Conflicts in International Investment Disputes Involving Environmental Issues: Theory and Practice

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要　旨

本稿は、国際投資法における国際環境法との適用関係について論じたものである。国際的な投資により投資受入国の環境に影響を与えたり、環境問題を理由にした新たな規制が投資受入条件を定めた二国間投資協定に反したりするなどの問題が顕在化している。本稿では、国際投資仲裁廷がこのような問題にどのように取り組んでいるのかを検討しつつ、国際投資法と国際環境法の関連についての理論研究を踏まえ、現状と課題を探求する。

Keywords: International Investment Disputes, International Environmental Law

1. Introduction

International investment law and international environmental law have evolved as specialised fields

of international law.[1] The relationship between these fields became a distinctive international issue through a number of parallel channels. Activities of multinational corporations may cause a negative impact on the environment of the host state (e.g., improper disposal of hazardous waste and destruction of biodiversity and cultural heritage). The negative spill-over arising from the activities has been emphasised by economists and politicians.[2] On the other hand, foreign investment can harness the resources to promote environmental protection through a variety of channels (e.g., energy efficiency and waste treatment). The ambiguity of promoting environmental protection and affecting the environment of the host state arises in the relationship between bodies of international law regulating foreign investment schemes and environmental protection.[3] Because of the controversial standards and principles of both laws, the competing norms have occurred within the international legal space. The link between these laws became noticeable in the late 1990s in the context of investor–state arbitration under the relevant International Investment Agreements (IIAs). IIAs gave specific rights to foreign investors by limiting the sovereignty of the host state to make regulations for environmental purposes.[4] The obligations of the host state under IIAs sometimes conflicted with its international environmental obligations.[5] The relationship between the treatment of environmental issues and norms and the rules confined within international investment agreements contentiously continued.[6]

In this respect, the purpose of the present article is to examine the conflicting relationship between international investment regulations and environmental norms. The article mainly discusses the topic of the conflicts in international investment disputes with environmental issues. In doing so, a theoretical approach by Jorge E. Viñuales[7] will first be presented. The concepts of 'normative conflict' and legitimacy conflict' presented by Viñuales are beneficial for understanding the impact of international environmental norms and international investment disciplines. It is useful to analyse the main legal issues raised by interactions between foreign investment and environmental protection.

Next, the article examines how international investment tribunals have recognised and resolved the conflicts of norms in these two specialised fields. The number of investment disputes with environmental issues has sharply increased in the last several years. The cases indicate that there have been many instances where environmental issues have been implicated.[8] The importance of environmental concerns could be observed in investment arbitration. For this purpose, a practical approach will be provided by analysing the international investment disputes involving environmental issues that shed light on the conflicts in the interaction between investment protection and environmental protection. How the tribunals applied the Viñuales theory of normative conflict and legitimacy conflict in their decision-making processes is discussed in the case analysis.

Through an analysis from the viewpoint of normative conflicts and legitimacy conflicts, the article aims at identifying conceptual issues not only in a theoretical way but also in a practical way. In order to apply the theory in practice, one has to acknowledge a distinction between these two conflicts of norms and the benefits of applying the theory. Finally, how the theory clarifies the link between international environmental norms and domestic environmental measures will be discussed.

The article intends to answer the following questions:

- How does Viñuales's theory of normative conflict and legitimacy clarify the link between international environmental norms, international investment norms and domestic environmental measures?
- How is the theoretical approach taken in the present article useful in investment disputes?
- What are the reasons for the reluctance of investment tribunals to consider environmental issues in their decisions?
- What are the potential solutions of the state parties in consideration of the conflicts?

In order to answer these questions, the theoretical approach of Viñuales's theory of normative conflict and legitimacy conflict will first be discussed (Chapter 2). The rest of the chapter will analyse particular international environmental conventions and international investment treaties that play a role in international investment case law on environmental issues.

Chapter 3 will discuss the current practices of tribunals regarding the utilisation of the theory in investment disputes with environmental issues. In this practical approach, investment disputes involving environmental issues in different sectors will be emphasised. Currently, environmentally friendly issues of a sensitive nature such as improper disposal of hazardous substances and other such activities, and biological and cultural diversity, have been increasing in investment disputes. Some relevant cases in these fields will be highlighted in the paper.

Finally, the article concludes with a proposal for what should be the considerations of the tribunals and state parties for managing conflicts in future investment disputes involving environmental issues (Chapter 4). The main sources for the article are international environmental conventions, international investment treaties, the decisions of the investment tribunals and previous research work of scholars in this field.

2. A Theoretical Approach to Investment Disputes

Interactions between international investment law and international environmental law have gradually increased, which strengthens both laws in terms of synergies and conflicts. The focus of this chapter is to point

out the conflicts between the protection of investment and environmental protection. In this context, the concept of normative conflicts and legitimacy conflicts will be examined by referring to the theoretical approach of Jorge E. Viñuales and Alessandra Asteriti.[9]

The following sections will describe how the theoretical approach of Viñuales plays an important role in approaching the specialised fields of international law including international investment law and international environmental law. Furthermore, the chapter illustrates the benefits of applying the theory.

2.1. Theoretical approach by Jorge E. Viñuales

Viñuales introduced the concepts of normative conflict and legitimacy conflict to analyse the main legal issues raised by the interactions of foreign investment and environmental protection. Viñuales demonstrated that collisions between environmental measures and investment disciplines would take the form of normative conflicts. Normative conflicts or principal conflicts mean conflicts between an obligation stemming from international environmental law and an obligation deriving from international investment law.[10] In other words, the normative conflicts arise between norms of the same legal order.[11] In order for a normative conflict to arise, a state needs to adopt certain conduct (command), not to adopt such conduct (prohibition) or authorise the adoption or not of this conduct (permission).[12] However, there are variable scopes within which an environmental norm would do this.

On the other hand, legitimacy conflicts or legal conflicts mean conflicts between an obligation arising from international investment law and a domestic measure based on environmental considerations other than an obligation stemming from international environmental law.[13] In other words, legitimacy conflicts arise between the norms of the different legal orders.[14] According to Viñuales, legitimacy conflicts can take different forms, such as the legal system at stake, the substance of the norms and the manner of the conflict. Regarding the legal system at stake, legitimacy conflicts may comprise one norm of international law and another of domestic law.[15] From the perspective of substance, a legitimacy conflict may occur between a norm from international investment law and a domestic environmental measure.[16] A conflict between certain norms of international environmental law and a domestic investment measure may arise.[17]

From the viewpoint of Alessandra Asteriti, normative conflicts in international law can arise whenever there is a conflict between international obligations or between domestic and international obligations. In her research work on conflict of norms, she adopted a more neutral terminology, such as ‘pure international conflicts’ instead of ‘normative conflicts’ (conflicts of international obligations) and ‘mixed conflicts’ instead

of ‘legitimacy conflicts’ (conflicts of international obligations and domestic ones).[18] In spite of the different terminologies, the essence of the theory was not diversified.

