of Arbitration of the International Centre for Settlement of Investment Disputes (ICSID). Through the revision of the ICSID Rules of Procedure for Arbitration in 2006 third-party intervention was finally accepted within the ICSID system.¹⁷⁰ Since July 2013, it

¹⁶⁶ CH. SCHREUER, *Interaction of International Tribunals and Domestic Courts in Investment Law*, in A.W. ROVINE (ed.), *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers (2010)*, Leiden, 2011, p. 71 ss., p. 88.

¹⁶⁷ An optimal solution in cases where parallel litigation takes place within international investment Law: see A. REINISCH, *The Issues Raised by Parallel Proceedings and Possible Solutions*, in M. WAIBEL, A. KAUSHAL, K.-H. LIZ CHUNG, C. BALCHIN (eds.), *The Backlash against Investment Arbitration: Perceptions and Reality*, Alphen aan den Rijn, 2010, p. 113 ss.

¹⁶⁸ M. BENZING, *Community Interests in the Procedure of International Courts and Tribunals*, in *Law Prac. Int. C. Trib.*, 2006, p. 369 ss., pp. 410-406; and E. DE BRABANDERE, *NGOs and the 'Public Interest': The Legality and Rationale of Amicus Curiae Interventions in International Economic and Investment Disputes*, in *Chic. Jour. Int. Law*, vol. 12-1, 2011, p. 85 ss.

¹⁶⁹ Decision of 15 January 2001, UNCITRAL, *Methanex Corporation v. United States of America*; and Decision of 17 October 2001, UNCITRAL, *United Postal Service, Inc. v. Canada*.

¹⁷⁰ Rule 37.2 of the ICSID Rules of Procedure for Arbitration sets forth that «After consulting both parties, the Tribunal may allow a person or entity that is not a party to the dispute (in this Rule called the “non-

also forms part of the procedural rules of the United Nations Commission on International Trade Law (UNCITRAL).¹⁷¹ All of these rules establish similar criteria to select participants, only admitting those who are pursuing a public interest, have experience and are independent.¹⁷²

Second, intervention as *amicus curiae* is limited because only legal or factual arguments that contribute specific knowledge about matters related to the arbitration may be presented to the tribunal. In practice, the material scope of this faculty has been interpreted restrictively and, with a few exceptions, participants are not allowed to make reference to matters not disputed by the parties,¹⁷³ or that deal with aspects of jurisdiction¹⁷⁴ or admissibility.¹⁷⁵

Third, by considering the impact that this intervention produces on the final decision adopted by the tribunal also makes its limited character apparent. Express references made to arguments presented by third parties in a decision or in an award are usually scarce. Nevertheless, out of the ten cases concluded up until now where this type of procedural intervention has been accepted,¹⁷⁶ only two have been decided in favour of the investor,¹⁷⁷

disputing party”) to file a written submission with the Tribunal regarding a matter within the scope of the dispute. In determining whether to allow such a filing, the Tribunal shall consider, among other things, the extent to which: (a) the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties; (b) the non-disputing party submission would address a matter within the scope of the dispute; (c) the non-disputing party has a significant interest in the proceeding. The Tribunal shall ensure that the non-disputing party submission does not disrupt the proceeding or unduly burden or unfairly prejudice either party, and that both parties are given an opportunity to present their observations on the non-disputing party submission».

