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Trade, investment and labour: interactions in international law

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4 International Investment Law and Labour

4.1 INTRODUCTION

International investment law constitutes the second main pillar of international economic law. There are important differences with the trade regime. International trade law provides a legal framework that governs inter-state flows of goods and services based on the macro-economy theory of comparative advantage. Private actors – importing and exporting companies – are undoubtedly affected by the regime, but are not part of it. International investment agreements (IIAs), however, are agreed between states, but intend protect the private interests of investors – most often corporations – from one state party when they make investments in the territory of the other state. These investors are granted subjective rights which are enforceable vis-à-vis their host state via investor-state dispute settlement (ISDS).

Because of the differences between the two legal regimes, the legal debate on the interaction between international investment law and labour standards is in many ways the mirror image of the previous chapter. In multilateral trade law, the central question is to what extent states may use tariff or non-tariff instruments to address low labour standards in other jurisdictions. Such measures could deter states from lowering their levels of protection. Admittedly, decisions to deregulate could be motivated by a desire to gain a trade advantage but also in order to lure foreign investors. In international investment law, however, the core concern is not deregulation but regulation. Rights that are granted to foreign investors through an IIA potentially restrict the ability of host states to adopt labour laws. Indeed, it has been argued that: "the terms of international investment agreements may constrain states from fully implementing new human rights legislation, or put them at risk of binding international arbitration if they do so."[1] When this occurs, investment agreements become 'golden straightjackets': states accept restrictions on their

[1] Human Rights Council, 'Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie: Guiding principles on business and human rights: implementing the United Nations 'Protect, respect and remedy' framework'' (21 March 2011) (A/HRC/17/31) 12.

legislative sovereignty for the purpose of attracting inward investment and fostering economic growth.[2]

International investment law not only has a different function, but also a different form compared to multilateral trade law. Whereas the trade regime operates on the basis of a legal framework with 164 member states and is the result of a handful of 'constitutional moments', international investment law is highly decentralised. According to the World Investment Report 2018, there are 3322 IIAs, most of which are bilateral investment treaties (BITs).[3] The international law on foreign investment is often characterized by its "organic emergence"[4] and developed through "bumps and bruises."[5] Although it is recognised that in addition to treaty-based international investment law, custom also provides a source of law in this field, the analysis below will not elaborate further upon its scope. Instead, this chapter will draw from a range of IIAs as well as the rich body of case law emanating from investor-state dispute settlement (ISDS), which only tend to apply "rules of customary international law in order to complete the provisions of an applicable BIT."[6]

This chapter consists of four parts. Part 4.2 provides an introduction to the various linkages between international investment law and labour. Part 4.3 gives an overview of the structure of international investment law and explores whether investor rights could constrain states when adopting or enforcing labour standards. Part 4.4 turns to the legislative and interpretative strategies to increase host states' regulatory autonomy. Part 4.5 contains an analysis of provisions that address the conduct of investors.

2 Robert McCorquodale and Penelope Simons, 'Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law' (2007) 70 Modern Law Review 598, 622, citing an op-ed by W. Greider, 'Investment rules are the obstacle' *Financial Times* (London, 26 November 2003).

3 UNCTAD, 'World Investment Report 2018: Investment and New Industrial Policies' (United Nations 2018) 89.

4 Joost Pauwelyn, 'Rational Design or Accidental Evolution? The Emergence of International Investment Law' in Zachary Douglas, Joost Pauwelyn and Jorge Viñuales (eds), The Foundations of International Investment Law (Oxford University Press 2014) 15.

5 Susan Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions' (2005) 73 Fordham Law Review 1521, 1536.

6 Florian Grisel, 'Sources of investment law' in Zachary Douglas, Joost Pauwelyn and Jorge Viñuales (eds), The Foundations of International Investment Law (Oxford University Press 2014) 221.

4.2 INTRODUCTION TO INVESTMENT-LABOUR LINKAGE

4.2.1 Introduction

The purpose of this part is to establish in what ways labour standards interact with international investment law. Section 4.2.2 looks at the deregulation of labour in order to attract foreign direct investment (FDI). Section 4.2.3 introduces the notion that IIAs may restrict the ability of host states to regulate labour, as foreign investors may perceive such regulations to be in violation of the treaty-based rights protecting their investments. Section 4.2.4 zooms in on the role of the investor, as IIAs are by no means conceptually bound to endow investors with rights whilst ignoring their responsibilities.

4.2.2 The deregulation of labour

A major assumption underlying the expansion of IIAs is that they would lead to an increase of inward FDI, as investors would be availed of any doubts they might have had regarding the domestic legal system in the potential host state.[7] As the 1992 World Bank Guidelines on the Treatment of Foreign Direct Investment put it: "a greater flow of foreign direct investment brings substantial benefits to bear on the world economy and on the economies of developing countries in particular." [8]That same report also emphasises that "labor

7 Andrew Guzman, 'Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties' (1998) 38 Virginia Journal of International Law 639, 688. According to Pauwelyn: "countries keep signing BITs and FTAs – albeit with continual adaptations – partly because they perceive them to be in their interest, partly because of network effects and path dependency." Joost Pauwelyn, 'Rational Design or Accidental Evolution? The Emergence of International Investment Law' in Zachary Douglas, Joost Pauwelyn and Jorge Viñuales (eds), The Foundations of International Investment Law (Oxford University Press 2014) 12, 40-41; for empirical research on the effect of BITs on FDI inflows, see: Jeswald Salacuse and Nicholas Sullivan, 'Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain' (2005) 46 Harvard International Law Journal 67, 111 concluding that "BITs have a particularly strong effect on encouraging FDI in developing countries. In short, the grand bargain between developing and developed countries that underlies BITs, the bargain of investment promotion in return for investment protection, seems to have been achieved." But cf. Jason Webb Yackee, 'Do Bilateral Investment Treaties Promote Foreign Direct Investment? Some Hints from Alternative Evidence' (2010) 51 Virginia Journal of International Law 397, 434, who argues that: "While BITs are routinely described as important tools for attracting FDI, and while certain empirical studies claim to have isolated huge causal impacts, my own examination suggests that, at best, BITs spur investment only irregularly, inconsistently, and with generally unassuming impact."

8 Susan Franck, 'Managing expectations: beyond formal adjudication' in Roberto Echandi and Pierre Sauvé (eds), *Prospects in International Investment Law and Policy* (Cambridge University Press 2013) 376-379. But mode of entry was recognized as early as 1974: "Depending on the purpose and method of entry of the multinational corporations into the host

market flexibility ... is recognized as an important element in a positive investment environment."[9] Indeed, to become attractive to inward-FDI, states not only removed existing barriers but also created certain incentives. In a report from 2003, the UN High Commissioner for Human Rights noted that:

> In the past, there has been concern that Governments have lowered environmental and human rights standards – including labour standards, freedom of expression and freedom of association – to attract investment. The phenomenon, known as the "race-to-the-bottom", has arisen specifically in the context of Economic Processing Zones (EPZ). While there is little direct evidence to support such "race-to-the-bottom" arguments, the International Labour Organization (ILO) acknowledges that, as a result of investment, downward pressure on labour and environmental standards exists and it is difficult to judge the extent to which foreign investment is inhibiting the socially optimal raising of standards.[10]

This echoes the coordination problem that was at the heart of the foundation of the ILO: in the absence of international legal rules states will encroach upon each other's levels of social protection. Although scholars have argued that foreign investors actually favour high labour standards, they also make the empirical observation that states deregulate nonetheless. According to Howse, Langille and Burda: "We do see jurisdictions compete for foreign investment, engaging in what seems a mugs game of transferring public resources (incentives, tax breaks, loans, etc.) to private firms in order to attract location of factories etc. And there are clear examples of lowering or violating labour rights in such attempts."[11] Indeed, many complaints that reach the ILO Committee on Freedom of Association deal with alleged violations of trade union rights in countries' export sectors.[12] Deregulation of labour in order to attract FDI is not exclusively done by developing countries. For example, in 2010 New Zealand passed the so-called 'Hobbit labour laws' after pressure from American

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country and the type of technology used, the impact on the level of employment varies." ECOSOC, 'The Impact of Multinational Corporations on Development and on International Relations: Report of the Group of Eminent Persons to Study the Role of Multinational Corporations on Development and on International Relations' (24 May 1974) UN DOC. E/5500/Add.1 Part 1, 13 ILM 800 (1974), 850.