The concept of ‘normative conflict’ and ‘legitimacy conflict’ are beneficial to avoid common misunderstandings underlying the analysis of the relations between environmental regulation and trade and investment disciplines.[19] Regarding the relations between them, the Organisation for Economic Co-operation and Development (OECD) Statement states that ‘the governments should review their new proposed environmental measures for compliance with investment law obligations’.[20] However, the use of this distinction does not mean that investment disciplines prevail over new, inconsistent, environmental regulation. If the conflicts occur between these two sets of norms, there are appropriate conflict techniques for resolving them. The solution is to be found on a case-by-case basis. The use of the distinction between normative and legitimacy conflicts would clarify the basic propositions that neither investment disciplines prevail over international environmental norms nor environmental norms prevail over the investment disciplines.[21]

The conflict between investment law and environmental law arises when the state has difficulty in choosing between protection of investments or protection of the environment. In complying with the relevant investment rules, states are faced with the possibility of intruding on environmental laws and *vice versa*. It becomes a legal problem in the sense that the state has to choose between a relevant Bilateral Investment Treaty (BIT) and a relevant environmental norm. In the last decade, an increasing number of investment claims have been brought against states in connection with the adoption of environmental measures.[22] These measures often have a purely domestic legal basis,[23] but in some cases, they are induced by international environmental standards.[24] Yet, the treatment of purely domestic and internationally induced measures has been incorporated by investment tribunals. The conflict between two norms of international law (normative conflicts) have thus been amalgamated with conflicts between a domestic environmental measure and an international investment norm (legitimacy conflicts). Consequently, the impact of international environmental law on the regulation of foreign investment systems remains unclear. In practice, it could be difficult to lay down the conflicting points between environmental norms and investment norms because of the unclear way in which these norms are structured. It is often difficult to determine whether two or more norms are in conflict or to identify the specific type of conflict.

In the theoretical analysis, Viñuales points out that international investment law and international environmental law develop and become more precise and demanding.[25] According to observations of Viñuales, normative or legitimacy conflicts between international environmental norms and investment disciplines become more frequently raised by disputing parties. However, investment tribunals have been hesitant to adopt

clear stances as to the conflicts of environmental and investment norms. Investment tribunals are still restrained in deciding the normative and legitimacy conflicts in their reasoning.[26] Tribunals have to interpret the imprecise provisions of environmental norms under the multilateral environmental agreements. In addition, the state parties of the investment disputes (host state and investor's home state) involving environmental issues have to be aware of their obligations to apply the theory in practice.

Even though the boundary between normative conflicts and legitimacy conflicts are vague, the tribunals have to be aware of these conflict norms in resolving the investment disputes with environmental issues. In addition, the solution is to be found on a case-by-case basis through the use of appropriate conflict techniques. In this connection, it is necessary to understand how environmental conventions and investment treaties are structured in the light of a state's international responsibility on environmental regulations. Before discussing the practical case analysis regarding the conflicts of norms, the next section is going to discuss some environmental norms that have been raised in investment disputes.

2.2. Applicable international environmental instruments and international investment regulations

International environmental law plays a certain role in some investment issues. This section is going to discuss some environmental norms that have been raised in investment disputes. Some particular international environmental conventions and international investment treaties will be exemplified.

2.2.1. The impact of environmental treaties on investment disputes.

International environmental treaties are of considerable importance in international investment disputes involving environmental issues. First, the norm at stake may explicitly prohibit specific conduct. An example is Article 4(5) of the Basel Convention[27] which states that '[a] Party shall not permit hazardous wastes or other wastes to be exported to a non-Party or to be imported from a non-Party.' If a host state was meant to implement regulations that would prohibit exports to non-parties, such conduct would be in fact seen as the application of an international environmental obligation. Similarly, a provision like the one embedded in Annex II of the Aarhus Protocol[28] expressly commands the re-examination of the specific usage of lindane, even though such re-examination could also be due to domestic environmental concerns.

On the other hand, some environmental conventions provide vague requirements. An example of this can be seen in Article 3(1) of the Kyoto Protocol.[29] Even though this Convention provides state parties (that is, states which have agreed to respect the quantified commitments provided by this Convention) with

greenhouse emissions objectives, the means to reach these goals are left to the discretion of each state.[30] Consequently, it is not exactly clear if a particular measure that a state adopts in order to foster its tasks under the Convention can be categorised as a strict requirement of an international environmental obligation.

A less strict form of this kind of requirement can be found in some international treaties for the protection of habitats and biological diversity. For example, under international environmental treaties such as Article 2 (1)(4) of Ramsar Convention,[31] states have to select at least one or more appropriate wetland(s) in their territory that can be included in the important international list of wetlands. Whereas the selection of one wetland within its territory is mandated by the Convention, the state appears to have significant discretion in the designation of specific zones as protected wetlands as well as in the particular measures to be implemented for their protection. If a state were to choose a zone located close to an industrial plant which is owned by a foreign investor, and further implement strict measures that would restrict the investor's activities, it could be less clear for investment tribunals to determine if such an act is commanded by international environmental law. Even more vague are requirements stated in Article 6 of the Convention of Biological Diversity[32] or in the Western Hemisphere Convention[33] under which states have broad discretion to designate the specific obligations undertaken by the state parties.

It is noticed that the norms under the environmental conventions are structured in the light of a state's international responsibility on environmental regulations. On the other hand, the norms may be unclear or imprecise. Consequently, there may be some conflicts between international environmental norms, international investment norms and domestic environmental norms of the host state. In case of the normative or legitimacy conflict, both host state and foreign investors are responsible for making clear their obligations under relevant international environmental instruments. The host states have to give attention to enacting the required domestic laws in compliance with the international obligations.

2.2.2. International Investment Agreements (IIAs)

Early investment treaties have not dealt with the potential and inherent conflicts between investment protection and environmental protection. In line with early investment policies, early BITs based on the Abs-Shawcross Draft Convention on Investment Abroad[34] or Draft Convention on the Protection of Foreign Property (OECD)[35] focused exclusively on the protection of foreign investors and their property through investment protection provisions. International investment policies and instruments promoting and protecting investment have evolved considerably in the last decade. And so has their relationship with environmental

issues. Recent IIAs have become increasingly mindful of the potential clash with environmental issues. To achieve this objective, IIAs are using various treaty-making techniques to include environmental protection in their main objectives.