¹⁷¹ The UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration came into effect on 1 April 2014. It is important to note that these rules not only apply to disputes arising out of treaties concluded prior to 1 April 2014 (the relevant date), but also apply in relation to disputes arising out of treaties concluded prior to the relevant date, when parties to the treaty, or disputing parties, agree to their application. In particular, Rule 5 envisages that «1. The arbitral tribunal shall, subject to paragraph 4, allow, or, after consultation with the disputing parties, may invite, submissions on issues of treaty interpretation from a non-disputing Party to the treaty. 2. The arbitral tribunal, after consultation with the disputing parties, may allow submissions on further matters within the scope of the dispute from a non-disputing Party to the treaty. In determining whether to allow such submissions, the arbitral tribunal shall take into consideration, among other factors it determines to be relevant, the factors referred to in article 4, paragraph 3, and, for greater certainty, the need to avoid submissions which would support the claim of the investor in a manner tantamount to diplomatic protection. 3. The arbitral tribunal shall not draw any inference from the absence of any submission or response to any invitation pursuant to paragraphs 1 or 2. 4. The arbitral tribunal shall ensure that any submission does not disrupt or unduly burden the arbitral proceedings, or unfairly prejudice any disputing party. 5. The arbitral tribunal shall ensure that the disputing parties are given a reasonable opportunity to present their observations on any submission by a non-disputing Party to the treaty.»

¹⁷² Decision of 17 March 2006, ICSID Case No. ARB/03/17, *Suez, Sociedad General de Aguas de Barcelona S.A., and Inter-Aguas Servicios Integrales del Agua S.A. v. Argentina*, paras. 30-33; and Order of 12 February 2007, ICSID Case No. ARB/03/19, *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. Argentina*, para. 18.

¹⁷³ Decision of 15 January 2001, UNCITRAL, *Methanex Corporation v. United States of America*, para. 36; and Decision of 1 August 2003, UNCITRAL, *United Postal Service, Inc. v. Canada*, paras. 5 and 9.

¹⁷⁴ In *Chevron*, however, the intervening NGOs put forward arguments on jurisdiction: see *Amicus curiae* arguments of 5 November 2010, PCA Case No. 2009-23, *Chevron Corporation and Texaco Petroleum Corporation v. Ecuador*, pp. 19-29.

¹⁷⁵ Decision of 17 October 2001, UNCITRAL, *United Postal Service, Inc. v. Canada*, para. 81.

¹⁷⁶ In four arbitrations, the arbitral tribunal rejected *amicus curiae* intervention: see Award of 21 October 2005, ICSID Case No. ARB/02/3, *Aguas del Tunari, S.A. v. Bolivia*; Award on Responsibility of 30 July 2010, ICSID

whereas eight have been favourable for the host State.¹⁷⁸ These figures would lead to the conclusion that, in disputes where third parties intervene as *amicus curiae*, arbitral tribunals seem to be more receptive towards the position of the host State, influenced to a greater or lesser degree by the observations of public interest presented by *amicus curiae*.

Fourth and finally, its limited character is highlighted as can be seen from the way in which the intervention made as *amicus curiae* by an international Organisation such as the EU, through the European Commission, has had a greater impact on investment arbitration than interventions made by NGOs or national associations. In this respect it is interesting to compare *Suez*,¹⁷⁹ where the tribunal dealt with the arguments presented by intervening NGOs in just one paragraph, with *Electrabel*, where the arbitral tribunal devoted various parts of the award to commenting on the observations related to jurisdiction and applicable Law presented by the European Commission.¹⁸⁰ This different treatment can be explained by the diverse international legal status of the entity intervening as *amicus curiae*.

Despite the limited powers that *amicus curiae* have in international investment Law, this form of procedural intervention contributes to improve transparency,¹⁸¹ as well as subduing growing opposition to investment arbitration cultivated in the public opinion. Without prejudice to the problems of a material and procedural nature raised,¹⁸² *amicus curiae* intervention promotes a greater balance between the arguments presented by the

Case No. ARB/03/19, *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. Argentina*; Award of 14 June 2013, UNCITRAL, *Apotex Inc. v. United States of America*; and ICSID Case No. ARB/10/15, *Bernhard von Pezold and others v. Zimbabwe*. Moreover, there are currently five pending cases in which *amicus curiae* intervention was dealt with by the arbitral tribunal: see Award of 11 December 2013, ICSID Case No. ARB/05/20, *Ioan Micula, Viorel Micula, S.C. European Food S.A., S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania* (subject to an annulment proceeding); ICSID Case No. ARB/07/19, *Electrabel S.A. v. Hungary*; ICSID Case No. ARB/09/12, *Pac Rim Cayman LLC v. El Salvador*; PCA Case No. 2009-23, *Chevron Corporation and Texaco Petroleum Company v. Ecuador*; and ICSID Case No. ARB(AF)/12/1, *Apotex Holdings Inc. and Apotex Inc. v. United States of America*.

