

International Investment Law and Genetic Resources

Can international investment law hinder the implementation of the Nagoya
Protocol?

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Acronyms

ABS	Access-benefit sharing
BIT	Bilateral Investment Treaty
CBD	Convention on Biological Diversity
COP	Conference of the Parties to the CBD
FET	Fair and Equitable Treatment
ICSID	International Centre for Settlement of Investment Disputes
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States
ILC	International Law Commission
IPR	Intellectual Property Rights
JPOI	Johannesburg Plan of Implementation
MAT	Mutually Agreed Terms
NAFTA	North Atlantic Free Trade Agreement
NIEO	New International Economic Order
OECD	Organization on Economic Cooperation and Development
PES	Payments for Ecosystem Services
PIC	Prior Informed Consent
UNCED	United Nations Conference on Environment and Development
UNFCCC	United Nations Framework Convention on Climate Change
UN GA	United Nations General Assembly
VCLT	Vienna Convention on the Law of Treaties

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1 Introduction

The question this thesis aims to answer is whether or not international investment law can hinder the implementation of the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Resources Arising from their Utilization (hereinafter the Nagoya Protocol).

The relation between investment law and environmental law has increased in recent years. References to the need for investment are routinely included in multilateral environmental agreements, including those concerned with biodiversity. Meanwhile, references to sustainable development and environment are slowly surfacing in investment agreements, but the relation between the two areas is not free from tension. On the contrary, investment law is often perceived as an obstacle to the regulatory power of states to adopt measures to advance environmental policy objectives.

The Nagoya Protocol is among the international environmental legal instruments where tensions with investment law could easily surface. Its objective is to ensure transparency and legal certainty in the access to genetic resources but also that the flow of benefits from their utilization reverts back to provider countries and their communities. Given the large business volume that genetic resources represents in many economic sectors and the essentially transnational nature of the activity, there is a high likelihood of international investors fearing a negative impact in their interests.

The Nagoya Protocol came into force less than a year ago so it is early to determine if investors would avail themselves of the legal protections in international investment law to advance their interests vis-à-vis regulatory measures that host states may adopt to implement the regime in the Protocol. However, it is never late to start looking into the potential conflicts and tensions between the two legal fields and analysing the potential outcome of investment disputes in light of previous interpretations by arbitration tribunals. This is the main focus of this thesis and the results of the analysis show that the potential for conflict or incoherencies between investment protection standards and the regime

proposed in the Nagoya Protocol are high. However, given the novelty of the Protocol and the lack of case law directly related to ABS and genetic resources more time will have to elapse before more solid conclusions can be reached.

The methodology applied in this exercise is a thorough review of legal sources and the analysis of the work of specialists in the fields of international investment and environmental law. To ensure that non-specialised readers can follow the discussion the study includes an introduction to the two legal domains at hand: the Nagoya Protocol and international investment law. The analysis of the potential conflicts or tensions is limited to four international investment protection standards. No quantitative techniques have been used in the research.

The thesis is structured around six chapters and a conclusion. Chapter one is this introduction. Chapter two describes the interaction between investment and international investment law and sustainable development, environment and biodiversity. It examines how the different concepts are related to each other in policy documents and international legal instruments. Chapter three describes the access and benefit sharing regime in the CBD and the Nagoya Protocol. Besides revisiting the most important legal provisions in the regime the chapter also describes the policy objectives and how they are aligned with the positions of the different State Parties, namely genetic resource-rich developing countries in one side and industry and technology holding developed countries in the other. Chapter four is a brief introduction to international investment law including a succinct description of the evolution of the discipline and the tensions with doctrines of sovereign equality. Chapter five discusses conflict of norms and techniques for resolution in international law with special emphasis on their application to conflicts between environmental and investment law. Chapter six addresses the core of the question this thesis is aiming to answer. It selects four standards of protection in international investment law and compares their nature and scope with relevant provisions in the ABS regime in the Nagoya Protocol. The last chapter summarizes the conclusions of the analysis and indicates reasons for further research in this subject.

2 International investment law, sustainable development, the environment and the biodiversity

2.1 Investment and sustainable development

The fundamental function of international investment law is to protect the activities of private foreign investors against the political risk which could arise if host governments change their position.¹ This protection is deemed necessary to ensure the flow of investment in a climate of certainty and confidence.² However, many soft law instruments have also referred to investment as a central element to achieve sustainable development. The modern concept of sustainable development first appeared at the 1972 Stockholm Declaration albeit with a strong environmental focus. In 1987, the Brundtland report defined the concept as “development that meets needs of the present without compromising the ability of future generations to meet their own needs”.³ There is widespread consensus that this definition marries environmental protection with economic and social development.⁴ Sustainable development and its principles have been guiding international law since the concept was accrued by the Brundtland report. It is explicitly mentioned as an objective in more than 50 binding international treaties, many numerous soft law declarations and key judicial decisions.⁵ Therefore, it can be considered a widely accepted objective of the international community.

The Brundtland formulation of the concept of sustainable development does not suggest to limit economic activities, including investment, but to re-conduce them to satisfy present and future needs. The significance of international investment has been advanced in numerous instruments based on this idea. Agenda 21, the global plan of action resulting from the United Nations Conference on Environment and Development (UNCED) of 1992,

¹ Dolzer (2012) p.22

² Werksman (2001) p. 1

³ Our Common Future: The report of the World Commission on Environment and Development. A/42/427. Annex p. 41

⁴ Gehring (2011) p. 6

⁵ Gehring (2011) p. 5

stressed the critical function of investment for sustainable and environmentally friendly economic growth of developing countries.⁶ In 2002, the so-called Johannesburg Plan of Implementation (JPOI) of the World Summit on Sustainable Development referred repeatedly to the need to increase and promote investment and specifically referred to the need for “an enabling environment for investment” as a foundation for sustainable development.⁷ The final report of the International Conference on Financing for Development, the so-called Monterrey consensus, also stressed that foreign direct investment contributes towards financing sustained economic growth.⁸

The international policy consensus on the importance of international investment for sustainable development reflected in these soft law instruments is not mirrored in economic theory. Economic theories favourable to international investment argue that foreign investment brings labour, skills, technology transfer and infrastructure and therefore it should be protected by international law to ease capital flow and contribute to the economic development of developing countries. Critics maintain that as long as investors are multinational corporations having their seat of incorporation in the capitals of western developed countries they will not serve the interests of the developing countries and will not contribute to sustainable development. A more nuanced approach was developed following the work of the United Nations Commission on Transnational Corporations in the 1970s. It suggested that foreign investment can be both positive and negative to the economic development of states and it requires a mix of regulation and openness. These theoretical approaches respond to the ideological and geopolitical trends and events that have marked the historical development of international investment law.⁹

Just as much as foreign investment is considered crucial for achieving sustainable development many argued that sustainable development and its principles have become a core objective of national and international investment law and policy.¹⁰ For instance, the World Bank’s intention when drafting the International Convention on the Settlement of

⁶ Agenda 21: Programme of Action for Sustainable Development, Report of the UNCED, vol. U.N. GAOR, 46th Sess., Agenda Item 21, UN Doc A/Conf.151/6/Rev.1 (1992), 31 I.L.M. 874 at para. 2.23

⁷ UN World Summit for Sustainable Development: Plan of Implementation UN Doc A/Conf.199/L.1 para. 4

⁸ Report of the International Conference on Financing for Development, Monterrey, Mexico, 18-22 March 2002 (A/CONF.198/11, chapter 1, resolution 1, annex. para.20)

⁹ Somarajah (2010) pp. 47-60

¹⁰ Gehring (2011) p. 4

Investment Disputes (ICSID) in 1965 was to assist in resolving disputes without becoming involved while promoting the economic development of poor countries.¹¹ Furthermore, a study of the Organization on Economic Cooperation and Development (OECD) shows that virtually all investment treaties concluded between 2012 and 2013 contain sustainable development language. It also shows that arbitrators frequently refer to issues and international agreements relating to sustainable development.¹²

Implementation remains a challenge even if international investment treaties increasingly refer to sustainable development. International and domestic investment law promote investment by protecting investors but does not provide flexibility and incentives to enhance sustainability.¹³ The OECD study indicates that references to sustainable development are not sufficient to achieve sustainable development objectives. It points especially to the need to include guidance on sustainable development for those in charge of interpreting and applying the treaties, namely arbitrators.¹⁴ It is however interesting that the jurisprudence of some ICSID arbitration tribunals refer to the contribution to the host countries economic development as a criterion that an investment must fulfil to trigger their jurisdiction.

Critics of international investment law question whether it can contribute to sustainable development since it is fundamentally designed to protect international investors. One criticism is that multinational corporations have sufficient power to shape international law to their benefit by using private techniques of dispute resolution i.e. arbitration tribunals.¹⁵ Others argue that the dispute resolution system is not transparent since awards are not necessarily publicized, arbitrators can be partial in their interpretation, there is a lack of legal certainty since arbitral jurisprudence does not create precedent and arbitrators can disregard other areas of international law like human rights or environmental law.¹⁶

¹¹ Lowenfeld (2008) p. 537

¹² Gordon (2014) p.6

¹³ Gehring (2011) p. 9

¹⁴ Gordon (2014) p.6

¹⁵ Sornarajah (2010) p. 4

¹⁶ Langford (2011) p. 179

2.2 Investment and environmental law

The irruption of the concept of sustainable development reconciled economic development and environmental protection. This balance is reflected in the United Nations Framework Conventions on Climate Change (UNFCCC) and on Biological Diversity (CBD).¹⁷ The reconciliation between environment and economic development also brought attention to foreign investment as a driver for both development and environmental protection. Foreign investment was mentioned in various declarations and soft instruments like Agenda 21 and JIPO and later made its way into legal instruments e.g. the Clean Development Mechanism of the Kyoto Protocol.¹⁸ Transfers of technology, payments for ecosystems services (PES) and access benefit sharing (ABS) agreements are often referred to as techniques to channel investment into environmental protection.¹⁹

As investment was recognised as a key driver in international environmental policy and legislation, environmental considerations made their way into international investment and free trade agreements.²⁰ An OECD report from 2011 showed that among 1,623 international agreements surveyed 8, 2 % included some reference to environmental issues.²¹ This number may seem low but when looking at agreements concluded after 2008, 89% of the treaties include some environmental clauses even if they are broad and uncertain.²² The same year the OECD issued a Statement on “Harnessing Freedom of Investment for Green Growth” reaffirming that environmental and investment goals are mutually reinforcing”.²³ Yet, the mutual recognition showed in environmental and investment policy and law does not guarantee that sustainability and economic profit would be compatible in the future.²⁴

The legal and policy developments may seem encouraging but the underlying tension between economic development and environmental protection remains and it is particularly prominent in international investment law and practice. By way of example, the OECD Statement not only emphasized the synergies between investment and environment. It also

¹⁷ UNFCCC preamble para 11 and 12 and articles 2 and 3. CBD preamble para. 19

¹⁸ Sands (2012) p. 870

¹⁹ Viñuales (2012) p. 24 and Romson (2011) p. 37

²⁰ Viñuales (2012) p. 14

²¹ Gordon (2011) p.8

²² Viñuales (2012) p. 6

²³ Harnessing Freedom of Investment for Green Growth: freedom of investment roundtable 14 April 2011. OECD p. 3

²⁴ Viñuales (2012) p. 24

called governments to “review their new proposed environmental measures for compliance with investment law obligations, such as those regarding non-discrimination”, thereby subordinating the environment to economic considerations.²⁵ If investment law is perceived as hierarchically superior, the growing body of BITs offering strong protections to investors may become an obstacle to the implementation of environmental law and policy.²⁶ The constant evolution of environmental law towards stricter standards could be used as justification to strengthen investors’ protection and their expectations to be treated fairly, without discrimination and to be compensated if expropriated. On the other end, if investors’ activities are risky or harmful, strong protections against regulation can become a threat to the environment.²⁷ The way forward to ease these tensions is not clear. Romson argues that harmonising the two perspectives requires that states enjoy a broad margin of appreciation to adopt environmental measures as long as minimum procedural requirements are respected.