9 World Bank Group, 'Guidelines for the Treatment of Foreign Direct Investment' (Legal Framework for the Treatment of Foreign Investment: Volume II: Guidelines, 1992) 35, 39.

10 OHCHR, 'Human rights, trade and investment' E/CN.4/Sub.2/2003/9 (2 July 2003) para 13.

11 Robert Howse and Brian Langille with Julien Burda, 'The World Trade Organization and Labour Rights: Man Bites Dog' in Virginia Leary and Daniel Warner (eds) *Social Issues, Globalisation and International Institutions: Labour Rights and the EU, ILO, OECD and WTO* (Martinus Nijhoff Publishers 2006) 172.

12 OECD, 'Trade, Employment and Labour Standards: A Study of Core Workers' Rights and International Trade (1996) 98.

production companies to hire film industry workers as independent contractors instead of employees.[13]

Various scholars have argued that these examples are merely anecdotal, and that low labour standards do not attract more FDI. In fact, "low labor rights may be a hindrance, rather than an attraction, for foreign investors."[14] A possible explanation is that the costs of (high) labour standards are offset by externalities that create a conducive trade or investment climate.[15] For example, the right to freedom of association and collective bargaining contribute to political and social stability, and the eradication of child labour and occupational discrimination positively affects a country's human capital.[16] High labour standards may even be a source of comparative advantage to attract foreign investors, and "anchor" domestic companies to their home state.[17]

Rational or not, an OECD study found that "some governments in non-OECD countries have restricted labour rights (especially in export processing zones) *in the belief* that so doing would help attract inward FDI from both OECD and non-OECD investors."[18] Many contemporary IIAs address this problem. The EU-Canada Comprehensive Economic and Trade Agreement (CETA), for example, provides that "a Party shall not waive or otherwise derogate from, or offer to waive or otherwise derogate from, its labour law and standards, to encourage trade or the establishment, acquisition, expansion or retention of an investment in its territory."[19]

These treaty provisions are inter-state obligations, prohibiting changes in domestic labour legislation if intended to lure foreign investors. As such, they are not at the heart of the debate about the relationship between international investment law and labour. The remainder of this chapter will be devoted to

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13 CBC News, 'New Zealand passes Hobbit labour law' *CBC News Website* (30 October 2010) <http://www.cbc.ca/news/arts/film/story/2010/10/30/hobbit-nz-labour.html> accessed 24 June 2018.

14 Dani Rodrik, 'Labor Rights in International Trade: Do They Matter and What Do We Do about Them?' in Robert Lawrence, Dani Rodrik and John Whalley (eds), *Emerging Agenda for Global Trade: High Stakes for Developing Countries* (Johns Hopkins Press for the Overseas Development Council 1996) 35.

15 David Kucera, 'Core labour standards and foreign direct investment' (2002) 141 International Labour Review 31, 63; Simon Deakin, 'The Contribution of Labour Law to Economic and Human Development' in Guy Davidov and Brian Langille (eds), *The Idea of Labour Law* (Oxford University Press 2011) 173-4.

16 David Kucera, 'Core labour standards and foreign direct investment' (2002) 141 International Labour Review 31, 37.

17 One study that focused on outward-FDI finds that high levels of employment protection may actually "anchor" companies to a home State. Gerda Dewit, Holger Gorg and Catia Montagna, 'Should I Stay or Should I Go? Foreign Direct Investment, Employment Protection and Domestic Anchorage' (2009) 145 Review of World Economics 93.

18 OECD, 'Trade, Employment and Labour Standards: A Study of Core Workers' Rights and International Trade (1996) 123 (emphasis added).

19 Art 23.4.2 CETA.

the law governing the relationship between host states and foreign investors. Non-derogation clauses will be discussed in chapter 5.

4.2.3 The regulation of labour

The main concern in international investment law is whether states that want to regulate labour could be confronted with claims by foreign investors. Over the last twenty years, states have been confronted with claims that challenged *bona fide* measures that aimed to advance social or environmental policies. Examples include challenges against landfill permits,[20] transboundary movement of hazardous waste,[21] the ban of certain gasoline additives,[22] the withdrawal of water and sewage concessions,[23] anti-tobacco legislation,[24] the phase-out of nuclear energy[25] and bank-bailouts and sovereign debt restructuring in the aftermath of the 2008 global financial crisis.[26] Some cases are deemed 'regulatory disputes' as they concerned "ordinary governmental regulatory activities" while others dealt with measures that targeted specific investors.[27]

The question is whether investment protection standards unduly restrict a host state's 'right to regulate'. Treaties limit the freedom of their state parties, but always on the basis of consent. However, the concern here is that investor protections are drafted in such a broad manner that they may be interpreted in ways not foreseen by the parties. The possibility that labour legislation could be challenged by foreign investors was first raised in 1959. According to Gardner:

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20 *Metalclad Corporation v The United Mexican States*, ICSID Case No ARB(AF)/97/1, Award, 30 August 2000, 40 ILM 36 (2001).

21 *S.D. Meyers, Inc. v Government of Canada*, UNCITRAL Arbitration (NAFTA), First Partial Award, 13 November 2000.

22 *Methanex Corporation v United States of America*, Final Award, 3 August 2005, 44 ILM 1345 (2005).

23 *Azurix Corp. v The Argentine Republic*, ICSID Case No ARB/01/12, Award, 14 July 2006.

24 *Philip Morris Asia Ltd (Hong Kong) v Commonwealth of Australia*, PCA Case No 2012-12, Award on Jurisdiction and Admissibility, 17 December 2015.

25 *Vattenfall AB and others v Federal Republic of Germany*, ICSID Case No ARB/12/12 (pending).

26 *Ping An Life Insurance Co of China v United Kingdom of Belgium*, ICSID Case No ARB/12/29, Award, 30 April 2015.

27 Julie Maupin, 'Differentiating Among International Investment Disputes' in Zachary Douglas, Joost Pauwelyn and Jorge Vinuales (eds), *The Foundations of International Investment Law: Bringing Theory Into Practice* (Oxford University Press 2014) 490. However, the latter author distinguishes between "*extraordinary* crisis disputes" and "*ordinary* regulatory disputes" (empasis added). The term 'regulatory disputes' is also used by Van Harten, see: Gus van Harten, *Investment Treaty Arbitration and Public Law* (Oxford University Press 2007) 4.