In the mid-1990s, a new generation of investment protection and liberalisation agreements based on the North American Free Trade Agreement (NAFTA)[36] emerged. The agreement incorporated the clarification of language which caters to the state's right to regulate for a public purpose, including the adoption of measures to protect the environment.[37] This new generation of treaties addressed the environmental issues and, in particular, the obligation not to lower environmental standards as an incentive to attract foreign investment.

NAFTA contains general language on environmental issues in its preamble and specific language on the relations between international investment law and international environmental law. NAFTA is one of the first treaties to include such specific language. Article 104 of NAFTA provides that:

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

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

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

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

d) the agreements set out in Annex 104.1,

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

2. The Parties may agree in writing to modify Annex 104.1 to include any amendment to an agreement referred to in paragraph 1, and any other environmental or conservation agreement.

NAFTA investor-state arbitrations occasionally address environmental concerns under this provision. The tribunal in *S.D Myers v. Canada*[38] reasoned with respect to the relation between the Basel Convention and NAFTA.

Chapter 11 of NAFTA contains environmental clauses in its Article 1114. According to this provision,

an exercise of regulatory power which unreasonably interferes with foreign investment would not be 'consistent' with Chapter 11. This approach has been reinforced by the North American Agreement on Environmental Cooperation (NAAEC) which pays particular attention to the implementation of environmental measures and assessment.

Another main multilateral treaty is the Energy Charter Treaty (ECT) signed in 1994 between a number of European and Asian states. It established a framework for cross-border cooperation in the energy industry. It grants foreign investors a number of substantive protections when their investment falls within the scope of the treaty, defined at Article 1(6) as any investment '*associated with an economic activity in the energy sector'*. As a consequence of the focus of the ECT on energy, environmental concerns regularly arise in arbitrations initiated under Article 26. The treaty also addresses the relations between investment and the environment. Article 19 (1) of the ECT emphasises that the protection of the environment should not be pursued through economically inefficient measures.

In the mid-2000s, a 'new generation of investment policies' emerged that went beyond the quantitative protection of investment flows and sought to foster investments that have a positive impact on economic and social development and that do not harm the environment.[39] Later generations of BITs and Free Trade Agreements (FTAs) have an explicit statement about the relationship between foreign investment and environmental protection. Foreign investors have regularly relied on investment arbitration to challenge a state's environmental policies that are causing them adverse effects.

Another provision addressing a potential conflict between international investment law and international environmental law can be seen in CARIFORUM_European Union Economic Partnership Agreement (EPA). Article 72 (c) of the agreement provides the importance of certain environmental treaties in connection with the activities contemplated in the Partnership Agreement, which states:

> *Investors do not manage or operate their investments in a manner that circumvents international environmental or labour obligations arising from agreements to which the EC Party and the Signatory CARIFORUM States are parties.*

However, the provision does not state that the environmental instruments identified prevail over the obligations of the state parties regarding economic cooperation. Most recent treaties are still struggling to reconcile two seemingly contradictory objectives: the protection of the foreign investor and the protection of the environment. A number of investor–state disputes have been brought by foreign investors under IIA to challenge the measures taken by states to protect the environment. Measures to ban the export of hazardous

waste, measures to cancel investment authorizations and building permits in environmentally sensitive areas are some example cases.[40]

2.3. Conclusion

Viñuales's theory of 'normative conflict' and 'legitimacy conflict' is useful for clarification of the link between international environmental norms, international investment norms and domestic environmental norms of the host state. If the normative conflict has occurred in the investment disputes with environmental issues, both host state and foreign investors are responsible for making clear their obligations under relevant international environmental instruments and IIAs, either BITs or multilateral investment treaties (MITs). Host states have to provide the required domestic laws in compliance with the obligations. In case of the multilateral environmental convention, some conventions might provide imprecise provisions and confer broad authority to the host state. Host states have to be aware of those obligations in advance. From the viewpoint of tribunals, in the arbitration process, they could apply interpretative rules to interpret these vague provisions.

On the other hand, if IIAs have explicit reference to environmental issues in their text (e.g., NAFTA), state parties also have to be mindful of it. If such provisions are absent in the relevant IIAs, the drafters of the treaties have to take this into consideration in order to balance the investor's protection and environmental protection.

In case of normative conflict, the conflicts may arise not only between international investment treaties and international environmental instruments. States parties also have to take into consideration the conflicts between two international environmental conventions. Where one state may be a member of the different environmental conventions for the sake of different environmental protections, this issue is also to be considered by the state parties.

Viñuales's theory of legitimacy conflict is also important for the conflicts between host state environmental legislation and international investment obligations. If the disputed environmental issue is not covered under the existing domestic laws, even it is obliged to do so under the IIAs, state parties have to take care of such a situation. By applying his theory in practice, state parties and investment tribunals could differentiate the specific issues to be considered in the particular case. Especially, they can clarify these conditions: what are the specific provisions in the relevant environmental conventions; whether the domestic laws are enacted in compliance with the international obligations; whether the host state has sufficient domestic laws to be considered in the particular sector; and what are the investment-related laws and investment treaties

that are currently applied in both state parties. Viñuales theory is relevant and beneficial for the host state's environmental awareness more precisely in demanding fields. State awareness and compliance with environmental rules and regulations would be improved as a consequence of identifying Viñuales theory of 'normative conflicts' and 'legitimacy conflicts'.

3. Practical Approach to 'Normative Conflict' and 'Legitimacy Conflict' in Investment Disputes

International investment tribunals have occasionally dealt with issues connected to the protection of the environment since the early years of modern investment arbitration. A number of investment arbitration cases indicate that there have been many instances where environmental issues have been implicated in a number of different areas. This part comprises two case studies on investment conflicts in which there were environmental issues in hazardous waste activities and biological and cultural diversity. Both disputes share some controversial legal issues in the field of international environmental law and international investment law. The theoretical approach of 'normative conflict' and 'legitimacy conflict' by Viñuales will be considered in this practical approach. By studying the particular cases, the chapter provides the tribunal's consideration of the different norms and its reasoning for reaching its decisions. In conclusion, the chapter provides a short overview of coping with the theory and suggestions for potential conflicts in the future.　Before analysing the cases, a typology of environmental cases and their involvement in investment arbitration will be illustrated.

3.1. Typology of environmental cases and figure of cases in investment disputes

Although many commentators have noted a rise in international environmental disputes, there is no common definition of this term. The majority of investment and environment disputes arise when a government take measures on alleged environmental grounds and those measures are challenged by an investor under investment rules of IIAs.