The growing number of investment disputes with an environmental remit illustrates the tensions between the two legal fields.²⁸ Critics of the investment dispute resolution system often point to those cases where the power of governments to regulate the environment is limited by claims being brought by investors like for example *Santa Elena v. Costa Rica* or *Metalclad v. Mexico*. It is not clear if this is true or simply a perception but the growing numbers of disputes and the resulting jurisprudence will provide a better basis to identify potential legal conflicts and their causes.²⁹

2.3 Investment and biodiversity

The CBD and its Nagoya Protocol are possibly the most prominent examples of how the principles of sustainable development (economic growth, social equity and environmental protection) are captured in an international environmental legal instrument. It has been argued that the CBD objectives of conservation, sustainable use and benefits sharing are fundamentally driven by economic considerations.³⁰ In particular, the access and benefit

²⁵ Harnessing Freedom of Investment for Green Growth: freedom of investment roundtable 14 April 2011. OECD p. 5

²⁶ Romson (2011) p. 37

²⁷ Viñuales p. 24

²⁸ Fauchald (2011) p. 33 and Viñuales (2012) p. 18

²⁹ Fauchald, (2011) p. 33

³⁰ Pavoni p. 208

sharing approach implies an economic exchange between non-developed countries with rich biodiversity resources in their territory and developed countries with powerful corporations and industries. The exchange will consist in granting access to those corporations and industries against a fair and equitable share of the benefits of the subsequent commercialization.³¹

Interest in economic exchanges around biodiversity resources follows from their importance for social and economic development. Biodiversity represents a great opportunity for investors since the commercial value of genetic resources alone was estimated in 1999 between USD 500-800 billion.³² Besides research institutes and universities, private companies operating in a wide range of sectors, including the pharmaceutical, biotechnology, seed, crop protection, horticulture, cosmetic and personal care, fragrance and flavour, botanicals, and food and beverage industries are likely to find investment opportunities in genetic resources and associated traditional knowledge.³³ More recent figures show that food and pharmaceutical companies relying on genetic resources earn more than 50 billion annually and 20% of the top 100 most prescribed drugs are derived from genetic resources.³⁴ Hence, the involvement of the private sector on biotechnology research and investment is large and could be expected to grow.³⁵

Conversely, it is also widely acknowledge that economic activities also have a major impact on biodiversity.³⁶ Therefore the role of the private sector is essential to ensure that economic activities and interests are in harmony with conservation and sustainable use of biodiversity.³⁷

The CBD explicitly acknowledges the need for substantial investment to achieve conservation and recognizes that environmental, economic and social benefits will arise from those investments.³⁸ Article 11 in the CBD calls parties to “adopt economically and

³¹ Ibid p. 208

³² Morguera (2014) p. 4

³³ An Explanatory Guide to the Nagoya Protocol on Access and Benefit-sharing (2012) p.4

³⁴ Morguera (2014) p. 4

³⁵ Cabrera (2011) p. 723

³⁶ CBD preamble para. 6 COP -8 Decision VIII/fifth preambular para.

³⁷ Cabrera (2011) p. 721

³⁸ CBD preamble para. 18

socially sound measures that act as incentives” to achieve the Convention’s objectives. This provision is the key legal justification for the incorporation of economic mechanisms that can contribute to biodiversity protection. Furthermore, article 16 of the Convention calls parties to take measures so the private sector facilitates technology transfer. However, if developed countries do not lift IPR protection to promote transfer of technology and other benefit sharing actions the objectives of the CBD and by extension sustainable development may be jeopardized.

The Conference of the Parties to the CBD (COP) has been explicit in wanting to promote investment. In 2000, it established a work programme to promote incentive measures of economic, social and legal nature aiming to improve the use of incentives to encourage and promote investment.³⁹ The programme was reviewed in 2008 and one of the conclusions was to ensure that investors should be aware of biodiversity legislation. In 2010, the COP adopted the Nagoya Strategic Plan for Biodiversity and call Government to “foster the effective contribution of the private sector”⁴⁰ and “to make the case for investment for biodiversity and ecosystems services”.⁴¹

The legal and policy framework on biodiversity seems to recognise the need for foreign investment to achieve the objectives of conservation, sustainable use and access and benefit sharing of genetic resources. In contrast, it appears that the international investment regime has not considered biodiversity in general nor access and benefit sharing of genetic resources in particular. The OECD survey on environmental concerns in international investment agreements showed that biodiversity is not explicitly mentioned in investment treaties and it is not possible to conclude on the merits of the generic references to environmental matters.⁴² The study suggests that there is little exchange between the investment and environmental policy communities.

As discussed in the previous section the relation between environmental and investment law is tense and this illustrated by the growing number of investment disputes with an environmental remit. On this basis, a basic legal question is arising in the field of

³⁹ COP 5 MAY 2000 , Decision V/15

⁴⁰ COP 10, decision X/2 para 3(a)

⁴¹ COP 10, Decision X/2 para 7.

⁴² Gordon (2011) p.8

biodiversity. Whether certain access and benefit sharing requirements and issues could fall within the scope of questions envisaged within investment treaties and, if so whether there could be a potential conflict between an investment or and an access and benefit sharing requirement or norm.⁴³

⁴³ Cabrera (2011) p. 726

3 The international legal regime of access and benefit sharing of genetic resources: the CBD and the Nagoya Protocol

3.1 The CBD and genetic resources

The CBD was adopted at UNCED in 1992 and was swiftly signed by 153 states and the EU. It entered into force in December 1993 and today 195 states are parties.⁴⁴

The CBD has three main objectives:

- 1) the conservation of biological diversity;
- 2) the sustainable use of its components; and
- 3) the fair and equitable sharing of the benefits arising out of the of the utilisation of genetic resources, including by appropriate access to genetic resources and by appropriate transfer of relevant technologies, taking into account all rights over those resources and to technologies, and by appropriate funding.⁴⁵

The CBD brought important novelties to international law.⁴⁶ It introduced a legal framework for the conservation and sustainable use of biodiversity as a common global good and general interest of humanity. It declared that states have sovereign rights over natural resources.⁴⁷ But the most important novelty is the introduction of a regime based on equity to turn the flows of benefits back to provider countries while creating incentives for conservation and sustainable use.⁴⁸ This regime regulates access to genetic resources and the fair and equitable sharing of the benefits of such access.⁴⁹

⁴⁴ The United States signed the CBD in 1993 but have never ratified it.

⁴⁵ Article 1 of the CBD Biodiversity.

⁴⁶ Morguera (2014) p. 5

⁴⁷ CBD preamble para. 3 and 4.

⁴⁸ Glowka (2013) p. 11

⁴⁹ Sands (2012) p. 457

Prior to the adoption of the CBD, access and use of genetic resources was based on the principle of common heritage of mankind. Developing countries provided their genetic resources freely to developed countries and their industries but they lacked the technology to benefit from the genetic resources in their territory. Moreover, the IPR regime in the developed countries restricted access by developing countries to the products originated from those resources.⁵⁰ Through the affirmation of the principle of national sovereignty over natural resources gene-rich⁵¹ countries aimed to redress the imbalance and reach a more equitable regime. Consensus on an international legal regime on ABS for genetic resources was not reached without controversy given that genes and other natural biochemicals are of vital importance to the development of many economic sectors.

The adoption of the CBD did not eliminate resistance based in other domains of international law. IPR holders –usually big corporations- are still able to protect their interests through private law.⁵² The World Trade Organization (WTO) TRIPS agreement does not contain any support to the principle of national sovereignty over natural resources since it allows patenting on the use of genetic resources without requiring prior informed consent from the country of origin. Whether international investment law may also become a tool for resistance will be discuss later in this paper.

3.2 ABS in the CBD

The ABS regime is captured in articles 15, 16, 19 and 8 (j). The main principles of the regime are outlined in Article 15. They include the recognition of “*sovereign rights of States over their natural resources*” and that “*the authority to determine access to genetic resources rests with national governments and subject to national law*”. Sovereign control is underpinned by the requirements of prior informed consent (PIC) and mutually agreed terms (MAT).⁵³ This article introduces the obligations on users to share benefits⁵⁴ and on providers to avoid restricting access.⁵⁵

⁵⁰ Morguera (2014) p. 8

⁵¹ *Ibid.* p. 7

⁵² *Ibid.* p. 8

⁵³ CBD art. 15.4 and 15.5

⁵⁴ CBD 15.7

⁵⁵ CBD 15.2

Article 16 imposes obligations on State Parties to provide and facilitate access or transfer of technology relevant to attaining the objectives of the Convention including easing IPR protection –patents in particular- to the benefit of developing countries providing genetic resources⁵⁶ and to cooperate so IPR regimes support the objectives of the CBD.⁵⁷ It also calls State Parties to ensure the private sector facilitates the development and transfer of technology for the benefit of the public and private sectors of developing countries.⁵⁸ Article 19 requires that State Parties facilitate access by provider countries to biotechnological research activities and to results and benefits⁵⁹ linked to the resources they have provided.

Under the title *in situ* conservation, article 8 (j) in the CBD also obliges parties to share the benefits arising from the utilization of knowledge innovations and practices of indigenous and local communities.

3.3 The Nagoya Protocol

3.3.1 The road to Nagoya

Despite its innovative features, the ABS provisions in the CBD are of general character and therefore insufficient to regulate the complexities of the genetic resources ABS regime. Unfortunately, little progress was made in the first years after the CBD was adopted. Developing countries had pushed for a strong ABS regime to end free access but had little capacity to enact efficient and transparent access legislation. Nonetheless, they recalled the duty of developed countries to prevent misappropriation and misuse. On the other hand, developed countries –generally hosting the research and commercial bioprospecting institutions- perceived that the few first national ABS laws were cumbersome and domestic institutional capacity was poor.⁶⁰ This legal and institutional uncertainty combined with a number of allegations of bio-piracy⁶¹ against researchers and companies led to a reduction of bioprospecting activities. Also, developed countries did not

⁵⁶ CBD art. 16.3

⁵⁷ CBD art. 16.5

⁵⁸ CBD art.16.4

⁵⁹ CBD art. 19. 1 and 19.2

⁶⁰ Glowka (2013) p. 24

⁶¹ “the ways that corporations from the developed world claim ownership of, free ride on, or otherwise take unfair advantage of, the genetic resources and traditional knowledge and technologies of developing countries”. (Dutfield p.14)

firmly engaged in taking measures supporting benefit sharing by their researchers and companies.

In 2002, State Parties approved the Bonn Guidelines.⁶² They are voluntary and aim to assist governments and stakeholders to develop measures on access and benefit sharing.⁶³ Just a few months after they were approved, during the World Summit on Sustainable Development, governments decided to “negotiate within the framework of the CBD [...] an international regime to promote and safeguard the fair and equitable sharing of benefits arising out of the utilisation of genetic resources”.⁶⁴

It took 8 years to negotiate the Nagoya Protocol. It was adopted in October 2010 and entered into force in October 2015. To date 91 parties have signed the protocol and 59 have ratified it.⁶⁵ It is expected to bring legal certainty and transparency for both user and providers of genetic resources.