> Property rights can be effectively destroyed in many ways short of an actual confiscation or expropriation – they can be taken indirectly by exchange controls, export and import regulation, taxation, labor legislation, limitations on the ownership and control of enterprises, price controls, even by runaway inflation. Indeed, the prospect of these indirect takings provides much more of a deterrent to private foreign investment in underdeveloped countries than the prospect of a direct taking *via* confiscation or expropriation.[28]

Similarly, Sohn and Baxter considered in their commentary on the 1961 Draft Convention on the International Responsibility of States for Injuries to Aliens (1961 Harvard Draft) that: "The measures which a State might employ for this purpose (i.e. indirect expropriation, RZ) are of infinite variety. [...] It may, through its labor legislation and labor courts, designedly set the wages of local employees of the enterprise at a prohibitively high level."[29] Another example is provided in the commentary to the 1967 OECD Draft Convention on the Protection of Foreign Property, which mentioned "prohibition of dismissal of staff" amongst the issues that could give rise to an indirect expropriation claim.[30]

Over the years, there have been various labour-related investment disputes. To date, however, no arbitral tribunal has granted compensation to a foreign investor because the host state breached its treaty commitments through labour-related acts or omissions. The feasibility of such claims continues to be raised in academic debate, however.[31] Also amongst trade unions and NGOs there is a fear that investor claims could be brought in response to collective

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28 Richard Gardner, 'International Measures for the Promotion and Protection of Foreign Investment' (1959) 53 *American Society of International Law Proceedings* 255, 262. This comment was made in reference to the Abs-Shawcross Draft Convention of 1959, which article on expropriation recognized the concept of indirect expropriation but omitted a reference to public interest as a constitutive element of lawful expropriations. See: Georg Schwarzenberger, 'The Abs-Shawcross Draft Convention on Investments Abroad: A Critical Commentary' (1960) 9 Journal of Public Law 147, 155-156.

29 Louis Sohn and Richard Baxter, 'Responsibility of States for Injuries to the Economic Interest of Aliens' (1961) 55 American Journal of International Law 545, 559.

30 OECD, 'Draft Convention on the Protection of Foreign Property' (1967), Notes and Comments to Article 3, 19.

31 See e.g. Joachim Karl, 'International Investment Arbitration: A Threat to State Sovereignty?' in Wenhua Shan, Penelope Simons and Dalvinder Singh (eds), *Redefining Sovereignty in International Economic Law* (Hart Publishing 2008) 231; Samrat Ganguly, 'The Investor-State Dispute Mechanism (ISDM) and a Sovereign's Power to Protect Public Health' (1999) 38 Columbia Journal of Transnational Law 113, 132; Thomas Wälde and Abba Kolo, 'Environmental Regulation, Investment Protection and 'Regulatory Taking' in International Law' (2001) 50 International and Comparative Law Quarterly 811, 813; Kathleen Claussen, 'The use of arbitration to decide international labour issues' in Adelle Blackett and Anne Trebilcock (eds) *Research Handbook on Transnational Labour Law* (Edward Elgar Publishing 2015) 401.

bargaining rights, constraints on the use of casual labour, or the failure to end industrial disputes or strikes.[32]

A derivative concern is the possibility that states will refrain from implementing such legislation in the first place, as they fear that investors will resort to arbitration which could have monetary repercussions.[33] This effect is known as 'regulatory chill'. Simply refraining from adopting new legislation may be the easy way out, especially in the absence of (strong) countervailing power such as trade unions. Regulatory chill is difficult to observe. Whether it exists is an empirical question, but requires "counterfactual evidence about the regulations that would have existed in the absence of the purported chilling."[34] Co^te´ found that "there are some findings which raise the possibility of influence by IIA ISDS cases on the regulatory development process or trends in regulation, [but] there is no consistent observable evidence to suggest the possibility of regulatory chill."[35] To give one example from practice, a 2012 memo by the New Zealand Associate Minister of Health notes that: "Regardless of the strength of the arguments that plain packaging is defensible in ... trade and investment agreements, the risk that a WTO dispute settlement case or investment arbitration would be brought against New Zealand is reasonably high."[36] But examination of the political process does usually not reveal which arguments were conclusive for the non-adoption of new legislation.

The regulatory chill hypothesis is also approached from a legal positivist point of view. Scholars thus debate to what extent the structure of international investment law contributes to the fear of regulatory chill. As noted by Schill, "what one can observe is a convergence, not a divergence, in structure, scope, and content of existing investment treaties."[37] In the context of environmental

32 Bill Rosenberg, 'Labour Rights and Investment Agreements' (Power Point Presentation, 2 March 2012), on file with the author; Roeline Knottnerus and others, 'Socializing losses, privatizing gains: How Dutch investment treaties harm the public interest' (SOMO Briefing Paper 2015) 4; Hugh Robertson, 'TTIP: US/EU Trade Talks Need to Raise, Not Lower, Safety Standards' (8 May 2014); Markus Krajewski, 'Modalities for investment protection and Investor-State Dispute Settlement (ISDS) in TTIP from a trade union perspective' (Friedriech Ebert Stiftung 2014), despite the title of the paper it must be noted that the author is a law professor and the paper does not indicate any affiliation with a trade union.

33 Kyla Tienhaara, 'Regulatory chill and the threat of arbitration: A view from political science' in Chester Brown and Kate Miles (eds), *Evolution in Investment Treaty Law and Arbitration* (Cambridge University Press 2011) 606.

34 Jonathan Bonnitcha, *Substantive Protection under Investment Treaties: A Legal and Economic Analysis* (Cambridge University Press 2015) 115.

35 Christine Côte, 'A Chilling Effect? The impact of international investment agreements on national regulatory autonomy in the areas of health, safety and the environment' (PhD Thesis London School of Economics 2014) 187.

36 Office of the Associate Minister of Health, 'Plain packaging of tobacco products' (undated) <https://www.health.govt.nz/system/files/documents/pages/03cabinet-paper-28-march.pdf> accessed 24 June 2018.

37 Stephan Schill, *The Multilateralization of International Investment Law* (Cambridge University Press 2009) 11.

measures, he argues that "investment treaties *should not* lead to a chill on environmental regulation nor obstruct measures that are introduced in an attempt to mitigate climate change."[38] Some scholars note that tribunals have a variety of legal techniques at their disposal to take account of public interest concerns and international obligations outside of the investment framework to safeguard the policy space of host states,[39] while others point to the "lack of determinacy and coherence in treaty arbitration" which, they argue, causes legitimate fear amongst host states that their regulations will be challenged.[40] Roberts, for example, has argued that investment case-law "frequently resembles a house of cards built largely by reference to other tribunal awards and academic opinions, with little consideration of the views and practices of states in general or the treaty parties in particular."[41]

There have been different responses to accusations that "IIAs grant rights without responsibilities."[42] Broadly speaking, these can be divided into three categories. Firstly, it is argued that different interpretative strategies may warrant different outcomes, and that arbitral tribunals have, for example, erroneously held that the object and purpose of IIAs is to protect investors, rather than to contribute to economic development. Secondly, new IIAs often include language that attests to a more holistic object and purpose They mention that states have a 'right to regulate' or create carve-outs in specific protection standards. Thirdly, new mechanisms are being developed to replace the system of *ad hoc* system of investor-state dispute settlement in order to create a more coherent and balanced jurisprudence.[43] As the first two elements are directly concerned with the question whether IIAs constrain host states in the development of their domestic labour legislation, they will be explored further in sections 4.3 and 4.4.