Viñuales included within his definition of environmental disputes not only cases involving activities impacting upon the environment and cases involving the application of domestic/international environmental law but also claims relating to environmental markets. According to Viñuales, investment disputes with environmental components include:[41]

> *disputes that arise from the operations of investors (i) in environmental markets (e.g. land-filling, waste treatment, garbage collection, pesticides/chemicals, energy efficiency, renewable energy,*

emissions reduction, biodiversity compensation, etc.) and/or (ii) in other activities, where their impact on the environment or on certain minorities is part of the dispute (e.g. tourism, extractive industries, pesticides/chemicals, water extraction or distribution) and/or (iii) to disputes where the application of domestic or international environmental law is at stake.

In 2011, a survey conducted in OECD countries found that 'the prevalence of environmental language in IIAs is low, but growing', identifying that only 8.2% of the sample of 1,623 IIAs signed between 1959 and 2010 contained environmental concerns.[42] However, the OECD report showed that, since the mid-1990s, the IIAs that contain environmental language gradually increased and reached a peak in 2008. The study underlined that 89% of newly concluded treaties referred to environmental concerns.[43] The study suggested that recognition of environmental protection has become more rooted in the regulatory approach of many countries.[44] Based on sample IIAs, the OECD report identified seven categories of environmental provisions in IIAs:[45]

[1] General language in preambles that mentions environmental concerns and establishes protection of the environment as a concern of the parties to the treaty…

[2] Reserving policy space for environmental regulation…

[3] Reserving policy space for environmental regulation for more specific, limited subject matters (performance requirements and national treatment) …

[4] [P]rovisions that clarify the understanding of the parties that non-discriminatory environmental regulation does not constitute "indirect expropriation" …

[5] [P]rovisions that discourage the loosening of environmental regulation for the purpose of attracting investment…

[6] [P]rovisions related to the recourse to environmental experts by arbitration tribunals…

[7][P]rovisions that encourage strengthening of environmental regulation and cooperation.

The obvious difference between earlier IIAs and those IIAs concluded in the last decade indicates that the interaction between environmental and investment law is increasing. Accordingly, investment disputes with environmental issues are becoming more common. Most investment disputes with environmental issues arose from the 1990s forwards. In the period from 2000 until December 2011, twenty-four investment disputes with environmental issues were decided by an arbitral tribunal or solved in another manner.[46] Another study identifies that nearly 80% of all environmental cases are concerned with cases relating to the transport of waste products and management of waste disposal sites, water services, cases relating to upstream natural resource

extraction industries and cases relating to industries producing petrochemicals, cement, and metals.[47]

In this regard, the disputes that arise from the activities of the investors in environmental markets (e.g., waste treatment) or in other activities where the impact of the environment is part of the dispute (e.g., tourism) are going to be treated as an analytical category. These cases are going to be analysed by linking with some salient investment protection standards of international investment treaties, norms of international environmental instruments and regulations of national legislation. From this case analysis, conflicts between international obligations and conflicts between international obligations and domestic ones could be observed. It is useful to answer the question of 'how is the theoretical approach taken in the present article useful in investment disputes?'

3.2. Case relating to regulation of hazardous substances and activities

This part identifies a conflict of norms between international investment law and international regulation of hazardous substances and activities on the actions of foreign investors. The following case is one of the first NAFTA arbitration cases (*S.D. Myers v. Canada*)[48] in which the tribunal had to deal with a defence based on conflicting environmental obligations.

The claimant S.D. Myers is a U.S. corporation based in Ohio that specialises in the process of polychlorinated biphenyl (PCB) remediation. Following the decision of the OECD in 1973 that urged member countries to limit the use of PCBs and to control them in a manner designed to minimise risk to human health and the environment, the U.S. and Canada banned future production of PCBs and also effectively banned the export of PCB waste.[49] In 1986, Canada and the U.S. entered into the Transboundary Agreement on Hazardous Waste which considered the possibility of cross-border activity, recognising that the long common border engendered opportunities for a generator of hazardous waste to benefit from using the nearest appropriate disposal facility.[50] Canada acceded to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal in 1989[51], while the U.S. had not ratified the Convention by the relevant time. The Convention prohibits the export and import of hazardous waste from and to states that are not contracting states unless such movement is subject to bilateral, multilateral or regional agreement.

Following the signing of the Convention, but before it came into force, the Canadian Federal and provincial ministers responsible for the environment agreed that the destruction of PCBs should be carried out to the maximum extent possible within Canadian borders.[52] In 1990, the firm tried to obtain the necessary approval to import equipment containing PCB wastes into the U.S. from Canada.[53] In 1993, Myers Canada

was incorporated under the Canada Business Corporation Act.[54] The Canadian Minister of the Environment stated in 1995 that the Canadian position is 'that the handling of PCBs should be done in Canada by Canadians'.[55] In 1996, the Canadian environmental agencies issued orders that banned commercial export of PCB for waste disposal. The Canadian–U.S. border was closed for cross-border movement of PCBs for a period of approximately 16 months.[56]

In this regard, S.D. Myers asserted that Canada's ban on exporting PCB wastes to the U.S. was a violation of investment disciplines such as national treatment, minimum standards, performance requirements and expropriation as provided in Chapter 11 of NAFTA to non-party states.[57] Canada argued that its ban was required under the Basel Convention and the 1986 Transboundary Agreement, both of which dealt with the environmentally sound management and destruction of hazardous waste and the possibility of cross border transport to achieve that end.[58] Canada invoked its obligations under Article 4(5) of the Basel Convention to ban the export of hazardous waste to non-party states (the U.S. had signed but not yet validated). Canada also cited Article 104 of NAFTA which provides express permission to employ trade restrictions to achieve international environmental goals pursuant to the relevant conventions, including the Basel Convention. In this case, the tribunal considered the Canadian argument that the measure challenged had been adopted pursuant to the Basel Convention, which prevailed over the obligations arising from NAFTA as a result of the conflict norm in Article 104 of NAFTA.

On the consideration of the effect of the Convention on the parties' legal positions, the tribunal focused on three factors. First, it examined the extent of the obligation in Article 4(5) of the Basel Convention in the light of Article 11 of the same Convention, which provides an exception to Article 4(5) when a state party has agreed on a treaty with a non-party state, subjecting movements to standards that are not 'less environmentally sound' than the ones in the Convention.[59] According to the tribunal, this exception was applicable in the case.

Second, the tribunal recognised the applicable rules that could solve a potential conflict involving the Basel Convention and NAFTA with reference to Annex 104 of NAFTA. The drafters of NAFTA explicitly purposed that the Basel Convention would prevail, but only to the degree that Canada had no 'equally effective and reasonably available alternatives for abiding by the Basel Convention'.[60]

Third, combining these two factors, the tribunal decided that the obligation in Article 4(5) was not applicable and, even if it was, Canada has less harmful means that an export ban to abide by the Basel Convention. [61] The tribunal considered that the Transboundary Agreement was an agreement within the meaning of Article 11 of the Convention and, therefore, Article 4(5) did not apply.