3.3.2 Objective

The Nagoya Protocol is a legally binding, supplementary agreement to the CBD meant to operationalize the CBD’s third objective.⁶⁶ Its main objective represents a balance between economic and non-economic values by linking access and benefit sharing with conservation and sustainable use and reads:

*the fair and equitable sharing of the benefits arising from the utilization of genetic resources, including by appropriate access to genetic resources and by appropriate transfer of relevant technologies, taking into account all rights over those resources and to technologies, and by appropriate funding, thereby contributing to the conservation of biological diversity and the sustainable use of its components.*⁶⁷

⁶² See <https://www.cbd.int/abs/bonn/>

⁶³ Glowka (2013) p.24

⁶⁴ United Nations, Report of the World summit on sustainable development (2002) UN Doc A/CONF.199/20, Resolution 2 Johannesburg Plan of Implementation, para 44 o.

⁶⁵ See list of signatures and ratifications at <https://www.cbd.int/abs/nagoya-protocol/signatories/default.shtml>

⁶⁶ Article 28 of the CBD explicitly foresees the development of protocols.

⁶⁷ Nagoya Protocol art. 1

3.3.3 Scope

Negotiating the scope of the Nagoya Protocol proved to be controversial and countries could not agree on the substantive, temporal or geographical scope and the final formulation in article 3 became a general provision.⁶⁸ The Nagoya Protocol “*applies to genetic resources within article 15 of the CBD*” and to “*the benefits of arising from the utilization of such resources*”. It also applies to traditional knowledge associated with genetic resources within the scope of the CBD and to the benefits arising from the utilization of such knowledge.

This general formulation does not clarify what is really the scope of application of the Nagoya Protocol and must be read in conjunction with articles 2, 4 and 10. It will only apply when genetic resources are accessed for research and development including the through the application of biotechnology therefore excluding biological resources traded as commodities.⁶⁹ The scope will also be limited by the relation with other instruments and agreements. Rights and obligations deriving from existing agreements are excluded and future specialized agreements will prevail if they are supportive and not contrary to the objectives of the CBD and the Nagoya Protocol.⁷⁰ Article 10 foresees the creation of a global multilateral sharing mechanism that could address some of the problems related to the geographical scope especially in situations where a bilateral approach is not possible.

3.3.4 Access to genetic resources

In line with the CBD, the principle of national sovereignty underpins access to genetic resources in the Nagoya Protocol. It is operationalized in the requirement of PIC and MAT of the country of origin or the country that has legitimately acquired those resources.⁷¹ Furthermore, it also requires PIC (or approval and involvement) from indigenous or local communities when they have established rights to grant access to genetic resources. PIC

⁶⁸ *An Explanatory Guide to the Nagoya Protocol on Access and Benefit-sharing (2012) p.25*

⁶⁹ Nagoya article 2 (d). Biotechnology means any technological application that uses biological organisms or derivatives thereof, to make or modify products or processes for specific use-

⁷⁰ Nagoya Protocol art. 4

⁷¹ Nagoya Protocol art. 6.1

and MAT requirements apply as well to access to traditional knowledge held by indigenous communities.⁷²

It requires provider countries to adopt measures to ensure that the legal and institutional framework guarantees legal certainty for users seeking access.⁷³ Legal certainty was a high priority for developed countries which wanted the users -research and commercial- to have guarantees that the providers were in fact entitled to grant access to the resources.⁷⁴

The catalogue of access measures is very comprehensive but it does not distinguish abstract aspirational goals such as legal certainty, clarity and transparency, from concrete tangible measures such as the provision of written decisions, cost efficient and timely procedures or making information on procedures available. Obviously, if concrete measures are adopted, legal certainty, clarity and transparency would be enhanced but what is an acceptable threshold could be subject to different interpretations and therefore dependant on the providing countries legal traditions and capacities. This matter is particularly relevant in terms of foreign investment protection and the fair and equitable standard of treatment in particular.

The access regime is completed with a list of special considerations that provider countries should take when developing their legal framework to facilitate research, coping with emergencies and give due regard to food and agriculture and their importance for food security.⁷⁵

Last, the regime foresees the creation of necessary institutional frameworks at national designation of a national focal point and international level. The access and benefit-sharing clearing house and information sharing mechanism foreseen in article 14 can significantly contribute to legal certainty and clarity. Governments need to actively contribute with relevant information to achieve this but by way of example only 14 countries had

⁷² Nagoya Protocol art. 7

⁷³ Nagoya Protocol Art. 6.3

⁷⁴ Glowka (2013) p. 29

⁷⁵ Nagoya Protocol Art. 8

contributed information on domestic ABS legislative, administrative and policy measures.⁷⁶

3.3.5 Benefit sharing from the utilization of genetic resources

Benefit sharing stands on the equity principle. The Nagoya Protocol clarifies that benefits include those originated from utilization of genetic resources and subsequent application and commercialization. It also links sharing of benefits to the other two objectives of the CBD: the conservation and sustainable use of biodiversity.⁷⁷

Benefits will be shared only with Parties providing the genetic resources and with indigenous and local communities with established rights over such resources in accordance with domestic legislation. Parties are called to adopt legislative, administrative and policy measures to ensure benefits are shared with indigenous and local communities.⁷⁸ Sharing should be fair and equitable and always based on MAT, meaning on a contract basis.⁷⁹ Acknowledging that MAT is a new feature in international and domestic law, parties are called to create an environment conducive for providers and users by creating and making available model contractual clauses, guidelines and codes of conduct.⁸⁰ Benefits can be monetary or non-monetary.⁸¹ Non-monetary benefits include access to and transfer of technology.

The Nagoya Protocol also foresees the possibility of a global multilateral benefit sharing mechanism to cover situations when a bilateral approach to ABS on the basis of PIC and MAT would be problematic.⁸² Discussions started in 2010 but so far there is no agreement on the scope of the mechanism provision.⁸³

Benefit sharing obligations could raise a number of tensions with international investment legal protections. Transfer of technology may have to be coherent with established

⁷⁶ See <https://absch.cbd.int/search>. Accessed 14.08.2015

⁷⁷ Nagoya Protocol art.9

⁷⁸ Nagoya Protocol art 5.1 and 5.2

⁷⁹ *An Explanatory Guide to the Nagoya Protocol on Access and Benefit-sharing (2012)* p. 28

⁸⁰ Nagoya Protocol articles 19 and 20.

⁸¹ Nagoya Protocol art. 5 and Annex

⁸² *An Explanatory Guide to the Nagoya Protocol on Access and Benefit-sharing (2012)* p.28

⁸³ Morguera (2014) p 199

protections against performance requirements and will be discussed in chapter 6 in this thesis.

3.3.6 Compliance

The Nagoya Protocol addresses compliance at two levels. Compliance by State Parties is addressed in article 30 which calls for the creation of cooperative procedures and institutional mechanisms in line with other international environmental agreements. In October, the COP-MOP⁸⁴ adopted a decision that developed the procedures and mechanisms, including *inter alia* the composition and functions of the compliance committee and measures to promote compliance and address non-compliance.⁸⁵

The other level of compliance focuses on supporting adherence to domestic ABS regimes⁸⁶ and enforcing ABS contractual arrangements.⁸⁷ These provisions are considered to be the most important pillar Protocol since they aim to address the long standing concerns of provider countries to detect and obtain remedy to breaches of ABS measures.⁸⁸ The compliance regime is complex since ABS measures are administrative decisions governed by public law while ABS contracts are governed by contractual freedom and when involving more than one jurisdiction, by private international law. To complicate the matter further, users are often private individuals or entities but they could also be public entities acting in private capacity.

Accessing genetic resources and associated traditional knowledge in breach of domestic ABS regulatory measures requiring PIC and/or MAT (i.e. violating a public or administrative act) was described as misappropriation during the negotiations. A holistic interpretation of the text leads to think that subsequent utilization and commercialization are included.⁸⁹ Articles 15 and 16 require that State Parties, primarily user countries, take measures to ensure that their nationals comply with ABS measures of providing countries. These measures include confirming compliance with the providing country requirements at

⁸⁴ Meeting of the Parties

⁸⁵ UNEP/CBD/NP/COP-MOP/DEC/1/4

⁸⁶ Nagoya Protocol arts. 15, 16 and 17.

⁸⁷ Nagoya Protocol art. 18

⁸⁸ Glowka (2013) p. 34

⁸⁹ Morguera (2014) p. 258

the time of access⁹⁰ and to identify and sanction breaches of the measures adopted to ensure compliance.⁹¹ State Parties shall also cooperate when allegations of violations of domestic ABS legislation or regulation surface.

As there is hardly any experience, State Parties are left with a great degree of flexibility to decide on how to implement compliance measures and what sanctions to apply as long as they are *appropriate, effective and proportionate*.⁹² Possible sanctions include revocation of IPRs and market approvals; monetary fines; criminalization of certain acts and the prohibition of using genetic resources when obligations have been violated.⁹³

The violation of the clauses established by MAT is essentially a violation of contractual obligations and has been referred to as misuse.⁹⁴ Article 18 is concerned with the transnational dimension of potential violations of MAT given that users and providers genetic resources are likely to be in different jurisdictions. Hence the aim to enhance legal certainty in contractual relations by promoting the inclusion of jurisdiction and applicable law clauses in contracts. State parties should also encourage the inclusion of alternatives for dispute resolution, like arbitration or mediation. For the same reason, article 18 requests State Parties to ensure the availability of legal recourse in their legal system in case of disputes between individual providers and users located in different countries.⁹⁵ Effective access to justice and mutual recognition of foreign judgements and arbitral awards complete the menu of obligations.

Despite its innovative character article 18 does not provide much guidance to State Parties on what basis domestic courts may decide whether or not they have jurisdiction over MAT related disputes. This is important because jurisdiction may end up being decided according to domestic law or private international law. Also there is no guidance for courts to interpret whether contractual terms in MAT are fair and efficient.⁹⁶ Finally, the availability of recourse may be difficult in practice because *locus standis* rules in certain

⁹⁰ Ibid p. 255

⁹¹ Ibid p. 260

⁹² Ibid p.260

⁹³ Ibid p. 260

⁹⁴ Chiarolla (2013) p 427-428

⁹⁵ Nagoya Protocol 18.2

⁹⁶ Morguera (2014) p. 285

jurisdictions may not accept collective entities such as indigenous communities as parties in judicial proceedings.⁹⁷

⁹⁷ Morguera (2014) p. 288

4 A brief on international investment law

4.1 Purpose of international investment law

As mentioned earlier, international investment is considered to be crucial to achieve sustainable development. Yet, international investment law is primarily concerned with protecting the interests of international investors in their relation with host states. Protective measures promote risk reduction and certainty and encourage the investment flow by removing market barriers and distortions.⁹⁸ These objectives and measures can sometimes clash with sustainable development and environmental policy goals, like the objective of the CBD and the Nagoya Protocol to re-direct benefit flows of genetic resource exploitation to developing countries.

A number of protection standards have been developed under international investment law to protect international investors from host government actions that could jeopardise certainty and create unexpected risks. These include but are not limited to fair and equitable treatment, protection against unlawful expropriation, full protection and security, access to justice, protection against discrimination and prohibition of performance requirements. Not all will be described in detail here but those chosen to assess the potential conflicts or incoherencies with the Nagoya Protocol will be examined in chapter six in this thesis.

4.2 Doctrine of sovereign equality and protection of investors: the evolution of international investment law

The development of international investment law as a system for the protection of foreign investors against host governments runs parallel to the attempts of developing countries to achieve more equitable international economic relations. Until the rise of bilateral and regional investment treaties in the early 1990s, the idea of international legal protection for investors run countered to the aspirations of sovereign equality, which included sovereign rights of states over natural resources and to expropriate foreign property. This tension

⁹⁸ Werksmann (2001) p. 6

underlines the evolution of the two international law principles that underpin the operation of international investment law: the protection of foreign property and the international minimum standard.