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38 Stephan Schill, 'Do Investment Treaties Chill Unilateral State Regulation to Mitigate Climate Change?' (2007) 24 Journal of International Arbitration 469, 477.

39 See e.g. James Harrison, 'The case for investigative legal pluralism in international economic law linkage debates: a strategy for enhancing the value of international legal discourse' (2014) 2 London Review of International Law 115, 124, who distinguishes between the hierarchical strategy, displacement strategy and the interpretative strategy.

40 Susan Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions' (2005) 73 Fordham Law Review 1521, 1586. Also: Caroline Henckels, *Proportionality and Deference in Investor-State Arbitration* (Cambridge University Press 2015) 3, who in turn refers to various studies of arbitral practice in relation to the fair and equitable treatment standard.

41 Anthea Roberts, 'Power and Persuation in Investment Treaty Interpretation: The Dual Role of States' (2010) 104 American Journal of International Law 179.

42 Jarrod Hepburn and Vuyelwa Kuuya, "Corporate Social Responsibility and Investment Treaties," in Marie-Claire Cordonier Segger, Markus Gehring and Andrew Newcombe (eds), *Sustainable Development in World Investment Law* (Wolters Kluwer 2011) 607.

43 Rob Howse, 'Designing a Multilateral Investment Court: Issues and Options' (2017) 36 Yearbook of European Law 209, 215-6.

4.2.4 The regulation of investors

In addition to concerns about deregulation and regulation of labour standards, IIAs increasingly address the responsibilities of investors. Since the Second World War, various attempts have been made to draft 'codes' and 'guidelines' that elaborate on the responsibilities of multinational corporations. It was an essential part of the developing countries' efforts to establish a New International Economic Order (NIEO). As one historic account of international investment law argues, the *de jure* reciprocity of treaties was often a sham. Rules on the protection of foreign-owned property applied in a way that "became inextricably linked with colonialism, oppressive protection of commercial interests, and military intervention."[44] One particular element of inequality was that international investment law provided no avenue for host states to "address damages suffered at the hands of foreign investors."[45]

In 1974, at the height of the NIEO movement,[46] the UN Economic and Social Council (ECOSOC) established a Centre and an intergovernmental Commission on Transnational Corporations.[47] The Commission would, *inter alia*, lay the groundwork for a code of conduct and specific or general 'agreements'. The word 'treaty' was not used. A Draft Code of Conduct on Transnational Corporations was eventually published in 1984.[48] In the meantime, however, the Organization for Economic Cooperation and Development (OECD) had developed the OECD Guidelines for Multinational Enterprises (OECD Guidelines). They were originally adopted in 1976 as a "preemptive strike" by the developed OECD members to avoid more stringent international regulation of MNEs.[49] The OECD Guidelines were annexed to the Declaration on International

44 Kate Miles, *The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital* (Cambridge University Press 2013) 21.

45 Ibid 32.

46 Political support for the position of the developing countries was reflected in a number of UN General Assembly resolutions during the 1960s and 1970s. In 1974, however, the UN General Assembly adopted the two main resolutions that outlined a broad agenda for global economic reforms: the 'Declaration on the Establishment of a New International Economic Order' and the 'Charter of Economic Rights and Duties of States'. UNGA Res 3201 (S-VI) (1 May 1974) 'Declaration on the Establishment of a New International Economic Order' UN Doc A/Res/VI/3201); UNGA Res 3281 (XXIX) (12 December 1974) 'Charter of Economic Rights and Duties of States' UN Doc A/Res/XXIV/3281. See generally, Nico Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties* (Cambridge University Press 1997) 82-118.

47 ECOSOC Res 1913 (5 December 1974) E/RES/1913 (LVII).

48 UN Code of Conduct on Transnational Corporations, 23 ILM 626 (1984).

49 Bob Hepple, 'A Race to the Top: International Investment Guidelines and Corporate Codes of Conduct' (1999) 20 Comparative Labor Law & Policy Journal 347, 353. In the literature, it has been considered whether the OECD Guidelines create binding obligations for OECD Member States. Article 5(a) of the OECD Convention provides that the organization may "take decisions which […] shall be binding on all the Members." On this basis, Robinson argued that the establishment and proper administration of National Contact Points is thus

Investment and Multilateral Enterprises (1976 IIME Declaration).[50] The core of the 1976 IIME Declaration was to guarantee National Treatment to MNEs from other OECD member states. As a *quid pro quo* for the expansion of investors' rights, the OECD member states "jointly recommend to multinational enterprises operating in their territories the observance of the Guidelines as set forth in the Annex."[51] While the motivations behind the project may have been somewhat skewed, the OECD Guidelines have arguably evolved into the most important CSR instrument promulgated by an international organization.[52] The OECD Guidelines especially stand out for its dispute resolution mechanism. Every adhering state has a so-called National Contact Point (NCP), which handles 'specific instances', which is the term used for allegations of non-compliance.[53]

Since 1976 the OECD Guidelines have been revised a number of times. Under the auspices of the ILO and the UN a number of other initiatives and guidelines were developed, of which the ILO's 1977 Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy and the 2011 UN Guiding Principles on Business and Human Rights (UN Guiding Principles) are the most important.[54] None of these instruments intended to create a legally binding framework for corporations. Instead, they have inspired corporate codes of conduct, multistakeholder initiatives and International Framework Agreements, which are agreements between MNEs and trade unions. Compliance with labour standards constitutes an important part of these

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an international obligation. See: Scott Robinson, 'International Obligations, State Responsibility and Judicial Review Under the OECD Guidelines for Multinational Enterprises Regime' (2014) 30 Utrecht Journal of International and European Law 68.

50 OECD, 'Declaration on International Investment and Multinational Enterprises' (21 June 1976) 15 ILM 967 (1976), Guidelines from 969. The 2011 Guidelines use the term "part of" to describe the relationship with the IIME.

51 OECD Declaration (1976) 968.

52 See in general about the development of CSR norms by international organizations: Peter Muchlinski, 'Human rights, social responsibility and the regulation of international business: The development of international standards by intergovernmental organisations' (2003) 3 Non-State Actors and International Law 123 (2003). For the interrelationship between the ILO Tripartite Declaration and the OECD Guidelines, see: Virginia Leary, 'Nonbinding Accords in the Field of Labour' (1997) 29 Studies in Transnational Legal Policy 247, 255-256.

53 OECD, 'OECD Guidelines for Multinational Enterprises, 2011 edition' (adopted 25 May 2011) 68.

54 ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, 17 ILM 422 (1978); Human Rights Council, 'Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie: Guiding principles on business and human rights: implementing the United Nations 'Protect, respect and remedy' framework'' (21 March 2011) (A/HRC/17/31). Both the ILO MNE Declaration and the UNGPs are referenced in the OECD Guidelines.

instruments, which are often grouped under the heading of corporate social responsibility (CSR).[55]

When the OECD embarked on the development of a Multilateral Agreement on Investment (MAI), it again intended to Annex the OECD Guidelines. After the publication of the 1998 draft, however, negotiations were discontinued.[56] Nonetheless, several years after the failure of the MAI, references to CSR and international instruments in this area started to emerge in IIAs. Some of these explicitly mention labour standards, whilst others contain more general language. Section 4.5 will explore these provisions in depth.