The tribunal concluded that the export ban of hazardous waste had been assumed to favour Canadian competitors.[62] It was found that Canada had breached the national treatment and minimum standard treatment protections provided by NAFTA; however, it dismissed the claim that it was a case of expropriation.[63]

In its reasoning, the tribunal interpreted the substantive NAFTA protections in accordance with the three-principles, including 'parties have the right to establish high levels of environmental protection".[64] The tribunal determined that 'there was no legitimate environmental reason for introducing the ban' and that alternative measures could have been taken to achieve the indirect environmental objective of keeping the Canadian disposal industry active.[65]

In this case, the theoretical approach of Viñuales regarding the normative conflict between international investment law (NAFTA) and the international environmental instruments (Basel Convention and Transboundary Agreement) could be seen in this practical issue. Canada's defence clearly structured the issue as a normative conflict. Even though Canada invoked its obligations under the Basel Convention to justify the ban, it was rejected by the International Centre for Settlement of Investment Disputes (ICSID) tribunal for the above-mentioned reasons. The Tribunal scrutinised whether the investment treaty's provisions indeed conflicted with the non-investment obligations, such as an environmentally sound solution to hazardous waste management arising from the Basel Convention. It found that such a contradiction does not, in reality, exist. In addition, the conflict norm was not technically applied in the case because the U.S. had not ratified the Basel Convention.[66] Besides, it can be found that Article 4 (5) of the Convention was applied in order to highlight the need for the tribunal to interpret NAFTA in the light of Canada's other international obligations.[67] However, the link between the measure challenged under the investment protection standards and an international environmental norm influenced the reasoning of the tribunal. The specific provisions regarding environmental protection and its relation to investment protections provided in the Basel Convention, Transboundary Agreement and NAFTA provisions have been considered by the investment tribunals by means of interpretation and scrutinising of international obligations under the relevant instruments. It can be said that this case is a good illustration of a tribunal's careful deliberation of international environmental treaties.[68]

In this case, Viñuales's concept of 'normative conflict' is proposed by the respondent state (Canada). The respondent argued that the ban on the export of PCB waste was a legitimate measure taken to comply with the Basel Convention's basic principle of the 'environmentally sound management of hazardous wastes and other wastes'.[69] The claimant's construction of chapter 11 of NAFTA is inconsistent with Canada's international obligations, including the Basel Convention and Transboundary Agreement; thus, the Basel

Convention prevails over chapter 11 obligations.[70] The respondent then asserted that the passing of Interim Order was necessary because the legality of the Enforcement Discretion was uncertain and it did not know whether PCBs were covered by the Transboundary Agreement.[71] Consequently, the conflicts occurred between international environmental obligations under the Basel Convention and Transboundary Agreement and the international investment obligation under chapter 11 of NAFTA. Here, the argument of Canada was adapted to the concept of 'normative conflict' as illustrated in chapter 2.

The state parties referred to the Basel Convention, Transboundary Agreement and NAFTA as their reliable sources. As mentioned in 2.2.1., Article 4(5) of the Basel Convention explicitly prohibits specific environmental-related conduct. The tribunal considered this provision and other relevant provisions of the Convention in connection with investment treaty and the Transboundary Agreement. The tribunal reasoned conflicts between the same legal order. The tribunal also interpreted NAFTA's protections relating to environmental concerns. In this case, the tribunal applied the specific conflict rules for resolving the normative conflicts by referring to the explicit provisions of the legal instruments. Even though the U.S. was a non-party to the Basel Convention, the tribunal reasoned other related provisions in its decision-making process. In this case, the applicable investment treaty NAFTA provides explicit provisions relating to environmental concerns. If the applicable instrument does not provide this type of provision, the parties' argument and tribunal's reasoning may be an alternative. It can be noted that this case is a remarkable one in which state parties and tribunals applied the 'normative conflict' theory. As mentioned in previous chapters, the application of Viñuales's theory, in this case, is beneficial for the clarification of the link between international investment law and international environmental law.

3.3. Case relating to protection of cultural diversity

This section examines the interaction between the international protection of biological and cultural diversity and international investment law. The connection between biological and cultural protection can be established with respect to the natural and cultural heritage protection of the 1972 World Heritage Convention (WHC). Treating these two angles of protection together can capture the way normative conflicts have ensued in some investment disputes.

Concerning the obligations of the protection of certain areas or species, several environmental agreements are provided. For example, Article 4 (1) of the Ramsar Convention[72] relating to protecting species provides that 'States shall promote the conservation of wetlands and waterfowl by establishing nature reserve

on wetland, whether they are included in the list or not, and provide adequately for the wardening.' Likewise, Article 4 of the WHC, Article II (1) of the Convention on Migratory Species and Article 8 (a-b) of the Convention on Biological Diversity provides similar obligations. Regionally, the obligation to set up protected areas is considered in Article II (1)-(2) of the Western Hemisphere Convention.

The analysis of the relationship involving the protection of biological and cultural diversity and investment schemes will be carried out in this section. The case will be examined in light of the environmental obligations regarding the protection of certain areas and species, whether particularly relating to biological and cultural protection or not. It may also be appropriate to illustrate how other types of international obligations could cause normative conflicts.

An early illustration of how the protection of cultural heritage might conflict with investment disciplines can be seen in the case of *SPP v. Egypt*.[73] In this case, with the initial approval of Egypt through an investment agreement in 1974, a foreign investor planned to build a tourist complex near the pyramids. In the construction period, due to political opposition, the Egyptian government declared in 1978 that the relevant parcels of land were a public utility and not suitable for tourism development. Consequently, the investor filed an arbitration proceeding claiming that its property had been expropriated in breach of domestic investment law and of the investment agreement.

In this regard, the tribunal analysed the impact of the WHC as a potential justification for the acts of Egypt. However, the occurrence of the obligations arising from the Convention was rather diluted by the interpretation taken by the tribunal. Specifically, the tribunal concluded that the effect of Articles 4, 5 (d) and 11 of the Convention were to create an obligation that had become binding, not on the date of entry into force of the Convention, but only on the date in which the World Heritage Committee accepted the nomination.[74] This interpretation has been criticised as excessively restrictive. On the other hand, some commentators have stated that states have an obligation to protect natural and cultural heritage irrespective of whether a particular site is listed or not.[75]

The argument is important to understanding the incidence of a number of environmental treaties on the treatment granted to foreign investors. If the approach retained by the tribunal is followed, then state parties would not be under an obligation to protect unlisted sites. Consequently, a state's ability to justify its actions by reference to such environmental regimes would be considerably limited. If, on the contrary, the approach by the commentators is followed, then, measures adopted to protect biological and cultural diversity could be justified by direct reference to obligations arising from international environmental law.