Protection of the property of aliens had generally been well enshrined in international law until the social meaning of property gained momentum with the Russian and Mexican Revolutions in the early XXth century. The approach followed by many developing countries thereafter was not exclude compensation but depending on the purpose of the taking, the nature of the expropriated property and on the available resources, payment could be delayed and be lower than the value of the property.⁹⁹ A number of arbitral and judicial decisions reaffirmed that under international law foreigners had the right to receive just compensation regardless of the legality and purpose of the taking. Western states reacted by asserting that even if states had the right to expropriate for a public purpose, international law required prompt, adequate and effective compensation.¹⁰⁰

The second principle is the right of foreigners to be treated in accordance with an international minimum standard. Generally, the principle of equal treatment required that aliens were entitled to compensation against expropriation in the same conditions as the nationals of the state of the taking since states generally recognized this right to their citizens.¹⁰¹ However, if domestic law did not meet adequate standards of equity and justice an international minimum standard should apply to foreigners. The Calvo Doctrine¹⁰² rejected this approach and affirmed that aliens had the same protection as nationals under international law, and offering them more protection would be contrary to international law. This also implied that aliens should submit their claims to the domestic courts.¹⁰³ The Calvo doctrine is in line with later views that criticize the international minimum standard because it hides an idea that law should be designed to serve interests of states with ability to expand their overseas trade and investments.¹⁰⁴

⁹⁹ Lowenfeld (2008) p. 472

¹⁰⁰ Also known as the Hull formula.

¹⁰¹ Lowenfeld (2008) p. 472

¹⁰² Developed by Carlos Calvo, an Argentinian lawyer of the XIXth century.

¹⁰³ Subedi (2014) p. 729

¹⁰⁴ Somarajah (2010) p. 19

Despite the critics and even if it has proven difficult to define, the international minimum standard for the protection of foreigners has endured and informs international standards of protection for foreign investors.

These principles on the protection of foreign investment remained unwritten customary law even after WWII and the proliferation of treaties thereafter.¹⁰⁵ Between 1945 and 1975 newly independent states wishing to use their resources to promote their economic development initiated a wave of expropriations and nationalizations against nationals and aliens under the principle of national sovereignty. Some compensation was often paid but it was never adequate, prompt and effective and usually obeyed political and economic considerations.¹⁰⁶

In 1962, the UN GA Declaration on the Permanent Sovereignty over Natural Resources¹⁰⁷ struck a balance between the rights of host state's to expropriate foreign investor's property and the protection of foreign investors. Consensus was reached on the obligations to pay compensation to aliens in accordance with international law and the binding effects of investment agreements and arbitration awards between states and private parties.¹⁰⁸ Later, the UN GA Declaration on the Establishment of a New International Economic Order (NIEO)¹⁰⁹ and the Charter of Economic Rights and Duties of States¹¹⁰ eliminated the requirement of a public purpose to expropriate and the right of investors to equal treatment. Consensus was broken and home countries to investors rejected it and refused to admit it constituted any changes in customary law.¹¹¹

States signed commerce and navigation treaties long before the tensions between sovereignty and protection of foreign investment arose in international relations. The first genuine bilateral investment treaty (BIT) was signed between Germany and Pakistan in 1959. Other European states and the US soon followed and BITs became a standard in economic foreign policy to secure the rights of investors. By 2015, UNCTAD is reporting

¹⁰⁵ Lowenfeld (2008) p. 482

¹⁰⁶ Lowenfeld (2008) p.485

¹⁰⁷ GA Res. 1803, 17 UNGAOR Annexes, Vol.I Agenda Item No. 39 at 59.

¹⁰⁸ Lowenfeld (2008) p. 489

¹⁰⁹ GA Res 3201 (S-VI) (1 May 1974)

¹¹⁰ GA Res 3281 (XXIX) (12 December 1974)

¹¹¹ Lowenfeld (2008) p.493

2926 Bits out of which 2279 are in force. It also reports 346 “other” international agreements that include foreign investment related provisions.¹¹²

Attempts at the OECD in 1967 and 1998 and in 2004 at the WTO to adopt a multilateral legal framework on foreign investment failed as states could not agree on the content and scope. At present, there is no support for a multilateral legal agreement on foreign investment.¹¹³ Much earlier the leadership of the World Bank had realised that an agreement on substance would be difficult to reach and focused instead on developing effective procedures for dispute resolution. This approach led to the adoption in 1965 of the Convention on the Settlement of Investment Disputes between States and Nationals of other States (ICSID Convention) and the establishment of the International Centre for Settlement of Investment Disputes. As a reaction to the wave of expropriations associated with the NIEO, the World Bank also took the initiative in the early 1980s to create the Multilateral Investment Guarantee Agency (MIGA) to improve the conditions for foreign investment and insure against the political risks of such investment.

4.3 Sources of international investment law

International investment law combines rules originating in various sources of law.¹¹⁴ This is not very different from other domains of international law but what makes international investment law special is the overlap between international and domestic law on the one hand, and public and private law in the other. This combination has also been attributed to certain areas of international environmental law and in particular to the Nagoya Protocol.

The most important international legal source in investment law are investment treaties. They usually include a definition of investment, the standards of protection and clauses on dispute resolution. Investment clauses are also included in regional free trade agreements like North Atlantic Free Trade Agreement (NAFTA) or sectoral agreements like the European Energy Charter Treaty (ECT).

¹¹² <http://investmentpolicyhub.unctad.org/IIA>

¹¹³ Dolzer (2012) p.8

¹¹⁴ Tams (2012) p. 2

Customary law also plays a significant role in investment relations because the international investment legal regime is not shaped by a multilateral treaty.¹¹⁵ In fact, some BITs explicitly refer to customary law as a source of law.¹¹⁶ It will generally apply in the absence of an investment treaty, to cover gaps or to interpret existing treaty provisions.¹¹⁷ As in other branches of international law the formation of customary law is subject to debate and is not clear whether the large number of investment treaties is giving rise to new customary rules.¹¹⁸ International arbitration tribunals generally rely on decisions of the ICJ, other investment tribunals or doctrinal publications when they refer to customary law.¹¹⁹ Accepted rules of customary law include rules on expropriation, non-discrimination or denial of justice. Some argue that right of host states to take non-discriminatory regulatory measures has become customary law.¹²⁰

General Principles of Law are considered a residual source of law applicable when treaties and custom do not cover a particular legal issue and are seldom referred to in investment arbitration jurisprudence.¹²¹

According to article 38.1 of the ICJ Statute, judicial decisions are “*subsidiary means for the determination of the rules of law*” but they significantly contribute to the development of international law in general, and investment law in particular. Case law has been crucial to develop key standards of treatment of foreign investors like rules on expropriation, fair and equitable treatment or full protection and security.¹²² The lack of consensus to develop a multilateral comprehensive treaty defining the principles of international investment law has created a dependency on international courts to deduce the applicable rules.¹²³ Investment arbitration tribunals are created ad hoc, do not belong to a hierarchical structure and are not bound by previous decisions. Anyhow, they are likely to follow the same reasoning in similar subject matters and develop the so called “*jurisprudence constant*”

¹¹⁵ Ibid. p. 4

¹¹⁶ The NAFTA Free Trade Commission stated that article 1105 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another party. (Moshe p9 footnote 31)

¹¹⁷ Hirsch (2011) p. 8

¹¹⁸ Ibid. p. 10

¹¹⁹ Hirsch p. 12

¹²⁰ Subedi (2014) p. 741

¹²¹ Hirsch p.13

¹²² Subedi (2014) p.747

¹²³ Ibid p.748

which is crucial to secure uniformity, stability and predictability of the law.¹²⁴ Some predict that as the investment law-making develops and becomes more sophisticated the role of arbitral tribunals as law-making agents will diminish.¹²⁵

Article 38 of the Statute of the ICJ does not consider domestic law a source of international law but it is widely accepted that domestic laws of the host state are a source of law governing foreign investment. This may include laws regulating taxation, property, labour, nationality or the environment.¹²⁶

Given that different laws –domestic or international- could be applicable to a dispute, a key question in drafting the ICISD Convention was to determine what law tribunals should apply.¹²⁷ According to article 42.1 of the ICSID Convention, arbitral tribunals will decide disputes in accordance with the rules agreed by the parties. If there is no agreement, the tribunal will apply the domestic law of the host state and “*such rules of international law as may be applicable*”.

States and private actors can enter into contracts that will be governed by domestic private law i.e. *pacta sum servanda* but that could be subject to rules of international public law i.e. minimum standard of treatment, if disputes arise.¹²⁸ Contracts per se are not considered a source of investment law but they can define tasks and responsibilities of the parties and more importantly can determine the applicable law to the investment and the forum for dispute resolution. The host government will generally be interested in protect its sovereignty while foreign investors are interested in predictable and stable legal environments. The result is generally a compromise between domestic and international law.¹²⁹

4.4 Investments and investors

The definition of investors and investments is crucial international investment law because only those activities that qualify as “investments” and are carried out by “investors” will be entitled to the its protection. Arbitral investment tribunals will only exercise jurisdiction if

¹²⁴ Dolzer (2012) p. 33

¹²⁵ Tams (2012) p. 8

¹²⁶ Cosby (2012) p. 3

¹²⁷ Lowenfeld (2008) p. 539

¹²⁸ Dolzer (2012) p. 12

¹²⁹ Ibid. p. 81

the investor's assets or interests qualify as investments.¹³⁰ The definition of investors and investments is of particular importance for the purposes of analysing the overlap or potential conflict between the Nagoya Protocol and the international investment law framework. Actors carrying out activities related to genetic resources and their subsequent utilization and commercialization may qualify as investors and investments and could claim protections under international investment law in detriment of the mechanisms foreseen in the Nagoya Protocol.

4.4.1 Investment

Despite its centrality in international investment law, the definition of investment provokes considerable debate among international lawyers. The debate is not theoretical and host states often allege that the activity in dispute is not an investment under domestic laws, hence tribunals should decline jurisdiction. Yet, even if the activity –for instance a contract- cannot be considered an investment per se under domestic law, it could constitute an investment under the treaty in question.¹³¹

Investment treaties generally include a very broad definition along the lines of “every kind of asset owned or controlled, directly or indirectly by a foreign investor” usually followed by a non-exhaustive list of examples.¹³² Sometimes there are references to “establishment of lasting economic activities” (or rights conferred by contracts or rights granted under national law).¹³³

Article 25 of the ICSID Convention limits the jurisdiction of ICSID arbitration tribunals to: “*any legal dispute arising directly out of an investment*” but it does not define what an investment is. Early ICSID arbitral tribunals applied article 31 of the Vienna Convention on the Law of Treaties (VCLT) and interpreted the term investment in article 25 of ICSID in light of its ordinary (economic) meaning. This early interpretation countered the wish of the parties to the ICSID Convention to leave the definition of investment to the autonomy of the parties.¹³⁴

¹³⁰ Mahlik (2009) p. 1

¹³¹ Mahlik (2009) p.1

¹³² Cosby (2012) p. 2

¹³³ Dolzer (2012) p. 64

¹³⁴ Report of the Executive Directors of the ICSID Convention, para. 27 (March, 1965)

Subsequent case law has developed into two different approaches to the definition of investment. The objective or self-contained approach refers to a set of criteria that an investment must meet to qualify under article 25 of ICSID: duration; assumption of risk; substantial commitment; and significance for the host state's development. These are known as the Salini criteria.¹³⁵ Some tribunals refer to good faith or compliance with domestic law as additional criteria.¹³⁶ The significance of foreign investment to the economic development of the host state has been the most controversial criterion. It is construed from the reference to development in the preamble of ICSID.¹³⁷ Some tribunals have further argued that the protection offered by the treaties to investors is generated by the investor's contribution to the host state development.¹³⁸