4.3 INVESTMENT PROTECTION STANDARDS IN RELATION TO LABOUR REGULATION

4.3.1 Introduction

This part introduces the basic structure of international investment law, and discusses how this influences the feasibility of labour-related claims. While the scope and content of IIAs have converged over the years, there remains a degree of variation in the substantive rights that are contained in these IIAs.[57] It would be difficult to conceive of the variety of labour-related acts and omissions that could give rise to an ISDS claim. The purpose of this part is therefore to provide a basic analysis of investment protection standards. Sections 4.3.2 to 4.3.5 discuss the protection against direct and indirect expropriation, fair and equitable treatment, full protection and security and non-discrimination (most favoured nation treatment and national treatment).

55 Ruben Zandvliet and Paul van der Heijden, 'The rapproachement of ILO standards and CSR mechanisms: towards a positive understaning of the 'privatization' of international labour standards' in Axel Marx, Jan Wouters, Glenn Rayp and Laura Beke (eds), *Global Governance of Labor Rights: Assessing the Effectiveness of Transnational Public and Private Policy Initiatives* (Edward Elgar Publishing 2016) 176-177.

56 For critical perspectives on the labour-related aspects of the MAI, see Lance Compa, 'The Multilateral Agreement on Investment and International Labor Rights: A Failed Connection' (1998) 31 Cornell International Law Journal 683; Nico Schrijver, 'A Multilateral Investment Agreement from a North-South Perspective' in Eva Nieuwenhuys and Marcel Brus (eds), *Multilateral Regulation of Investment* (Kluwer Law International 2001)29-33.

57 Susan Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions' (2005) 73 Fordham Law Review 1521, 1530.

4.3.2 Direct and indirect expropriation

4.3.2.1 Background of the norm

The expropriation of property has been a long-standing concern of international law.[58] Expropriation is only allowed under certain conditions. Article 13 of the 2004 Canadian Model BIT is an example of a typical treaty provision:

> Neither Party shall nationalize or expropriate a covered investment either directly, or indirectly through measures having an effect equivalent to nationalization or expropriation ... , except for a public purpose, in accordance with due process of law, in a non-discriminatory manner and on prompt, adequate and effective compensation.

Historically the term expropriation referred to the direct taking of property through its legal title. While there are still examples of such 'direct expropriations', focus has shifted to situations in which there is no "physical invasion of the property" but instead an "erosion of rights associated with ownership by state interferences."[59] Through this notion of 'indirect expropriations' a wider range of host states actions is potentially covered.[60] A finding of this kind would require the host state to provide compensation to the investor, but does not nullify the regulation as such.

4.3.2.2 Taxonomy of treaty interpretation

The threshold for indirect expropriations has been commented upon by a number of tribunals. This has not led to the development of a coherent theory or framework. Bonnitcha submits that case-law on indirect expropriation can be divided into three "structures of inquiry": (1) the effects structure, (2) the exception structure, and (3) the balancing structure.[61] The effects structure is embedded in many IIAs. Article 6.2 of the French Model BIT, for example,

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58 For an historic overview of the controversies and the development of the norm, see Wil Verwey and Nico Schrijver, 'The taking of foreign property under international law: a new legal perspective?' (1984) 15 Netherlands Yearbook of International Law 3.

59 UNCTAD, 'Taking of Property' (UNCTAD Series on Issues in International Investment Agreements, 2000) 20. The concept of indirect expropriations is not new, however, but was recognized in the case-law of the Permanent Court of International Justice. See: *Norwegian Shipowners' Claims (Norway v United States of America)* (13 October 1922) I RIAA 307; *Case Concerning Certain German Interests in Polish Upper Silesia (Germany v Polish Republic)* (Judgment) PCIJ Rep Series A No 7 (25 August 1925) 3.

60 In a report that was published in 1972 the US Department of State listed a few instances of expropriations resulting from labour disputes: US Department of State Report on Nationalization, Expropriation, and other takings of U.S. and Certain Foreign Property since 1960 (1972) 11 ILM 84.

61 Jonathan Bonnitcha, *Substantive Protection under Investment Treaties: A Legal and Economic Analysis* (Cambridge University Press 2015) 243.

provides that: "Neither Contracting Party shall take any measures of expropriation or nationalization or any other measures having the effect of dispossession, direct or indirect, of nationals or companies of the other Contracting Party of their investments." The multilateral Energy Charter Treaty also defines indirect expropriations as "measures having effect equivalent to nationalization or expropriation"[62]

The effects structure has been applied in a number of cases. In *Metalclad v Mexico*, the Tribunal had to consider an Ecological Decree which declared an ecological reserve in the area in which the claimant had been granted permission to construct a landfill for hazardous waste. The Tribunal found that it "need not decide or consider the motivation or intent of the adoption of the Ecological Decree."[63] The *Pope & Talbot* tribunal also followed this approach, but adds that interference must have a "substantial" impact on the investment to qualify as expropriatory.[64]

Some treaties contain explicit exceptions that exclude measures that fall within certain 'policy domains' from being classified as an indirect expropriation. The COMESA Investment Agreement provides that:

> Consistent with the right of states to regulate and the customary international law principles on police powers, bona fide regulatory measures taken by a Member State that are designed and applied to protect or enhance legitimate public welfare objectives, such as public health, safety and the environment, shall not constitute an indirect expropriation under this Article.[65]

Exception clauses in indirect expropriation clauses are not common, however.[66] Importantly, the provision claims that the exception is already 'consistent' with customary international law. An explicit carve-out in the text of the agreement should thus not be necessary. Indeed, in *Methanex v United States*, the tribunal held in relation to Article 1110, which contains no such carve-out, that:

> as a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, inter alios, a foreign investor or investment is not deemed expropriatory and compensable unless specific commitments had been given by the regulating government to ... refrain from such regulation.[67]

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62 Art 13.1 Energy Charter Treaty.

63 *Metalclad Corporation v The United Mexican States* (2000) 40 ILM 36 (2001) para 111.

64 *Pope & Talbot v Canada*, UNCITRAL Arbitration (NAFTA), Interim Award, 26 June 2000, para 102.

65 Art 20.8 COMESA Investment Agreement.

66 Jonathan Bonnitcha, *Substantive Protection under Investment Treaties: A Legal and Economic Analysis* (Cambridge University Press 2015) 256.

67 *Methanex Corporation v United States of America*, UNCITRAL Arbitration (NAFTA), Final Award, 3 August 2005, 44 ILM 1345 (2005) pt. IV, chp D, para 7.

The *Methanex* decision has been followed in subsequent cases, confirming that measures "commonly accepted as within the police powers of States" are protected by customary international law.[68] Under the exceptions structure of inquiry, it is thus necessary to determine (1) whether a measure is within a state's police powers, and if so, (2) whether an exception applies, such as bad faith, discrimination, undue process or breach of specific commitments.[69]

Notably, while the American Law Institute's *Third Restatement of the Foreign Relations Law of the United States* also embraces a broad police powers exception,[70] US investment agreements typically note that: "*Except in rare circumstances*, nondiscriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations."[71] It is unclear whether 'rare circumstances' refers to bad faith, discrimination, undue process and breach of specific commitments, or whether a disproportionate impact could also fulfil this requirement.