¹⁷⁷ Award on Responsibility of 30 July 2010, ICSID Case No. ARB/03/17, *Suez, Sociedad General de Aguas de Barcelona S.A., and Inter-Aguas Servicios Integrales del Agua S.A. v. Argentina*; and Award of 7 December 2012, PCA Case No. 2008-13, *Achmea B.V. v. Slovakia*.

¹⁷⁸ Final Award of 9 August 2005, UNCITRAL, *Methanex v. United States of America*; Award of 24 May 2007, UNCITRAL, *United Postal Service, Inc. v. Canada*; Award of 24 July 2008, ICSID Case No. ARB/05/22, *Bivater Gauff (Tanzania) Ltd. v. Tanzania*; Award of 8 June 2009, UNCITRAL, *Glamis Gold, Ltd. v. United States of America*; Award of 31 March 2010, UNCITRAL, *Merril & Ring Forestry L.P. v. Canada*; Award of 4 August 2010, ICSID Case No. ARB(AF)/07/01, *Piero Foresti, Laura de Carli and others v. South Africa*; Award of 23 September 2010, ICSID Case No. ARB/07/22, *AES Summit Generation Limited and AES-Tisza Erőmű Kft v. Hungary*; and Award of 12 January 2011, UNCITRAL, *Grand River Enterprises Six Nations, Ltd., and others v. United States of America*.

¹⁷⁹ Award on Responsibility of 30 July 2010, ICSID Case No. ARB/03/19, *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. Argentina*, para. 262.

¹⁸⁰ Decision on Jurisdiction, Applicable Law and Liability of 30 November 2012, ICSID Case No. ARB/07/19, *Electrabel S.A. v. Hungary*, Parts IV and V.

¹⁸¹ B. STERN, *Civil Society's Voice in International Economic Disputes*, in *For. Invest. Law Jour.*, vol. 22-2, 2007, p. 280 ss.; J.A. VANDUZER, *Enhancing the Procedural Legitimacy of Investor-State Arbitration Through Transparency and Amicus Curiae Participation*, in *McGill Law Jour.*, vol. 52, 2007, p. 681 ss.; and L. BASTIN, *Amici Curiae in Investor-State Arbitration: Eight Recent Trends*, in *Arb. Inter.*, vol. 30-1, 2014, p. 125 ss.

¹⁸² Such as the erosion of the consensual nature of investment arbitration, the increase in procedural costs, delays in the arbitral proceedings or safeguarding confidentiality: see K. FACH GÓMEZ, *Rethinking the Role of Amicus Curiae in International Investment Arbitration: How to Draw the Line Favorably for the Public Interest*, in *Fordh. Int. Law Jour.*, vol. 35, 2012, p. 510 ss., pp. 548-554; and L. BASTIN, *The Amicus Curiae in Investor-State Arbitration*, in *Cambridge Jour. Intern. Comp. Law*, vol. 1-3, 2012, p. 208 ss., pp. 226-233.

investor and the host State and, therefore, favour legal debate regarding the inclusion of public interest in international investment Law.

4. *Final Remarks*

From the standpoint of the formation of conventional rules on the protection of foreign investments, an emerging process of institutionalisation and material expansion stands out, through concluding multilateral treaties that cover different issues (NAFTA and CAFTA-DR), including the protection of investments and public interest. The EU must follow this trend by exercising competences in the field of foreign direct investment protection after the entry into force of the Lisbon Treaty.

This phenomenon impacts on the progressive development of the sources of international investment Law, as well as the relations between custom and international treaties insofar as concluding multilateral treaties that are more and more homogeneous and of a broader scope could, in the future, give rise to confirmation of a *consensus generalis* revealing the existence of a nucleus of customary obligations in the field of international investment Law. In short, the unity of this legal subsystem is favoured by means of this progressive institutionalisation process and material expansion, creating a more uniform set of obligations for the protection of foreign investments.