The subjective approach arose as a reaction to the Salini criteria and its derivatives. Tribunals in those cases argued that neither the *travaux préparatoires* nor article 25 of ICSID ever fixed any objective criteria and the Convention had not vested authority in any tribunal to impose their views on the definition of the investment. For the subjective approach as long as the investment is not against the domestic law, no arbitral tribunal should deny BIT protections because the investment does not contribute to the economic development of the host state or other pre-determined criteria.¹³⁹

Tribunals have generally agreed that investment is a complex process with several interrelated activities that cannot be considered in isolation.¹⁴⁰ It is also generally accepted that investment should take place in the territory of the host state, except financial instruments like interests in immovable property or transfer of funds.¹⁴¹

¹³⁵ These criteria came to be known as the Salini criteria after the case *Salini Costruttori S.p.A. and Italstrade v. Morocco*

¹³⁶ See *Phoenix v Czech Republic*

¹³⁷ Paragraph 1 of the preamble to ICSID “*Considering the need for international cooperation for economic development, and the role of private international investment therein;*”

¹³⁸ Dolzer (2012) p. 75

¹³⁹ *Ibid* p. 75

¹⁴⁰ *CSOB v. Czechoslovakia*

¹⁴¹ See *Fedax v Venezuela*

It is questionable whether activities to access genetic resources (i.e. bioprospecting) or the subsequent utilization of genetic resources or biotechnology as defined in article 2 of the Nagoya Protocol constitute investment. The subjective approach leaves it up to the autonomy of the parties to decide what constitutes investments and States generally apply broad open-ended definitions. Therefore, it seems the activities regulated by the Nagoya Protocol will be considered investments by an arbitration tribunal following this approach. The criteria in the objective approach lift the test to a much higher level. However, if an investor in the sector of biotechnology would comply with its benefit sharing obligations over a certain period of time and assuming risks, financial or otherwise it could be argued that the activities are contributing to the development of the host state. In sum, it seems that activities covered by the Nagoya Protocol could be considered investments under the current investment legal framework.

4.4.2 Investor

International investors can be private individuals or companies nationals of one of the state parties to an investment treaty. State controlled entities can also qualify as investors as long as they act in a commercial capacity. It seems that non-for-profit organizations could also be considered investors.¹⁴²

Nationality of individuals will generally be determined by the law of the country they claim to be nationals (find document in NRC civil documentation guide) but if nationality is disputed, arbitral tribunals are entitled to decide upon it.¹⁴³ Nationality of companies is generally determined by the place of incorporation or the place of central administration.¹⁴⁴ Some investment treaties require an economic bond between the company and the state, like effective control by nationals of the state or genuine economic activity of the company of that state.¹⁴⁵ Tribunals have found variations of these requirements in different disputes. Even when companies do not meet nationality requirements, if shareholders do, the company will be considered the investment and protection will extend to the assets of the company.¹⁴⁶ Nationality planning to obtain the maximum possible protection under

¹⁴² Dolzer (2012) p. 44

¹⁴³ See *Soufraki v. UAE*

¹⁴⁴ See *Tokio Tokelés v. Ukraine*

¹⁴⁵ Dolzer (2012) p. 45

¹⁴⁶ *Ibid* p.60

existing treaties is generally accepted in arbitration practice as long as nationality arrangements are carried out before the facts leading to the dispute.¹⁴⁷

When host states require that investments are made through locally incorporated companies that usually would not qualify as foreign investors they will be considered foreign investors if there is effective control by foreign investors and a specific agreement to that effect.¹⁴⁸

It has been argued that the model on access and benefit sharing of genetic resources promoted in the CBD and the Nagoya Protocol is essentially a bilateral investor-state approach to economic transactions of genetic resources.¹⁴⁹ Certainly, the concept of users of genetic resources as proposed in the Nagoya Protocol seems to fit with the definition of investor distilled from the case law of arbitration tribunals as described in the preceding paragraphs.

4.5 Dispute resolution

Procedures for resolution of investment disputes are governed by a web of domestic and international rules. Investors are generally guaranteed access to domestic courts and other dispute resolution mechanisms in accordance with national laws of the host states. But most importantly, treaties and investment contracts usually grant foreign investors direct recourse to international arbitration mechanisms. ICSID is the main forum for solving disputes between foreign investors and host states. But not all states are parties to the ICSID convention and it is not the only one. BITs often give investors a choice among ICSID or other mechanisms like the International Chamber of Commerce (ICC) or the London Court of International Arbitration. These forums usually apply the UNCITRAL Arbitration Rules of 1976 and the ICC Arbitration Rules of 1976.

There is potential for normative conflicts -or at least incoherencies- between the dimensions of the compliance regime in the Nagoya Protocol addressing disputes between user and providers of genetic resources and the direct recourse to international arbitration

¹⁴⁷ Ibid p. 52

¹⁴⁸ Art. 25 of ICSID

¹⁴⁹ Pavoni p.212

granted to foreign investors by investment treaties. This matter is analysed in detail in chapter 6 in this thesis.

5 Conflicts of norms in international law

The basic question discussed in this study is whether or not the legal regime on international investment could potentially hinder the implementation of the Nagoya Protocol. The possibility that these two regimes -or norms within the regimes- may not be coherent or even directly collide is implicit in this question. The theories and techniques applied to the problem of conflicts of norms in international law, and in particular to conflicts between the investment and environment regime are therefore relevant to this discussion and are explored in the sections below.

5.1 The problem of fragmentation of international law

The characteristics of international law make it particularly prone to conflicts of norms. States are simultaneously subjects and creators of law and there is no centralized institution or system to adjudicate or decide on potential conflicts of norms. States are in theory equal and international law is created on the basis of their consent, whether when a treaty is signed or customary law is generated through general practice and *opinio juris*.¹⁵⁰ Generally, it can be assumed that there is no hierarchy among treaties and all have the same legal value no matter what topic they regulate.¹⁵¹

States trend to create law around so-called self-contained regimes that address specific issues or policy objectives. Sometimes this happens in the context of organizations created to that effect like the WTO or as a result of a more or less spontaneous process like investment law that has generated around 3000 bilateral investment treaties in the last 60 years. The self-contained regimes yield specialised principles, rules and enforcement mechanisms which are not necessarily coherent across regimes. This phenomenon is known as fragmentation and it reflects the complexity of international politics.

¹⁵⁰ This chapter is limited to discuss conflicts in treaty law. Conflicts among treaties and customary law or general principles of law are not discussed here.

¹⁵¹ Voigt (2009) p.195

Fragmentation is not negative *per se* but when there are gaps or overlaps and different norms pursue contradicting objectives problems may arise.¹⁵²

The International Law Commission (ILC) argues that isolated branches of international law should be avoided¹⁵³ and proposes reliance in the legal techniques of *lex specialis*, *lex posteriori* and *lex superior* to address the problem. Yet, a technical and formal approach to conflicts of norms ignores the substantive legal or political preferences that underline states choices in making law.¹⁵⁴ Some scholars have argued that the techniques proposed by the ILC have not solved the problems of fragmentation and the subsequent conflicts arising from it and the best solution is to accept fragmentation and that conflict may be unsolvable.¹⁵⁵ Voigt suggests that the fragments of international law must be inter-related and coherent. She argues that this can be achieved through applying general principles of law, like the principle of sustainable development, that will vest with a higher status those norms “*protecting collective fundamental principles like the functioning of essential life-sustaining natural process that are a pre-requisite for human activity, inclusive economic activity*”.¹⁵⁶ If this premise would be applied to conflicts between investment and biodiversity rules the later would prevail. The situation in practice may be rather different.

5.2 Normative conflicts and conflict norms

Fragmentation is a problem largely arising from the self-contained regime trend. Yet, conflicts surface between norms and not so much between regimes.¹⁵⁷ Conflicts of norms are a problem for decision makers in international law because they force them to privilege one norm over another.¹⁵⁸

Kelsen’s classic definition of conflict of norms in international law implies that one obligation cannot be fulfilled without necessarily violating another one.¹⁵⁹ This situation occurs under a strict set of conditions and leads to an absolute incompatibility. The ILC

¹⁵² Ibid. p.196

¹⁵³ Study on the «Function and scope of the *lex specialis* rule and the question of self-contained regime”, preliminary report by M. Koskenniemi, Chairman of the Study Group ILC (LVI)/SG/FIL/CRD 1, 7 May 2004, 9. See analysis in Voigt (2009)p. 197

¹⁵⁴ ILC preliminary report, 2006, 16 cited in Voigt (2009) p. 197

¹⁵⁵ Kammerhofer (2011) p. 98

¹⁵⁶ Voigt (2009)p. 198

¹⁵⁷ Kammerhofer (2011) p. 84

¹⁵⁸ Ibid p. 83

¹⁵⁹ Voigt (2009) p. 199

refers to this approach to conflicts as a mere logical subsumption that mischaracterizes proper legal reasoning. This “narrow” view of conflicts does not take into account that sometimes norms could overlap or collide without leading to an absolute incompatibility. The ILC refers instead to a broad notion of conflicts where two rules or principles suggest a different way of dealing with a problem.¹⁶⁰ Therefore, conflicts may not always lead to situations of absolute incompatibility in a logical sense but nonetheless create similar negative effects, affecting the coherence and effectiveness in international law.¹⁶¹

Conflict norms in international law can be specific or general. The legal maxims of *lex superior*, *lex generalis* and *lex posteriori* are regarded as general conflict norms. On the other hand, specific conflict norms have narrowly defined scopes and are limited to solve conflicts between specific norms (or regimes) of international law.¹⁶² Interpretation techniques like mutual supportiveness, general systemic integration and the principle of contemporaneity can also play an important role in defining and solving conflicts.

5.3 Conflicts of norms in investment law and environmental law

Two types of conflicts can arise from the interaction between international investment law and international environmental law: normative or legitimacy conflicts. Normative conflicts arise when norms from the same legal order (i.e. international law) collide. Legitimacy conflicts happen when norms from different legal orders interact. This could happen between domestic environmental measures and protections under international investment treaties.¹⁶³ This thesis concentrates on normative conflicts only. As mentioned above, the conflict norms applicable in a normative conflict can be specific or general.

The first problem that surfaces when analysing whether environmental norms conflict with investment norms is the unclear meaning and scope of the norms at hand. Both investment and environmental norms are often vague which makes it difficult to determine if in fact there is a conflict. Environmental norms are often phrased vaguely and it is difficult to determine whether they prohibit, authorise or require an action from the state. Article 6 of

¹⁶⁰ ILC, 58th session (Geneva 1, May-0 June and 3 July-11 August 2006), Fragmentation of International Law: Difficulties Arising from the Diversification and expansion of International Law, Report of the Study Group of the International Law Commission., United Nations A/CN.4/L.682, 4 April 2006, 16 – cited in Voigt (2009) p. 199.

¹⁶¹ Voigt p. (2009) p. 199

¹⁶² Viñuales (2012) p. 133

¹⁶³ *Ibid.* p. 28

the CBD is a good example since the measures a state could undertake to implement it could be interpreted both as a domestic initiative or as a conduct required by the CBD. International investment protection standards like fair and equitable treatment or full protection and security are equally vague although arbitral decisions in investment disputes have contributed to define their scope and content.¹⁶⁴

As the relation between international and environmental law intensifies, more international investment and free trade agreements incorporate provisions addressing potential conflicts with international environmental legal instruments. The most specific conflict norm in an investment agreement is perhaps article 104 of NAFTA which considers a number of environmental treaties superior to NAFTA. However, it requires State Parties to choose the implementation alternative that is the least inconsistent with NAFTA. Other agreements refer to the need to respect implementation of environmental norms without specifying which ones. Although important, these references are not satisfactory to solve potential conflicts between international investment law and international environmental law.¹⁶⁵ Yet, they may ease the way for decision makers since they will be able to refer to the environmental norms incorporated in the investment treaty in question in case of conflict.¹⁶⁶ The following paragraphs discuss whether general conflict norms are better options than the existing catalogue of specific conflict norms.