Indeed, some tribunals have followed a balancing approach that looked at "both the effects and the characteristics of a measure in determining whether it constitutes indirect expropriation."[72] The tribunal in *LG&E v Argentina*, for example, found that:

> it can generally be said that the State has the right to adopt measures having a social or general welfare purpose. In such a case, the measure must be accepted without any imposition of liability, except in cases where the State's action is obviously disproportionate to the need being addressed.[73]

Crucial to a finding of proportionality is that "the greater the limitation on a right or interest, the more compelling the social need or public objective should be."[74] What yardsticks tribunals could or should use to determine how 'compelling' a certain need is unclear. Furthermore, the question arises

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68 *Saluka v Czech Republic*, UNCITRAL Arbitration, Partial Award, 17 March 2006, para 262.

69 Jonathan Bonnitcha, *Substantive Protection under Investment Treaties: A Legal and Economic Analysis* (Cambridge University Press 2015) 257; Jorge Viñuales, 'Sovereignty in Foreign Investment Law' in Zachary Douglas, Joost Pauwelyn and Jorge Viñuales (eds), *The Foundations of International Investment Law* (Oxford University Press 2014) 343

70 American Law Institute, 'Third Restatement of the Foreign Relations Law of the United States' (1987) Section 712 g.

71 Annex 10B, Panama-US FTA (emphasis added).

72 Jonathan Bonnitcha, *Substantive Protection under Investment Treaties: A Legal and Economic Analysis* (Cambridge University Press 2015) 260.

73 *LG&E v Argentina*, ICSID Case No ARB/02/1, Decision on Liability, 3 October 2006, para 195.

74 Caroline Henckels, 'Indirect Expropriation and the Right to Regulate: Revisiting Proportionality Analysis and the Standard of Review in Investment Treaty Arbitration' (2012) 15 Journal of International Economic Law 223, 226-227.

whether states could be obliged to consider alternative measures with a less intrusive impact on the investment.

4.3.2.3 Police powers, legitimate public welfare objectives, and labour

The co-existence of different methods to determine indirect expropriation precludes a categorical statement that labour-related measures can never be deemed expropriatory. The 'exceptions approach', which excludes certain domains of governmental policy from the scope of indirect expropriations is most likely to bar such claims. There is broad support for the notion that customary international law shields any claims of indirect expropriation that are within the police powers of states. Attempts to identify certain 'legitimate public welfare objectives' should therefore not be interpreted as introducing a new standard, but as more explicit guidance on the scope of a state's police powers. It is merely a legislative response to the inconsistent application of expropriation norms.[75]

Notably, however, carve-outs rarely go beyond the standard list of health, safety and the environment. Labour or social regulation is not mentioned in any of the clauses that aim to refine the expropriation standard, although it was reportedly discussed in this context during the MAI negotiations,[76] and trade unions are advocating for its explicit recognition as a legitimate public policy objective.[77] This is not necessary, however. The domains listed in IIAs are examples, and do not represent a limitative list.[78] Rather, the standard

75 Jasper Krommendijk and John Morijn, ''Proportional' by What Measure(s)? Balancing Investor Interests and Human Rights by Way of Applying the Proportionality Principle in Investor-State Arbitration' in Pierre-Marie Dupuy, Ernst-Ulrich Petersmann and Francesco Francioni (eds), *Human Rights in International Investment Law and Arbitration* (Oxford University Press 2009) 434-5.

76 Edward Graham, 'Regulatory Takings, Supernational Treatment, and the Multilateral Agreement on Investment: Issues Raised by Nongovernmental Organizations' (1998) 31 Cornell Journal of International Law 599, 611, noting that: "MAI negotiators recognized some of the problems associated with the regulatory taking provision under the MAI draft. At meetings held in early 1998, negotiators expressed views that MAI signatory governments were "not meant to be required to pay compensation for losses which an investor or investment may incur through regulation, revenue raising, and other measures of general application taken by governments, and that laws establishing taxation measures, environmental or labour standards, or intellectual property regimes, are not intended to constitute expropriation for the purposes of the MAI." (Internal citation from personal correspondence of Mr. Pierre Poret, Principal Administrator of Directorate for Fiscal, Financial and Enterprise Affairs of the OECD to the author of the article.)

77 European Trade Union Confederation, 'Resolution on EU Investment Policy' (Brussels, 5-6 March 2013).

78 Jasper Krommendijk and John Morijn, ''Proportional' by What Measure(s)? Balancing Investor Interests and Human Rights by Way of Applying the Proportionality Principle in Investor-State Arbitration' in Pierre-Marie Dupuy, Ernst-Ulrich Petersmann and Francesco Francioni (eds), *Human Rights in International Investment Law and Arbitration* (Oxford University Press 2009) 435.

list combines the issues that were already included in the 1961 Harvard Draft (e.g. public order, health, morality)[79] with ones that have emerged from arbitral practice (environmental measures). If investors had been more assertive in claiming compensation for damages arising from labour regulation, the issue may have been included in subsequent IIAs as well.

Indeed, despite the early warnings during the 1950s and 1960s, there have been no cases in which investors came close to advancing a successful indirect expropriation claim originating from the introduction of labour or social security legislation. While there are examples of domestic cases in which the retroactive application of a social security arrangement was considered expropriatory,[80] no such cases have been brought before international arbitral tribunals. Cases that are nonetheless relevant to determine whether this would be possible are scarce. *Foresti v South Africa*, which was brought pursuant to the BITs between Italy and South-Africa and between the Belgo-Luxembourg Economic Union and South-Africa, concerned the legality of the latter's 'Black Economic Empowerment' (BEE) legislation, which included certain affirmative employment actions.[81] The BEE programme concerned a broad set of measures that aimed to improve the position of Historically Disadvantaged South-Africans (HDSA). This included targets for 40 per cent HDSA participation in management and 10 per cent for women in mining, to be reached within five years.[82] While the investor included the management quota in its head of claim, the case mainly concerned the mandatory transfer of ownership rights to HDSAs.[83] The proceedings were eventually discontinued as the parties reached agreement on the mitigation of some BBE measures unrelated to affirmative employment action, so that these issues were never discussed on the merits.[84] A second example is *Svenska Management Gruppen AB v Sweden* before the European Commission on Human Rights. In this case, which was relied upon by South-Africa in *Foresti*, the Commission found that an expropriation claim concerning the increase of social security contributions was manifestly unfounded and did not engage in a detailed examination whether Article 1 of the First Protocol to the ECHR was breached.[85]

79 Art 10.5 Draft convention on the international responsibility of States for injuries to aliens, prepared by the Harvard Law School (1961), cited in: International Law Commission, 'First report on State responsibility by Mr. Roberto Ago, Special Rapporteur – Review of Previous work on codification of the topic of the international responsibility of States,' A/CN.4/217 and Corr.1 and Add.1 (1969) 142.

80 See e.g. the US Supreme Court case of *Eastern Enterprises v APFEL*, 524 U.S. 498 (1998).

81 *Foresti v South Africa*, ICSID Case No ARB(AF)/07/01, Award, 4 August 2012.

82 Luke Eric Peterson, 'South Africa's Bilateral Investment Treaties: Implications for Development and Human Rights' Friedrich Ebert Stiftung, Occasional Papers No. 26 (November 2006) 27.

83 *Foresti v South Africa*, ICSID Case No ARB(AF)/07/01, Award, 4 August 2012, para 79

84 *Foresti v South Africa*, ICSID Case No ARB(AF)/07/01, Award, 4 August 2012, paras 79-82.

85 *Svenska Management Gruppen AB v Sweden* App No 11036/84 (EComHR, 2 December 1985).