Another relevant issue regarding the norms of conflict is the disagreement between the parties regarding the choice of applicable law. In the case, the investor claimed that its property had been expropriated in 1978 in breach of domestic law and an investment agreement of 1974. The respondent claimed that the dispute was to be entirely governed by Egyptian Law according to the first sentence of Article 42 (1) of ICSID. The respondent further argued that international law could apply only to the extent that it had been incorporated in Egyptian Law, as was the case with the WHC.[76] The claimant opposed that there was no such implicit choice of law and, therefore, international law was applicable in accordance with Article 42 (1) second sentence of the ICSID Convention.[77]

The Tribunal considered that both Egyptian law and international law, including the WHC, were applicable to the dispute.[78] The tribunal further stated that:[79]

> *When municipal law contains a lacunae, or international law is violated by the exclusive application of municipal law, the Tribunal is bound in accordance with Article 42 of the Washington Convention to apply directly the relevant principles and rules of international law.*

The situation, which attributes a supplemental and corrective role to international law over domestic law, has received considerable support in the investment case-law.[80] In this case, the host state argued that it had adopted expropriation acts in accordance with the WHC so that the application of international law is important in this regard. However, the tribunal considered that the host state obligation to protect the site had not arisen until the registration by the World Heritage Committee in 1979. Therefore, the expropriation acts could not be justified as conduct required by the provisions of the WHC. The tribunal considered that from 1979 forwards, the obligations of Egypt under the WHC prevailed over the protections granted to investors. Therefore, the compensation due to the investor could not take into account gains that would have accrued after the emergence of the obligation under the WHC.[81] In this conclusion, the priority of international environmental law over domestic investment disciplines was impliedly assessed by the investment tribunal.

In this case, conflicts between international environmental conventions and the domestic laws of the host state occurred as a legitimacy conflict as noted in the theoretical approach in the previous chapter. The investment tribunal considered these conflicts of norms in the context of reasons of justification and choice of applicable law. In the context of the clear provisions under Articles 4, 5 (d) and 11 of the WHC, the tribunal took consideration of the conflict between the international environmental-related treaties and domestic legislation in its interpretation towards the decision. In this regard, how tribunals should take into consideration imprecise provisions of the international environmental treaties as mentioned before becomes a potential

problem for the tribunals. Investment tribunals, host state and foreign investors have to be considered the potential challenges regarding the conflict of norms.

The tribunal used the environmental norms as the norm regulating specific conduct. The tribunal considered that the WHC was relevant in this case and it regulated the conduct of the respondent. The tribunal also noted that the Convention obliged the respondent to refrain from acts or contracts contrary to the Convention.[82] The state parties relied on the international environmental convention (WHC), international investment agreement (1974 BIT) and the ICSID provisions. The tribunal considered that both domestic law and international law are applicable under the ICSID Convention. The tribunal considered these instruments in resolving the normative conflicts of the case. The conflicts arose from Articles 4, 5(d) and 11 of the environmental Convention and international investment treaty. In this case, the tribunal considered that WHC prevailed over the investment protection standards. Viñuales's theory of normative conflict can also be seen in this case. The tribunal interpreted the vague provisions regarding the binding date of the Convention. Applicability of domestic law is discussed to some extent, but the turbinal directly applied the relevant principles and rules of international law. The tribunal's reasoning in the case is also relevant to normative conflict theory. It is helpful to clarify the link between WHC, BIT and ICSID provisions.

3.4. Conclusion

In summary, the analysis of the above-mentioned cases illustrates that the concepts of 'normative conflict' and 'legitimacy conflict' were considered in the arbitration process. In *S.D. Myers v. Canada* case, the respondent state obviously structured the issue as a normative conflict. The tribunal analysed the conflicts between the IIA (NAFTA) and the international environmental instruments (Basel Convention and Transboundary Agreement). The tribunal scrutinised and interpreted Canada's international obligation in connection with environmental and investment protection. Viñuales's theory of 'normative conflict is helpful for the clarification of the link between international investment law and international environmental law.

In the *SPP v. Egypt* case, the tribunal concluded that WHC was applicable to the dispute and analysed the impact of the Convention as a potential justification for the acts of the respondent state. The tribunal also noted that the Convention obliged the respondent to refrain from acts or contracts contrary to the Convention. The state parties relied on the international environmental Convention and international investment regulations. The tribunal considered these instruments in resolving the normative conflicts of the case. The tribunal also interpreted the vague provisions regarding the binding date of the Convention and considered that WHC

prevailed over the investment protection standards. The tribunal's reasoning in the case is also relevant to normative conflict theory. It can be seen that the theoretical approach stated in the previous chapter is useful to clarify the link between international environmental convention and international investment regulations in practical cases.

According to observations of Viñuales, normative or legitimacy conflicts between international environmental norms and standards of investment protection become more frequently raised by disputing parties; however, investment tribunals have been hesitant to adopt clear stances as to the relative hierarchy of environmental and investment norms.[83] Investment tribunals are still restrained in deciding the normative and legitimacy conflicts in their reasoning.

In the theoretical approach, scholars' views regarding the normative and legitimacy conflicts are quite similar, even though the terminology may be different.[84] Basically, the theory is that tribunals have to be considered treaty norms of environmental character when interpreting the provisions contained in international investment norms. However, in practice, tribunals are still needed to take consideration of these conflicts of environmental norms by using the relevant international environmental instruments. The introduction of environmental rights norms into the international investment regime is based on the role of arbitral tribunals in investment disputes.

4. Conclusion

In this concluding chapter, the article summarises the significant features of the theoretical approach and practical approach to the adjudication of investment disputes with environmental components. In this part, the article intends to point out the benefits of the theoretical and practical approaches, as well as the issues remaining in the concepts. In doing so, the article concludes with some possible solutions for the issues. These proposals will be made for the consideration of core actors in the investment arbitration: state parties (foreign investor and the host state government) and investment tribunals.

As discussed in previous chapters, Viñuales's theory of 'normative conflict and legitimacy conflict' is useful for clarification of the links between international environmental norms, international investment norms and domestic environmental norms of the host state. If a normative conflict has occurred in the investment-related environmental dispute, host state and foreign investors are responsible to make their obligations clear under relevant international environmental instruments. Host states have to provide the required domestic laws in compliance with the obligations. In case of the multilateral environmental convention, some conventions

might provide imprecise provisions and confer broad authority to the host state. Host states have to be aware of those obligations in advance. In addition, if IIAs have explicit reference to the environmental issues in their text (e.g., NAFTA), state parties also have to be mindful of it. If such provisions are absent in the relevant IIAs, the drafters of the treaties have to take this into consideration in order to balance investor protection and environmental protection.