Lex superior presupposes an exception to the general doctrine of equal legal value of international laws. *Ius cogens* norms are recognised as superior to other norms. Neither environmental law nor investment law have reached the status of *ius cogens* rules.¹⁶⁷ However, the ICJ has characterized in some decisions the protection of the environment as an essential interest¹⁶⁸ but despite these decisions the emergence of a peremptory environmental has yet to emerge.¹⁶⁹

The principle *lex specialis derogate legi generalis* presupposes that since special law is more concrete it takes better account of the context, reflects better the intent of the parties

¹⁶⁴ Ibid p. 37

¹⁶⁵ Ibid p. 140

¹⁶⁶ Kammerhofer p.97

¹⁶⁷ Viñuales (2012) p. 142

¹⁶⁸ Gabcikovo-Nagymaros Project (Hungary v. Slovakia), ICJ Reports 1997, 7 para. 112

¹⁶⁹ Ibid. p. 142

and therefore can bring more equitable results than general laws. Applying this principle to conflicts between international environmental law and international investment law may be problematic because they pursue different policy objectives. There is a high likelihood of investment tribunals applying investment law as *lex specialis* since in order to assert their jurisdiction over a dispute it needs to be related to an investment. Therefore it is more likely that the investment dimensions of the dispute will take precedence over the environmental ones.¹⁷⁰

The last general conflict rule is *lex posterior derogat legi priori* which means that later norms shall supersede previous norms. However, *lex posterior* will only supersede previous law if the parties are identical. Also, the nature of environmental law will make it difficult to determine what obligation came into force first. For example, the CBD came into force in 1992 but a COP decision may develop its provisions in 2002. Which one should prevail over a BIT signed in 2000?

5.4 Avoiding conflicts through interpretation techniques

As mentioned earlier, interpretation techniques can contribute not only to identifying conflicts but also to solve them.¹⁷¹ Mutual supportiveness has been used to articulate trade and environmental law through a harmonised interpretation. The concept implies that when states interpret tensions between international norms they avoid to subordinate one to another. It also calls states to clarify the relation between competing regimes when negotiating new instruments. Often there is a vague reference to mutual supportiveness in the preambles of the legal instruments, for example in paragraph 20 of the preamble to the Nagoya Protocol.¹⁷²

The principle of general systemic integration is receiving increasing attention. It is grounded in article 31(3) c) of the Vienna Convention on the Law of Treaties that states that “*there shall be taken into account together with the context any relevant rules of international law applicable in the relations between parties*”.¹⁷³ The ILC argues that this provision implies that no rights or obligations have priority over others and that other legal

¹⁷⁰ Viñuales (2012) p. 144

¹⁷¹ Ibid. p. 148

¹⁷² Morguera (2014) p. 88

¹⁷³ Viñuales (2012) p.151

sources are relevant for the interpretation of a given treaty.¹⁷⁴ This approach has been followed in disputes with an environmental remit. The ICJ has referred to systemic integration in its decisions on the Gabczykovo-Nagymaros case¹⁷⁵ and the Pulp Mills case.¹⁷⁶ Investment tribunals have also applied the principle of systemic integration to interpret investment protections in light of the legal context in which they operate.¹⁷⁷

The last relevant interpretation technique is the principle of contemporaneity in the application of environmental norm. It was first formulated in a separate opinion to the Gabczykovo-Nagymaros case and later ICJ referred to it in the Pulp Mills case¹⁷⁸

5.5 Investment tribunals and normative conflicts with environmental law

The case law developed by investment arbitration tribunals has not addressed potential conflicts between rules of international investment law and other international legal disciplines. The approach has been pragmatic and for the most part they have based their decisions on the maxim of *lex specialis* and favoured the application of the terms in the investment agreement.¹⁷⁹ Tecmed v. Mexico and Santa Elena v. Costa Rica are two prominent examples of this trend. The tribunals considered that environmental considerations are overrun by the protections afforded to investors in the investment agreements. However, some arbitral tribunals have taken the opposite approach. In S.D. Meyers v. Canada, the tribunal relied in the reference to Basel Convention¹⁸⁰ in article 104 of NAFTA to bring environmental concerns to its analysis of the dispute.¹⁸¹ In Mafezzini v. Spain the tribunal explicitly referred to environmental impact assessments as an environmental protection tool recognised by international law.¹⁸² Anyhow, courts and tribunals may be biased towards their own regime, simply because this is the law they are more used to apply.

¹⁷⁴ See 166 above para. 18 cited in Viñuales (2012) p.151

¹⁷⁵ Ibid p. 151

¹⁷⁶ Pulp Mills in the River Uruguay (Argentina v. Uruguay) April 2010, para.65 and 66 cited in Viñuales (2012) p. 156

¹⁷⁷ See S.D. Meyers v. Canada para. 247 and Parkerings v. Lithuania para. 392

¹⁷⁸ Ibid., paras. 66, 194, 197 and 204

¹⁷⁹ Kammerhofer p.87

¹⁸⁰ Basel Convention on the Control of Transboundary Movements of hazardous Wastes and their Disposals (March 1989)

¹⁸¹ S.D. Meyers v. Canada para. 250

¹⁸² Mafezzini v. Spain para. 67

5.6 Conflicts of norms in the Nagoya Protocol

The Nagoya Protocol aims to clarify its relations with other international instruments in article 4. This provision has been characterised as a step towards the right direction in making clauses on mutual supportiveness more concrete.¹⁸³ Interestingly, relations to other international legal instruments are not addressed in the preamble of the Protocol but in the operational text making it a substantive standard of conduct rather than just an aid for contextual interpretation.¹⁸⁴

The first premise advanced in Article 4.1 of the Protocol follows the logic of Article 22 of the CBD by which all existing rights and obligations of the State Parties remain unaffected by the Convention and the Protocol, except if the exercise of those rights and obligations could cause damage or threat to biological diversity. This formulation has been denominated a *reverse conflict clause* meaning that only in the event of threat or damage, the CBD and the Protocol would prevail.¹⁸⁵ Article 4.1 adds that this provision is not aimed at creating a hierarchy between international norms. This formulation has been interpreted as a *conditional priority* of the CBD and the Protocol over other instruments. It implies a broad margin of discretion for Parties as well as duty to identify threats and damages potentially arising from other regimes.¹⁸⁶ It appears the best way of doing this is by taking a case-by-case approach instead of a principled approach assessing the relation with other international instruments.¹⁸⁷

Article 4.3 calls Parties to the Protocol to implement it in a mutual supportive manner with other instruments. However, it does not provide guidance on how Parties can deal with potential conflicts arising with other international agreements so it does not qualify as a specific conflict norm. Yet, mutual supportiveness can guide State Parties in navigating potential conflicts with investment agreements through a harmonised interpretation and avoiding subordinating one another. It can also be a useful technique to avoid that future investment agreements are in conflict with the CBD and the Nagoya Protocol.

¹⁸³ Viñuales (2012) p. 150

¹⁸⁴ Morguera (2014) p. 85

¹⁸⁵ *Ibíd.* p. 87

¹⁸⁶ Morguera (2014) p. 87

¹⁸⁷ *Ibíd.* p. 88

Finally, paragraphs 2 and 3 of article 4 underline the Nagoya Protocol is a residual regime to existing or future access and benefit sharing agreements as long as they are coherent with the objectives of the CBD and the Nagoya Protocol.

6 Protection of international investors and the ABS regime in the Nagoya Protocol: coherent or conflictive regimes?

This thesis explores whether international investment law could hinder the implementation of the ABS regime in the Nagoya Protocol. The literature reviewed to prepare this research indicates a high risk of collision between investors' protections in international investment law and ABS provisions in the Nagoya Protocol.¹⁸⁸ There are also indications that this collision may surface when investors avail themselves of the possibility to bring a dispute to an international arbitration tribunal alleging that measures taken to implement the ABS regime in the Nagoya Protocol conflict with investor protections included in an investment treaty.¹⁸⁹ It is important to stress that so far there are no investor-state disputes brought to investment arbitration tribunals directly concerned with measures adopted under the framework of the Nagoya Protocol so this analysis is hypothetical.¹⁹⁰

The following sections in this chapter will analyse some of these assumptions through four protection standards in international investment law: fair and equitable treatment, non-discrimination and national treatment, prohibitions of performance requirements and finally, dispute resolution mechanisms.

6.1 Fair and equitable treatment

The protection standard of fair and equitable treatment (FET) features in almost every international investment agreement and it has become the most frequently invoked protection standard by investors in their disputes with host states.¹⁹¹ The objective behind FET is to ensure that the investment environment is legally stable, consistent and

¹⁸⁸ See Viñuales (2012) p.195 and Cabrera (2011) p. 729

¹⁸⁹ Morguera (2014) p. 93

¹⁹⁰ Viñuales (2012) p. 213

¹⁹¹ Dolzer (2012) p. 130

predictable.¹⁹² Critics of investment law claim that FET implies a significant reduction of the regulatory space of the states with low institutional capacity.¹⁹³

There is no generally accepted definition of the standard. Arbitral tribunals have taken more or less stringent views on whether acts of the host state have violated FET. Yet, there is consensus in that the ‘legitimate expectations’ of the investor are at the core of the standard. The legitimate expectations of investors rely on domestic law, treaties, contracts assurance, political statements and any other act, explicit or implicit that represents the intentions of the state, regardless of what organ of the state is responsible for the act.¹⁹⁴ One stringent interpretation that has been followed by other tribunals was delivered in the *Tecmed v. Mexico* case. According to the tribunal, the state must act in a way that basic expectations taken into account by the foreign investor to invest are not affected. Also, acts of the states should be consistent, unambiguous and transparent so an investor will know all laws and regulations before investing.¹⁹⁵ Other tribunals have adopted a more lenient approach and argued that expectations must be reasonable and legitimate in light of the circumstances.¹⁹⁶ (*Saluka v. Czech Republic* para. 304-305)

Other elements of the standard include transparency, compliance with contractual obligations, due process, good faith and freedom from coercion and harassment. Violations of contracts, cancellation of permits or changes in conditions for granting permits or executing activities could all be considered to be actions that violate the FET standard.

When analysing if provisions of the Nagoya Protocol could collide with the FET standard it is important to remember that one of the primary aims of the Protocol is to ensure clarity, transparency and certainty both in accessing genetic resources and in the conditions for sharing the benefits of their utilization. Article 6 (3) includes a long and heterogeneous list of legislative, policy or administrative measures clearly aiming to ensure that procedures and rules to obtain prior and informed consent and to establish mutually agreed terms for benefit sharing are clear, stable, transparent and procedurally sound. Therefore it is

¹⁹² Dolzer (2012) p.160

¹⁹³ Cosby (2012) p. 113

¹⁹⁴ Dolzer (2012) p.145

¹⁹⁵ See *Tecmed v. Mexico* para. 13

¹⁹⁶ See *Saluka v. Czech Republic* para. 304-305

unlikely that they could be interpreted as being in conflict with the FET standard. However, depending on the circumstances of the case an investor could potentially allege violations of the FET due to the application of the Protocol.