Provided that a tribunal would not follow the sole effects or balancing doctrines, a labour-related indirect expropriation claim could only succeed when the tribunal determines that labour regulation is not a legitimate public welfare objective. This is unlikely to succeed. At its core, labour regulation is no different from healthcare or environmental-related measures. Arguably, the character of labour regulation makes it even more unlikely it will be challenged by investors. Governmental measures in the environmental or public health domain, for example, are often more specific compared to the regulation of labour. This includes the withdrawal of permits based on environmental reasons, or the prohibition of certain chemicals that are considered a threat to public health.[86]

4.3.3 Fair and equitable treatment

4.3.3.1 Background of the norm

Having determined that labour regulation is unlikely to be challenged as a form of indirect expropriation, the question arises whether the fair and equitable treatment (FET) standards provides an alternative ground for an aggrieved investor. The FET standard aims to provide investors with a consistent, transparent, stable and predictable business environment.[87] Indeed, Dolzer and Schreuer note that various ICSID tribunals "have interpreted the concept of indirect expropriation narrowly and have preferred to find a violation of the standard of fair and equitable treatment."[88] Indeed, the FET standard is the most frequently invoked standard in investor-state arbitration. Its wording tends to be succinct. The 1991 BIT between the Netherlands and the Czech Republic, for example, holds that:

86 Kulick has considered an alternative scenario in which a mining company, with tacit approval of the government, forces the local population to work at its mine. After a change in government, the managing personnel is prosecuted and the mining license is withdrawn without compensation due to the company's forced labour practices. While these enforcement measures are 'labour-related' they do not touch upon the core of labour regulation. They may thus be assessed differently from labour regulation as such. For example, if a tribunal would consider whether the enforcement measure was proportional it may which to consider alternative measures to effectively enforce the country's forced labour legislation and determine that the withdrawal of a permit is not strictly necessary. When a host state would change a material labour norm, however, an inquiry into alternative means is less likely. Andreas Kulick, *Global Public Interest in International Investment Law* (Cambridge University Press 2014) 54-55.

87 Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (2nd edn, Oxford University Press 2012) 160

88 Ibid 101.

> Each Contracting Party shall ensure fair and equitable treatment to the investments of investors of the other Contracting Party and shall not impair, by unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal thereof by those investors.

In its attempt to interpret the meaning of this provision, the *Saluka v Czech Republic* tribunal noted that the FET standard "can only be defined by terms of almost equal vagueness."[89] Indeed, its lack of precision means that it has the potential to accommodate a much broader range of claims than other IIA standards. For this reason, some authors regard its lack of precision "a virtue rather than a shortcoming."[90]

From the perspective of investors this certainly holds true. According to UNCTAD, the FET standard is "the most relied upon and successful basis for a treaty claim."[91] Arguably the most far-reaching assertion of the scope of the FET standard has been made by the *Tecmed* tribunal, which interpreted the FET standard in the 1995 Spain-Mexico BIT.[92] It held *in dicta* that:

> The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations.[93]

This overly broad expectation has not been repeated in other cases. The tribunal in *Saluka* gave a more accurate description of when an investor could successfully invoke the FET standard:

> A foreign investor whose interests are protected under the Treaty is entitled to expect that the [host state] will not act in a way that is manifestly inconsistent, non-transparent, unreasonable (*i.e.* unrelated to some rational policy), or discriminatory (*i.e.* based on unjustifiable distinctions).[94]

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89 *Saluka v Czech Republic*, UNCITRAL Arbitration, Partial Award, 17 March 2006, para 297.

90 Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (2nd edn, Oxford University Press 2012) 133.

91 UNCTAD, 'Latest Developments in Investor-State Dispute Settlement: IIA Monitor No. 1' (2009) UNCTAD/WEB/DIAE/IA/2009/6/Rev1, 8.

92 Art 4.1 of that agreement provided that: "Each Contracting Party will guarantee in its territory fair and equitable treatment, according to International Law, for the investments made by investors of the other Contracting Party." While it did not mention "unreasonable or discriminatory" like the Netherlands-Czech Republic BIT, this minor difference does not explain the discord between the interpretation of the FET standard in *Saluka* and *Techmed*.

93 *Técnicas Medioambientales Techmed, SA v United Mexican States*, ICSID Case No ARB(AF)/00/2, Award, 29 May 2003, 43 ILM 133 (2004), para 154.

94 *Saluka v Czech Republic*, UNCITRAL Arbitration, Partial Award, 17 March 2006, para 309.

Tribunals thus confirm that under normal circumstances, the host state has an "undeniable right and privilege to exercise its sovereign legislative power."[95] This is not impaired by investors' subjective expectations.[96] Therefore, legitimate expectations have to be based on contractual commitments, specific representations, or situations in which the state acts "unfairly, unreasonably or inequitably in the exercise of its legislative power."[97] Acts in bad faith could clearly give rise to FET claims. But when the state acts in good faith, and conforms with its contractual commitments, the 'legitimacy' of the expectation has to be recognizable by a third-party. This is in line with the 1926 *Neer* award which holds that *bona fide* measures can only be characterized as arbitrary, and thus contrary to investors' legitimate expectations, when the measure is recognized as such "by any reasonable and impartial man"[98] Also the 1989 *ELSI* judgment of the ICJ adopted this line of argument, where it considered that the conduct of the host state must "[shock], or at least surprises, a sense of juridical propriety."[99]

A consistent interpretation of the FET standard has not yet developed. To the contrary, in the *AWG v Argentina* case, the dissenting arbitrator noted that "the standard of fair and equitable treatment has been interpreted so broadly that it results in arbitral tribunals imposing upon the Parties obligations that do not arise in any way from the terms that the Parties themselves used to define their commitments."[100] In *Saluka v Czech Republic*, the majority criticized previous tribunals' interpretations of the FET standard, noting that "if their terms were to be taken too literally, they would impose upon host states' obligations which would be inappropriate and unrealistic."[101]

More specificity on the scope of the FET standard could be provided by including detailed provisions in the treaty itself, or by bodies that may issue interpretations after the treaty has been concluded. Examples of the latter include the 'Joint Committee' that are established in CETA,[102] and the trilateral 'Free Trade Commission' that may resolve issues on the interpretation or

95 *Parkerings-Compagniet AS v Lithuania*, ICSID Case No ARB/05/8, Award, 11 September 2007, para 332; *Saluka v Czech Republic*, UNCITRAL Arbitration, Partial Award, 17 March 2006, para 305; *S.D. Myers Inc v Canada*, UNCITRAL Arbitration (NAFTA), First Partial Award, 13 November 2000) para 263.

96 *Suez, Sociedad General de Aguas de Barcelona SA, and Vivendi Universal SA v Argentine Republic*, ICSID Case No ARB/03/19, Decision on Liability, 30 July 2010, para 209. *Saluka v Czech Republic*, UNCITRAL Arbitration, Partial Award, 17 March 2006, para 304.

97 *Parkerings-Compagniet AS v Lithuania*, ICSID Case No ARB/05/8, Award, 11 September 2007, para 332.

98 *LFH Neer and Pauline Neer (USA v United Mexican States)* (1926) 4 UNRIAA 60, para 60.

99 *Case Concerning Elettronica Sicula S.p.A (ELSI) (United States of America v Italy)* (Judgment) [1989] ICJ Rep 15, para 128.

100 *AWG Group Ltd. v Argentine Republic*, UNCITRAL Arbitration, Separate Opinion of Arbitrator Pedro Nikken, 30 July 2010, para 27.