In case of normative conflict, state parties also have to take into consideration the conflicts between two international environmental conventions. While one state may be members of the different environmental conventions for the sake of different environmental protections, this issue is also to be considered by the state parties. In case of legitimacy conflict, if the disputed environmental issue is not covered under the existing domestic laws, even though it is obliged to do so under the IIAs, state parties have to take care of such a situation.

In practice, it could be difficult to lay down the conflicting points between environmental norms and investment norms because of the unclear way in which these norms are structured. However, by applying Viñuales's theory of 'normative conflict and legitimacy', state parties in practice could be responsive to clarify many circumstances. For instance, state parties have to concentrate on: (i) specific provisions of the relevant environmental conventions, (ii) domestic laws that have to be in compliance with international obligations and current environmental concerns and (iii) investment treaties that have to be included in environmental objectives and environment-friendly clauses. In some developing countries, IIAs without explicit environmental objectives might encourage developing countries not to further develop their environmental norms or fail to actively enforce them. Because of the threat of potential disputes leading to investment arbitration, the government might be afraid to implement higher environmental standards or take measures to protect the environment. However, in the future, states ought to factor environmental concerns into their treaty drafting and renegotiation of investment agreements. In addition, states had better endeavour to implement the environmental-related domestic laws and enforcement mechanisms.

In certain instances, it may be possible that international environmental obligations are specific and should prevail over the BIT of state parties. In such a case, a solution for developing countries might be to engage in regional treaties on environmental protection. Host state country awareness and compliance with environmental rules and regulations on the domestic front were improved, and the impact of international instruments, such as conventions and customary law, would prove to be more effective.

The introduction of environmental rights norms into the international investment regime is based on the role of arbitral tribunals in investment disputes. According to Viñuales's theory, tribunals have to consider treaty

norms of environmental character when interpreting the provisions contained in international investment norms. However, in practice, investment tribunals seem rather reluctant to give international environmental law larger room in their decisions.[85] There may be different reasons for such reluctance. Tribunals are not in the best position to decide on two different competing fields of international law in which they have little knowledge. Broad formulation of environmental norms and vague clauses in environmental treaties are some of the difficulties for the tribunals. Tribunals have to be considered to interpret the imprecise provisions of environmental norms under the multilateral environmental agreements. Depending on the scope of mandate in the arbitration clause, there is less room for consideration of the justification of normative conflicts and legitimacy conflicts in international investment law and international environmental law by the tribunals. Without the state parties' strong argument for resolution of normative conflicts, tribunals may be reluctant to consider the issue. Although the primary task of the investment tribunal is to provide dispute settlement services related to investment disputes, environmental concerns should not be excluded from investment tribunals. Using relevant environmental norms as interpretation tools and introducing *obiter dicta* by the tribunals might be some possible considerations for environmental concerns in investment disputes. Even though the boundary between normative conflicts and legitimacy conflicts is even thinner, the tribunals have to be aware of these conflicts in adjudicating the investment disputes involving environmental issues.

Endnotes

1 Jorge E Viñuales, *Foreign Investment and the Environment in International Law: An Ambiguous Relationship,* 80 BRITISH YEARBOOK OF INTERNATIONAL LAW, 246 (2010).
2 SAVERIO DI BENEDETTO, INTERNATIONAL INVESTMENT LAW AND THE ENVIRONMENT 3 (Edward Elgar Publishing 2013).
3 PIERRE-MARIE DUPUY & JORGE E. VIÑUALES, INTERNATIONAL ENVIRONMENTAL LAW 453 (CUP 2nd ed. 2018).
4 BENEDETTO, *supra* note 2, at Preface.
5 DUPUY & VIÑUALES, *supra* note 3, at 454.
6 KATE MILES, RESEARCH HANDBOOK ON ENVIRONMENT AND INVESTMENT LAW 1 (Edward Elgar Publishing 2019).
7 Jorge E Viñuales is a Harold Samuel Professor of Law and Environmental Policy at the University of Cambridge.
8 DUPUY & VIÑUALES, *supra* note 3, at 461.
9 Alessandra Asteriti is a Junior Professor of International Economic Law, Leuphana University.
10 JORGE E. VIÑUALES, FOREIGN INVESTMENT AND THE ENVIRONMENT IN INTERNATIONAL LAW 28 (CUP 2012). See also Aida Mokhtare, *Methods Applied to Resolve Law Conflicts between Environmental Requirements and Commitments of Investment Rights*, 13 EURASIA J Biosci 572, 571-577 (2019).
11 VIÑUALES, *supra* note 10, at 33.
12 Id. at 34.
13 Id. at 29. See also Mokhtare, *supra* note 10, at 574.
14 VIÑUALES, *supra* note 10, at 33.
15 Id. at 282.
16 *Compania del Desarrollo de Santa Elena, S.A. v. Costa Rica*, ICSID Case No. ARB/96/1, Award (17 February 2000) (*CDSE v. Costa Rica*).
The case is related to expropriation of biodiversity-rich land under the Costa Rica Law. Even though the respondent argument on quantum was based on the domestic environmental law, it was considered that the rules on compensation were concerned with international investment law.
17 *Southern Pacific Properties (Middle East) Limited (SPP) v. Arab Republic of Egypt*, ICSID Case No. ARB/843/3, Award

(20 May 1992) (*SPP v. Egypt*).
18 Alessandra Asteriti, *Conflict Clauses in International Investment Agreement*, Working Paper, February 2016, DO-10.13140/RG.2.1.3009.5127.
19 VIÑUALES, *supra* note10, at 33.
20 OECD Statement on "Harnessing Freedom of Investment for Green Growth", Freedom of Investment Roundtable, 14 April 2011, para 4.
21 VIÑUALES, *supra* note 10, at 34.
22 VIÑUALES, *supra* note 10, chap.1.
23 *Metalclad Corp. v. United Mexican States*, ICSID Case No. ARB(AF)/97/2, Award (30 August 2000) (*Metalclad v. Mexico*).

The dispute is concerned with the refusal to grant an administrative permit to build a landfill and the subsequent reclassification of the land as an ecological preserve. The administrative permits are required by domestic law. Granting, refusal or withdrawal of such permits are a matter of pure domestic law.
24 *SPP v. Egypt*, *supra* note 17.
25VIÑUALES, *supra* note 10, at 1.
26 Jorge E. Viñuales & Magnus Jesko Langer, *Managing Conflicts between Environmental and Investment Norms in International Law* (September 27, 2010). in Y. Kerbrat and S. Maljean-Dubois, eds., INTERNATIONAL LAW FACED WITH ENVIRONMENTAL PROBLEMS, Oxford, Hart Publishing, Forthcoming. Available at SSRN: https://ssrn.com/abstract=1683465 (last accessed on November 5, 2019).
27 Basle Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal art 4(5), March 22, 1989, 1673 UNTS 57 (Basle Convention).