In principle, new investors should take the ABS regime in the Nagoya Protocol into consideration when initiating bioprospecting activities and they could not claim they were not aware that a host state party to the Protocol would be required to implement them. Arguably, investors specialized in bio technology would be well informed about the requirements and conditions in the Protocol.¹⁹⁷

The situation may be different for investors already present in the host country when the Nagoya Protocol becomes binding. Presumably, the authorities in the host country would try to create a levelled playing field for all investors in in the biotechnology sector and could revoke licenses, request investors to apply for prior and informed consent under new conditions and most importantly enforce standards and procedures for benefit sharing that could carry financial implications. Hypothetically, those investors could claim a violation of FET since legal circumstances in the country have changed and they could not have legitimately expected them. Obviously, the host state could argue that the CBD has been in force for more than two decades and it already advanced the creation of an ABS regime including prior and informed consent, benefit sharing provisions, etc. This defence would obviously not apply to investors present in the country before the entry into force of the CBD.

It is not possible to predict how an investment arbitration tribunal would interpret these legal questions. The temporal question could possibly be resolved through applying the *lex posterior derogat legi priori* maxim. Accordingly, the Nagoya Protocol should supersede bilateral investment treaties as long as the Parties are identical i.e. two parties to the Nagoya Protocol that also have signed a bilateral investment treaty. Yet, as discussed in the previous chapter, the case law developed by investment tribunals has not been very prolific in applying conflict norms to solve conflicts with other legal disciplines. Generally, they have applied *lex specialis* and favoured investment law over other legal disciplines since disputes brought to their attention must be investment related for the tribunal to exercise

¹⁹⁷ Morguera (2014) p. 93

jurisdiction.¹⁹⁸ In some cases tribunals have virtually ignored the links between international environmental law and the facts in the dispute.¹⁹⁹ However, the regime advanced by the Nagoya Protocol on ABS to genetic resources is rather specific and concrete so it is difficult to envisage that a tribunal would rely upon the *lex specialis* maxim and not even take into account the Protocol in the analysis.

A different problem could arise if investors bring a dispute against a state alleging that the domestic measures taken to implement the procedures foreseen by article 6 of the Nagoya Protocol violate the FET standard. This would be a legitimacy conflict (see page 24 in the previous chapter) and different conflict norms would apply. The approach in such situations will depend on how clear is the link between domestic measures and international environmental law and whether it is vulnerable to allegations of proportionality and due process.²⁰⁰

6.2 Protection against discrimination: national treatment

It is generally accepted that discrimination in investment law is linked to nationality. Accordingly the two standards of protection against discrimination are based in nationality: national treatment and most favoured nation treatment. This section analyses potential problems arising from the national treatment protection standard and the Nagoya Protocol.²⁰¹

National treatment features in most international investment agreements. The most common language in European BITs refers to “*accord treatment to foreign investors no less favourable than that which the host state accords to its own investors*”.²⁰² In US treaties the phrase “in like circumstances” is added. In most agreements, national treatment applies after the investor has established a business in the host state but some have extended the protection to the right to access and establish a business.²⁰³ National treatment is often considered a non-controversial standard, but as usually in international investment law, there is no unanimous interpretation so its application may vary depending of the facts

¹⁹⁸ Kammerhofer (2011) p.88

¹⁹⁹ Tecmed v. Mexico and Santa Elena v. Costa Rica are the most cited examples.

²⁰⁰ Viñuales (2014) p. 219

²⁰¹ A similar analysis could be conducted regarding the most-favoured nation protection standard.

²⁰² Dolzer (2012) p. 198

²⁰³ See art. 1102 in NAFTA and Art. 5 in the ASEAN Comprehensive Investment Agreement.

of the case.²⁰⁴ The application of the standard to the facts requires a four step test: (i) the basis of comparison; (ii) existence of differentiation; (ii) justification for the differentiation and (iv) intent.

Tribunals have adopted two distinct interpretations of the basis for comparing investors. Some have taken a narrow approach so that only business in the same similar economic sectors could be compared²⁰⁵ while others compare businesses in general.²⁰⁶ The term like circumstances is also interpreted broadly and in light of the general legal context.²⁰⁷ For tribunals it is not relevant whether differentiation happens *de jure* or *de facto* or if it responds to a policy goal of the host state as long as it exists.²⁰⁸ Also, the majority of rulings have discarded intent as a necessary element for discrimination, as long as the discriminatory act of the host state carries negative consequences in favour of the practical implications for the investor.²⁰⁹ Investment treaties are silent with regards to whether different treatment could be justified, but case law shows it could be accepted on reasonable grounds. These could be government regulations to protect the public interest²¹⁰ or for legitimate policy goals as long as differentiation is not addressed against the investor in particular.²¹¹ Whether the policy in question is coherent with international law is an important factor in deciding this question.²¹²

One of the aims of the regime on ABS to genetic resources proposed by the CBD and the Nagoya Protocol is to bring a more equitable balance in the enjoyment of the benefits of the exploitation of genetic resources. Historically, provider countries felt that user countries and their industries profited of free access and subsequent exploitation and they did not benefit from the process. Naturally, the rules for accessing genetic resources primarily established in article 6 of the Nagoya Protocol are addressed to foreign users. Therefore, a foreign investor specialised in biotechnology will have to comply with regulations established in accordance with article 6. Other regulations may address

²⁰⁴ Dolzer (2012)p. 199

²⁰⁵ Feldman v. Mexico para. 171

²⁰⁶ See Occidental v. Ecuador

²⁰⁷ Dolzer (2012) p.200

²⁰⁸ Corn Products v. México para. 142

²⁰⁹ S.D. Meyers v. Canada para. 254

²¹⁰ Ibid para. 250

²¹¹ Gami v. Mexico para.114 and 115

²¹² Dolzer (2012) p.203

activities of domestic investors in the sector but the measures adopted under article 6 of the Nagoya Protocol will not strictly apply to them.

At first sight, the measures that a state party to the Nagoya Protocol will have to implement to fulfil its obligations will imply that foreign investors and domestic investors are treated differently. Arguably, ABS requirements could be considered less favourable treatment of foreign investors. So a state that has signed investment treaties that include the national treatment standard and that is also a Party to the Nagoya Protocol may not be able to comply with both norms. This situation may be interpreted as a strict conflict of norms as explained in chapter 5 in this thesis.

The four step test applied by international arbitration tribunals to determine whether there is a discriminatory treatment between foreign and national investors seems to indicate that the different treatment that a state will apply to foreign investors in the economic sector of bio technology based on the ABS regime of the Nagoya Protocol could be justified on grounds of a legitimate policy goal based on a rule of international law.²¹³

The principle of general systemic integration could also be relevant to address this potential normative conflict. Article 31.3 (c) of the Vienna Convention on the Law of Treaties that states that “*there shall be taken into account together with the context any relevant rules of international law applicable in the relations between parties.*” Given that the primary objective of the CBD and the Nagoya Protocol is to address a misbalance in the sector of genetic resources, investment arbitration tribunals should take this into consideration when looking into potential violations of the national treatment standards, at least in those cases where home countries to investors have ratified the Nagoya Protocol.

6.3 Performance requirements

Performance requirements are conditions imposed by the host state to investors in order to establish or operate an investment in its territory or to conduct business in a particular manner.²¹⁴ The objective of performance requirements is to maximize domestic and social benefits resulting from investments. Some argue that performance requirements have yielded good results for the sustainable development of host countries and that there is no

²¹³ See *Gami v. Mexico* para. 114-115 and *ADF v. US* para. 156-158

²¹⁴ Dolzer (2012) p.90

evidence that they are a bad economic policy.²¹⁵ However, they are considered inconsistent with the principles of liberal markets.²¹⁶ In line with this policy premise, the WTO Agreement on Trade-Related Investment Measures (para. 1 (a) in the Annex) and an increasing number of investment agreements include prohibitions against performance requirements.²¹⁷ Generally, they do not pertain to the category of standards of protection for foreign investors, rather to conditions for admission and establishment.

There is a wide catalogue of performance requirements. For the purposes of this discussion the analysis will focus on transfers of technology. These are explicitly prohibited both in NAFTA Article 1106 (1) (f) and US model BIT art.8 (f).

Transfer of technology is a core objective of the CBD and the Nagoya Protocol. According to the language in both instruments, transferring appropriate technologies is an integral part of the objective to have a fair and equitable sharing arising of the utilization of genetic resources and a key contribution to the conservation of biodiversity and the sustainable use of its components.²¹⁸

The Nagoya Protocol regulates transfers of technology at two different levels. On the one hand, it refers in article 23 to transfers of technology as part of the broader collaboration and cooperation between states. These are soft obligations or appeals to the State Parties to encourage and motivate private entities to engage in transferring technology. On the other hand, article 5 and paragraph 2 (f) in the annex to the Nagoya Protocol foresee that transfer of technology is a modality of benefit sharing arising directly from MAT. As explained in the third chapter of this thesis, MAT is fundamentally a contract often between private entities and regulated by private law. To complicate matters further, parties to MAT could also be public (reference in IUCN guide). Also, article 6 (g) in the Protocol calls Parties to establish clear rules and procedures for MAT that may include the terms of benefit sharing, including in relation to intellectual property rights. This could be interpreted as giving a provider State Party the prerogative to require that every MAT includes relevant transfers

²¹⁵ Cosby (2012) p. 29

²¹⁶ Dolzer (2012) p.90

²¹⁷ See NAFTA article 1106; US Model BIT 2004 and 2012 art.8, and 2012 ASEAN Comprehensive Investment Agreement.

²¹⁸ See CBD para 5 of preamble and articles 1 and 16. And Nagoya Protocol article 23 and annex 2.

of technology, hence imposing a performance requirement as understood in terms of international investment law.

To what extent could prohibitions of performance requirements hinder the implementation of the Protocol? From the previous analysis it seems that an investor coming from a home state (i.e. user country) that has signed an international investment agreement with the host state (i.e. home country) that includes prohibitions on performance requirements could potentially file a claim before an arbitral investment tribunal against the host state.

It is not possible to foresee how an arbitral tribunal would deal with such a claim. If both states are parties to the Nagoya Protocol the tribunal may apply the maxims of *lex specialis* or *lex posteriori* and decide against the investor. As discussed in the previous section, another possibility is to waive the performance requirements prohibition through the application of the principle of systemic integration that calls interpretation of treaty obligations in light of all international legal obligations applicable between parties. Since States Parties to the Nagoya Protocol have admitted that transfer of technology is a rule they will have to apply, the protection to investors in international investment agreements should be interpreted in light of such a rule.

As mentioned earlier, investment arbitration tribunals have not been prolific in incorporating other rules of international law in their analysis of investors' claims so whether this will change in these sorts of situations is not easy to anticipate. It would appear that if the home state to the investor would not be a party to the Nagoya Protocol, the potential for performance requirements becoming an obstacle for the implementation of the Protocol will be much higher.

6.4 Dispute resolution mechanisms

One of the distinct features of the international investment regime is that under certain circumstances investors can bring claims against states to international dispute resolution mechanisms. Normally, disputes between investors and states should be solved before domestic courts but international investment law doctrine argues that bringing disputes to domestic courts is not a good alternative for international investors.²¹⁹ Domestic courts are

²¹⁹ Dolzer (2012) p.235

perceived as potentially biased in favour of domestic interests. Also, domestic courts are bound to apply domestic laws and regulations even if these are not coherent with international law protecting investors' rights. In fact, domestic law is often at the heart of the complaints brought by investors. Furthermore, the executive may not respect the decisions of the courts or even be immune against them.²²⁰ And last, domestic proceedings are often slow and a long time can elapse until a final decision is reached. These are some of the reasons behind granting investors a direct recourse to international mechanisms for the resolution of their disputes with host states namely, international arbitration tribunals. A direct recourse implies that the usual requirement of exhausting domestic remedies before accessing international protection mechanisms is waived. Occasionally, arbitral tribunals have looked at attempts to obtain a remedy in domestic courts as evidence that a standard had been violated²²¹ but this approach has been generally disregarded by subsequent tribunals.