The institutionalisation of the treaty-based regime for the protection of foreign investments and the incorporation of public interests into it considerably alter the relational paradigm around which international investment Law has been organised. Although it is true that the incorporation of public interest into bilateral and multilateral agreements on protection of investments is partial, basically affecting labour and environmental rights, it is no less so that this interplay makes the creation of legal coordination techniques necessary to ensure the systematic interpretation of these treaties, the contents of which are increasingly complex. From a material point of view, some BITs provide for the possibility of invoking the principle of systemic integration, whereas certain multilateral free trade agreements (CAFTA-DR) codify the principle of *lex superior* and, in the event of a conflict, the chapters dedicated to protecting public interest prevail over the chapter that contains the obligations to protect investments.

Interactions between international investment Law, international human rights Law and international environmental Law can also be seen in investment arbitration. These interactions can be analysed from a substantive and procedural perspective.

The interactions of a substantive nature between the different legal subsystems relate to a presumption of compatibility between all of them, endorsed by both the IACtHR (*Samboyanaxá*) and by investment tribunals (*Suez*), as in general, investment treaties do not set out homogeneous legal mechanisms to settle any conflict between the international regime of foreign investment protection and public interests. The presumed compatibility between subsystems relegates the consideration of international human rights Law and international environmental Law as being applicable Law in investment arbitration to a marginal role.

The limited acceptance of the principle of systemic integration in international investment Law requires the use of other legal coordination techniques. Accordingly, this opens up the possibility of establishing «gateways» through concepts and categories

generally used in public Law, such as legitimate expectations (*Tecmed*) or the principle of proportionality (*Yukos*). Indirect integration of legal contents is also frequent in investment arbitration, that is, using standards of protection of public interests to establish a failure to fulfil the obligations of protection of foreign investments (violation of the right to an effective legal remedy in international human rights Law can give rise to a denial of justice contrary to the obligation to provide fair and equitable treatment to investors recognised in international investment Law). Furthermore, these «gateways» between different subsystems promote legal dialogue in cases of parallel litigation. More caution should be used when the intention is to apply autonomous notions created in a praetorian way from international human rights Law, such as the national margin of appreciation, automatically and by analogy, because they have their own specific characteristics that make their adaptation to another legal subsystem extremely complex (*Continental Casualty*).

The interactions of a procedural nature reflect, first of all, the need to overcome the risks arising from the proliferation of adjudication bodies in international Law through dialogue between international jurisdictions. The possibility of an investor initiating parallel proceedings before different dispute settlement bodies, in both international investment Law and international human rights Law, allows the phenomenon of sectorialisation of public international Law to be channelled and there should be no problems of horizontal compatibility, as long as arbitral tribunals restrict their activity to the settlement of disputes originating in the normative regime where they operate and with the instruments it provides (*Yukos*). What is more, this diversity of dispute settlement mechanisms enriches the international regime, favouring effective judicial protection. In the presence of a vertical conflict between international and national judicial bodies (*Chevron*), it may be necessary to resort to mechanisms of an inter-State character, such as diplomatic protection, to elucidate the fulfillment of international obligations. Secondly, interactions of a procedural nature contribute to an adjustment between the rights of foreign investors and the obligations of host States, a balance traditionally tipped towards the side of the investor. The intervention of third parties as *amicus curiae* in investment arbitration favours the incorporation of public interests into arbitration, and enables a cohesive interpretation of the categories, institutions and general rules of international Law.

Although the decentralised and sectorial character that pervades contemporary international Law makes relations between the different normative subsystems analysed in this study complex, in conventional and arbitral practice interactions between them all take place using diverse legal coordination techniques; mechanisms that, even if it is still in a rudimentary way, allow for uniform application of secondary rules and, in this fashion, contribute to guaranteeing the unity of the international legal order.