The Convention has provided avenues for the domestic and international awareness building and discussion on the effects of waste, chemicals and organic pollutants on the ecosystems.
28 Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution on Persistent Organic Pollutants, June 24, 1998. (Aarhus Protocol).

Annex II of the Aarhus Protocol clearly requires the conduct of a reassessment of certain uses of lindane, although such reassessment may also be triggered by domestic health and environmental considerations.
29 Kyoto Protocol to the United Nations Framework Convention on Climate Change art 3 (1), December 11, 1997, 2303 UNTS 148. (Kyoto Protocol). It provides:

> The Parties included in Annex I shall, individually or jointly, ensure that their aggregate anthropogenic carbon dioxide equivalent emissions of the greenhouse gases listed in Annex A do not exceed their assigned amounts, calculated pursuant to their quantified emission limitation and reduction commitments inscribed in Annex B and in accordance with the provisions of this Article, with a view to reducing their overall emissions of such gases by at least 5 percent below 1990 levels in the commitment period 2008 to 2012.

30 Viñuales, *supra* note 1, at 285.
31Convention on Wetlands of International Importance especially as Waterfowl Habitat art 2 (1) and (4), February 2, 1971, 996 UNTS 245 (Ramsar Convention).
32 Convention on Biological Diversity art 6, June 5, 1992, 1760 UNTS 79 (CBD). Article 6 states:

> Each Contracting Party shall, in accordance with its particular conditions and capabilities: (a) Develop national strategies, plans or programmes for the conservation and sustainable use of biological diversity or adapt for this purpose existing strategies, plans or programmes which shall reflect, *inter alia*, the measures set out in this Convention relevant to the Contracting Party concerned; and (b) Integrate, as far as possible and as appropriate, the conservation and sustainable use of biological diversity into relevant sectoral or cross-sectoral plans, programmes and policies.

33 Convention on Nature Protection and Wild Life Preservation in the Western Hemisphere, October 12, 1940, 56 Stat. 1354, TS 981 (Western Hemisphere Convention).
34 UNCTAD, The Abs-Shawcross
Draft Convention on Investment Abroad, International Investment Instruments: A Compendium, Non-Governmental Instruments, Vol V.
35 UNCTAD, 1967 Draft Convention on the Protection of Foreign Property, OECD, Paris, October 16,1967, A Compendium, Vol. XIV.
36 North American Free Trade Agreement (1993) (NAFTA).
37 UNCTAD, World Investment Report 2012: Towards a New Generation of Investment Policies, New York and Geneva: United Nations 101-102 (2012).
38 *S.D. Myers Inc. v Canada*, NAFTA Arbitration (UNCITRAL Rules), Partial Award, 13 November 2000 (*S.D. Myers v. Canada*), para 214–215.
39 UNCTAD, *supra* note 37.
40 For example: *S.D. Myers v. Canada*, *supra* note 38.
41 Jorge E. Viñuales, *Foreign Investment and the Environment in International Law: Current Trends*, in MILES, *supra* note 6, 20 (Kate Miles ed., 2019).
42 KATHRYN GORDON & JOACHIM POHL, ENVIRONMENTAL CONCERNS IN INTERNATIONAL INVESTMENT AGREEMENTS: A SURVEY, OECD WORKING PAPERS ON INTERNATIONAL INVESTMENT 2011/01, 8 (2011).

43 Id.
44 DAVID COLLINS, AN INTRODUCTION TO INTERNATIONAL INVESTMENT LAW 257 (CUP 2017).
45 GORDON & POHL, *supra* note 42, at 11.
46 VIÑUALES, *supra* note 10, at 18.
47 Daniel Behn, *Trumping the Environment? An Empirical Perspective on the Legitimacy of Investment Treaty Arbitration,* 18 JOURNAL OF WORLD INVESTMENT & TRADE 37, 14-61 (2017).
48 *S.D Myers v. Canada*, *supra* note 38.
49 Id. at para 88-101.
50 Id. at para 103.
51 Id. at para 105.
52 Id. at para 108.
53 Id. at para 109.
54 Id. at para 111.
55 Id. at para 116.
56 Id. at para 118-24.
57 Canada acceded to Basel Convention on The Control of Transboundary Movements of Hazardous Wastes and their Disposal in 1989, while the U.S. had not ratified the Convention by the relevant time.
58 *S.D. Myers v. Canada*, *supra* note 38, at para 103-8.
59 Id. at para 213.
60 Id. at para 215.
61Id. at para 255-256.
62 DUPUY & VIÑUALES, *supra* note 3, at 462.
63 *S.D. Myers v. Canada*, *supra* note 38, at para 256, 269 and 288.
64 Id. at para 220.
The three principles are (i) Parties have the right to establish high levels of environmental protection. They are not obliged to compromise their standards merely to satisfy the political or economic interests of other states; (ii) Parties should avoid creating distortions to trade; (iii) environmental protection and economic development can and should be mutually supportive.
65 Id. at para 195.
66 Id. at para 150, 213-215.
67 Id. at para 104-12, 200-3.
68 ANDREAS KULICK, GLOBAL PUBLIC INTEREST IN INTERNATIONAL INVESTMENT LAW, 259 (CUP 2012).
69 This principle requires the state parties to ensure that adequate disposal facilities are available within their territory and the transboundary movements are reduced to the minimum under Basel Convention, Art 4(2) (b) and Art 4 (2) (d).
70 *S.D. Myers v. Canada*, *supra* note 38, at para 150.
71 Id. at para 151.
72 *supra* note 31.
73 *SPP v. Egypt*, *supra* note 17.
74 Id. at para 154.
75 Francesco Francioni & Federico Lenzerini, *The Destruction of the Buddhas of Bamiyan and International Law*, 14 EUROPEAN JOURNAL OF INTERNATIONAL LAW 631, 619-651(2003)
76 *SPP v. Egypt, supra* note 17, at para 75-6.
77 Id. at para 77. The second sentence of Article 42 (1) stated:
> In the absence of such agreement, the Tribunal shall apply 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 *SPP v. Egypt, supra* note 17, at para 78-80.
79 Id. at para 84.
80 Id. at para 154.
81 Id. at para 191.
82 Id. at para 78.
83Viñuales & Langer, *supra* note 26.
84 See *supra* section 2.1.
85 For example, *Metalclad v. Mexico* Award, *supra* note 23. The tribunal failed to analyse the potential relevance of the Convention on Biological Diversity, although the host state asserted their obligation and concern to protect endangered species.

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