Arbitration mechanisms are supported by a variety of institutions but most frequently used is ICISD hosted by the World Bank. Others are the International Chamber of Commerce (ICC), the London Court of International Arbitration (LCIA) and the Permanent Court of Arbitration (PCA). The UNCITRAL rules on arbitration do not include a specific institution but can be applied in arbitration proceedings before any other institution.

The exercise of jurisdiction in investment arbitration requires a legal dispute concerning an investment. These requirements have been subject to different interpretations by investment tribunals. Generally, disputes about political or economic elements will not trigger the jurisdiction of arbitral tribunals. They will only admit disputes about the legal rights and obligations arising from the investment. The dispute can relate to commitments arising from legislation, contracts or treaties, not only to the investment as such.²²² Finally, an investment must exist for a tribunal to exercise jurisdiction. Tribunals have adopted different views about what criteria qualify activities as investments. This analysis assumes that bioprospecting and other biotechnology activities as defined in the CBD and the Nagoya Protocol may constitute acceptable forms of investment.

²²⁰ Ibid p. 235

²²¹ Waste Management v. Mexico para. 97

²²² Dolzer (2012) p. 248

A dispute brought to an arbitration tribunal will always involve a foreign investor and the host state. International investment law protects the rights of investors, and therefore it is designed for investors to bring claims against states. The opposite situation is not contemplated. The dispute could involve actions of the host state's organs or territorial units and even entities with a separate legal personality. All their actions still would be considered the actions of the host state as long as they are performing public functions. Investors in a dispute are often private juridical persons and sometimes individuals. Shareholders could also be considered investors.²²³

Both parties must consent to bring their disputes for resolution in arbitration mechanisms. The investor and the state might consent through a clause in the contract. Otherwise, host states may issue legislation offering the possibility of arbitration to investors. Lastly, investment treaties often include arbitration clauses. Investors must also express consent to arbitration under this possibility.²²⁴

Occasionally, contracts between investors and host states include a forum selection clause that refers disputes to domestic courts. In a growing number of cases where investors have availed themselves the recourse to direct arbitration on the basis of an investment treaty, host states have challenged the jurisdiction of investment tribunals on the basis of such selection clauses. The case law indicates that tribunals should distinguish between breaches of the contract and breaches of the investment treaty. No matter what are the issues arising from the execution of the contract, tribunals should decide on the claims based on the protections included in the treaty.²²⁵ Some argue that this practice does not work in the best interest of the investors. They may file a claim with domestic courts on contractual aspects and another one with international tribunals for treaty-based claims which will lead to parallel proceedings instead of a final and comprehensive solution to a dispute.²²⁶

Dispute resolution mechanisms are addressed in the compliance pillar of the Nagoya Protocol under article 18. As mentioned earlier, effective compliance mechanisms were perceived by developing countries (i.e. the majority of the provider countries) as a

²²³Dolzer (2012) p.250

²²⁴ Ibid p. 254

²²⁵ See & Vivendi v. Argentina, Decision on Annulment (July 2002)

²²⁶ Dolzer (2012) p. 277-278

cornerstone of the ABS regime on genetic resources.²²⁷ The compliance regime in the Protocol is structured around two concepts: misappropriation and misuse. None of these terms was finally used in the text. Misappropriation refers to situations where genetic resources (or associated traditional knowledge) are accessed without following the legislation of the provider country regarding PIC and MAT. For example, this could consist in a user accessing genetic resources without having followed procedures to obtain the necessary permits proving that PIC had been obtained. These sorts of situations could obviously trigger a claim from an investor (i.e. private user) against the host state (i.e. provider country) before an investment arbitration tribunal. However, the focus of this analysis is the potential incoherencies between the direct recourse to international arbitration and the mechanisms proposed in article 18 of the Nagoya Protocol to address disputes between a user (i.e. potentially an investor) and a provider of genetic resources.

Misuse refers to the deviation of the mutually agreed terms (MAT) between a provider and a user.²²⁸ Deviations could consist of using genetic resources for a different purpose than agreed or not complying with the benefit sharing agreement. Unlike the procedures for accessing genetic resources which are regulated by public law, MAT is a private contractual act between two private parties and as such regulated by civil law or private international law when more than one jurisdiction is involved.²²⁹

Compliance with MAT is addressed in article 18 of the Protocol and it includes general obligations to Parties regarding access to justice, recognition of foreign judgments and arbitral awards and opportunities to seek recourse to justice. It also obliges Parties to encourage providers and users of genetic resources to foresee the jurisdiction and applicable law for dispute resolution, as well as options for alternative dispute resolution mechanisms. However, in article 6.3. (g)(i), the Protocol uses more categorical language and requires Parties to establish clear rules and procedures for MAT including dispute settlement clauses. Therefore, it is not clear from the text of the Protocol whether Parties, primarily providing countries, are required to impose on user and providers establishing

²²⁷ An Explanatory Guide to the Nagoya Protocol on Access and Benefit-sharing (2012) p. 159

²²⁸ Ibid p. 183

²²⁹ Ibid p. 183

MAT, precise dispute resolution provisions -including applicable law and jurisdiction- or on the contrary, user and providers will be able to negotiate their own terms.

The following paragraphs explore to what extent the direct recourse to international arbitration that international investment law avails to investors could hinder the implementation of the dispute resolution approach proposed in article 18 of the Nagoya Protocol.

Let's assume that a user of genetic resources is also an investor in international investment law terms and has accessed genetic resources following the domestic procedures for PIC and establishing MAT. The provider is a community in the providing country. The contract resulting from MAT includes a number of clauses establishing the jurisdiction and the law applicable to the dispute. A dispute arises between the investor/user and the community/provider. Let's also assume that the countries of the investor/user and the community are Parties to the Nagoya Protocol and that there is an investment treaty between them availing investors of a direct recourse to arbitration. Could the investor elude the terms in the MAT contract and bring the dispute to arbitration against the host state?

There is no specific case law to guide the answer to this question. However, it is well established that the parties to an investment dispute are an investor and a state.²³⁰ As mentioned earlier, any organ or body carrying out a public function is considered to be the state for the purposes of bringing a dispute to international arbitration. The investor will have to argue successfully that the community is acting in some sort of public function. In regular circumstances this would be difficult but occasionally a community or an indigenous community may have been vested by the provider state with a biodiversity conservation or stewardship role which could be considered a public function.

The situation may be different if the provider is a public organ or body. In this case, the parties to a potential investment dispute will be the investor and the state and this jurisdictional requirement to bring the dispute to an investment arbitration tribunal would be fulfilled.

²³⁰ Dolzer (2012) p.249

However, the contractual nature of MAT is as important as the status of the provider. As mentioned earlier, there are more and more investment contracts that include a forum selection clause that refers disputes to domestic courts. The case law of arbitration tribunals indicates that breaches of a contract can be referred to domestic courts and breaches of a treaty to international arbitration.²³¹

From the point of view of the investor, MAT could be considered an investment contract. The activities of the investor happen to fall within the economic sector of biotechnology which is regulated by a special regime i.e. the Nagoya Protocol and the subsequent domestic legislation and policies. But as long as they can be considered an investment and the other party is the state, international protections for investors apply.

Therefore, it appears that if in the course of the execution of the contract the state has incurred in violations of its obligations as a result of the investment treaty, the investor will have a direct recourse to arbitration no matter what dispute resolution clauses were included in MAT regarding jurisdiction and applicable law. However, if the dispute refers strictly to the terms in the contract, the jurisdiction and applicable law agreed in MAT will apply.

This analysis shows that there does not seem to be an absolute incompatibility between norms regulating dispute resolution in investment law and in the Nagoya Protocol. State Parties to the Nagoya Protocol and to investment treaties may be able to fulfil the obligations arising from both regimes with regards to dispute resolution. But if we look at the potential normative conflict in the broader sense adopted by the ILC our conclusion may be different. The ILC suggests that two rules or principles may suggest a different way of dealing with a problem. This may not lead to an absolute incompatibility between the rules or principles but nonetheless create negative effects and affect the coherence and effectiveness in international law.²³²

It appears that the broader understanding of normative conflicts as proposed by the ILC may occur with regards to dispute resolution mechanisms in the Nagoya Protocol and international investment law. As mentioned earlier, developing countries considered the

²³¹ See *Vivendi v. Argentina*, Decision on Annulment (July 2002)

²³² Voigt (2009) p. 199

compliance mechanisms in the Nagoya Protocol as a cornerstone of the regime on ABS of genetic resources. An essential objective of the Protocol is to ensure that the benefits of the utilization of genetic resources reach provider countries and their communities and indigenous peoples. MAT was included in the CBD and later developed in the Nagoya Protocol, including dispute resolution purposes, to ensure that purpose was achieved. However, under investment law an investor using genetic resources could bring a claim against the provider state circumventing the system for dispute resolution envisaged in the Nagoya Protocol and possibly endangering the effective sharing of the benefits of the utilization of genetic resources. Furthermore, investment law specialists argue that dealing with contract breaches and treaty breaches separately is counterproductive for the interest of settling disputes swiftly and comprehensively. If this view is followed by investment tribunals in the future disputes related to MAT may end up being solved in different jurisdictions and under different laws than those agreed when entering into MAT, hence hindering the approach to dispute resolution proposed by the Nagoya Protocol.

7 Conclusions

The aim of this thesis is to answer whether or not international investment law can hinder the implementation of the Nagoya Protocol. The analysis of international policy documents undertaken seems to indicate that states have reached a broad consensus about the importance of international investment for sustainable development, including the environment. This trend is reflected inter alia in the provisions of the CBD that call for more investment in biodiversity. However, references to sustainable development are much less frequent in international investment agreements and there are even less references to environmental matters, let alone to biodiversity. Also, it seems that international investment law is perceived in certain forums as hierarchically superior to international environmental law despite the non-hierarchical relation between treaties. Decisions of international arbitrators also have generally been inclined to favour investment interests versus environmental objectives. From this broader perspective it is possible to infer that international investment can possibly become a problem to the implementation of the Nagoya Protocol.

The analysis of the potential normative tensions or conflicts that could arise between the ABS regime on genetic resources proposed by the Nagoya Protocol and specific international investment protection standards confirms this assumption. The sample of standards chosen for this analysis includes FET, national treatment, performance requirements and direct recourse to international arbitration. It is possible to anticipate the existence of normative conflicts or incoherencies in all four of them. However, the application of the conflict norms and other interpretation techniques may be conducive to solutions that do not necessarily hinder the implementation of the Nagoya Protocol. This will depend greatly on how investment arbitration tribunals will apply conflict norms and other interpretation techniques when solving disputes involving the sector of genetic resources and the regime of the Nagoya Protocol. Although the number of investment disputes with an environmental remit is growing so far there have been no disputes involving ABS of genetic resources. Yet, given the strong economic interests in the sector and the impact that an effective implementation of the Nagoya Protocol could carry, it is not unlikely that disputes will arise in the near future.

The fact that so far there are no specific investment disputes involving neither genetic resources nor provisions of the Nagoya Protocol is a shortcoming for the analysis in this thesis. The analysis is based in the legal texts and in case law over disputes affecting investment in other sectors. Although it is possible to draw some assumptions from the trends followed by international arbitration tribunals, these tribunals are not bound by previous decisions. Furthermore, the regime proposed by the Nagoya Protocol is to a great extent unprecedented so the future is somewhat uncertain. For these reasons, it is important to remain cautious.

The Nagoya Protocol entered into force less than a year ago. Some of the scenarios posed in this analysis could become pertinent as State Parties progress with implementation. In the future it will be particularly interesting to research and analyse the interaction of international investment law with domestic regulatory measures adopted to implement the Nagoya Protocol.

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