101 *Saluka v Czech Republic*, UNCITRAL Arbitration, Partial Award, 17 March 2006, para 304.

102 Art 8.31 and 26.1 CETA.

application of NAFTA.[103] These are political bodies, whose pronouncements on the interpretation of their respective agreements are binding. NAFTA's Free Trade Commission has used this competence ones, when it stated that the FET standard does "not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens."[104]

The Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) and the Canada-EU Trade Agreement (CETA) include a more detailed FET standard than the ones found in most IIAs. The former emphasizes that it does not create any obligations beyond what is required by customary international law. It subsequently provides more detailed guidance on what, according to the parties, may and may not qualify as a breach of the customary FET standard. The FET standard in CETA takes a different approach. It does not refer to customary international law, but contains a closed list of non-acceptable acts. This includes denial or justice, fundamental breach of due process, manifest arbitrariness, targeted discrimination and abusive treatment. Notably, it states that: "a Tribunal may take into account whether a Party made a specific representation to an investor to induce a covered investment, that created a legitimate expectation, and upon which the investor relied in deciding to make or maintain the covered investment, but that the Party subsequently frustrated."[105] The FET standard in CETA is more likely to reduce the interpretative discretion of tribunals than its CPTPP counterpart.[106] However, the boundary between 'legitimate' and 'illegitimate' expectations remains in flux.

From a review of the FET standard's jurisprudence, it can be concluded that the adoption of new labour legislation *as such* is unlikely to give rise to a FET claim. At the same time, however, it cannot be concluded that (enforcement of) labour law could never lead to such a claim. If, for example, an investor has received explicit guarantees that the government will not raise the minimum wage in its sector for the next five years, or if the labour inspectorate conducts extensive and burdensome inspections while ignoring competitors without an apparent reason, labour-related FET claims would be possible. The former scenario is more challenging than the latter. Accepting certain legitimate expectations concerning the regulation of labour or wages as a ground for a FET claim may effectively limit the application of substantive norms, while discriminatory or coercive enforcement of labour regulation could be resolved without impairing the norm that is being enforced. In a similar

103 Art 2001 NAFTA.

104 NAFTA Free Trade Commission, 'Notes of Interpretation of Certain Chapter Eleven Provisions' (31 July 2001).

105 Art 8.10(4) CETA.

106 Caroline Henckels, 'Protecting Regulatory Autonomy through Greater Precision in Investment Treaties: The TPP, CETA, and TTIP (2016) 19 Journal of International Economic Law 27, 36.

vein, Bonnitcha argues that: "Under the other elements of the FET standard (e.g. lack of due process, bad faith, coercion and harassment, RZ[107]), liability turns primarily on the characteristics of governmental conduct, not the extent of interference with the investor's interests."[108] The breaking of the promise is what matters, not the substance of it. For the purpose of the present study, the doctrine of legitimate expectations thus warrants some further examination.

4.3.3.2 Legitimate expectations and labour

Protection under the FET standard on the basis of legitimate expectations has been invoked once in relation to labour. The dispute that gave rise to *Paushok v Mongolia* arose when Mongolia adopted legislation that imposed a maximum of 10 per cent foreign workers in the mining sector, and a 'Foreign Workers Fee' of ten times the salary of every foreign employee above this threshold.[109] The arbitral tribunal concluded that the contested legislation did not violate Mongolia's obligations under the Russian-Mongolian BIT, stating that "it is not unheard of that States impose restrictions on the hiring of foreign workers; such restrictions can take various forms. By themselves, such restrictions, including a total ban on foreign workers, do not automatically constitute a breach of a BIT."[110] Importantly, 'not unheard of' is a rather low threshold when making a comparative assessment whether certain regulations are being applied by host states.

Furthermore, the claimant advanced no additional evidence of specific representations to support its expectation. Tribunals have considered different grounds for expectations, including specific rights that investors have acquired under domestic law, specific representations given to the investor, general stability of the host state's legal framework, and expectations based on the investor's business plan, provided that it was known by the host state.[111] In the labour context, there are two types of specific representations that can be considered systemic: (1) export processing zones in which (enforcement of) labour regulation is different than outside the zone, and (2) stabilization

107 Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (2nd edn, Oxford University Press 2012) 145-160.

108 Jonathan Bonnitcha, *Substantive Protection under Investment Treaties: A Legal and Economic Analysis* (Cambridge University Press 2015) 168

109 *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v The Government of Mongolia*, UNCITRAL Arbitration, Award on Jurisdiction and Liability, 28 April 2011, paras 109, 353-353

110 Ibid, para 364.

111 Jonathan Bonnitcha, *Substantive Protection under Investment Treaties: A Legal and Economic Analysis* (Cambridge University Press 2015) 167-194. Other authors apply different categorizations. Potestà, for example, distinguishes between contractual arrangements, informal representations, and the general regulatory framework. Michele Potestà, 'Legitimate Expectations in Investment Treaty Law: Understanding the Roots and the Limits of a Controversial Concept' (2013) 28 ICSID Review 88.

clauses in investor-state contracts. Both have led to investor claims. In *Goetz v Burundi* the claimant had established an investment in a Burundian 'free-zone' and thus benefited, according to the award, from certain tax, customs, exchange control and labour incentives.[112] The tribunal upheld the claim after which the parties agreed on an amicable settlement which *inter alia* reinstated free zone tax privileges for the company. With regard to labour, however, the agreement states that the general labour code applies to the company.[113]

Stabilization clauses are arguably the most important mechanisms to limit states' "right to enact, modify or cancel a law at its own discretion."[114] Given the widespread practice of these clauses, they may have a bigger impact than treaty-based protection standards. Stabilization clauses are not found in investment treaties, but in contractual arrangements between investors and host states. These contracts are used to allocate the costs, benefits, rights and obligations between the parties, but may also serve as a tool for broader "political risk management."[115] The tribunal in *Total v Argentina* defined stabilization clauses as:

> clauses, which are inserted in state contracts concluded between foreign investors and host states with the intended effect of freezing a specific host State's legal framework at a certain date, such that the adoption of any changes in the legal regulatory framework of the investment concerned (even by law of general application and without any discriminatory intent by the host State) would be illegal.[116]

The risks that investor seek to mitigate are broad. According to Wälde and N'Di, taxes and export restrictions are most important, followed by labour

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112 *Antoine Goetz et consorts c République du Burundi*, Award, CIRDI ARB/95/3, 10 February 1999 (in French) ICSID Review-Foreign Investment Law Journal 457, 459 For an English translation, see: James Crawford and Karen Lee (eds) *ICSID Reports Vol 6* (Cambridge University Press 2004) 3.

113 Ibid 524.

114 *Parkerings-Compagniet AS v Lithuania*, ICSID Case No ARB/05/8, Award, 11 September 2007, para 332.

115 Thomas Wälde and George N'Di, 'Stabilizing International Investment Commitments: International Law Versus Contract Interpretation' (1996) 31 Texas International Law Journal 215, 217.

116 *Total S.A. v Argentine Republic*, ICSID Case No ARB/04/01, 27 December 2010, para 101. Andrea Shemberg, 'Investment Agreements and Human Rights: The Effects of Stabilization Clauses' (Working Paper No. 42, March 2008) at page 4 defines them as "contractual clauses in private contracts between investors and host states that address the issue of changes in law in the host state during the life of the project."; cf. the definition given by the Iran-United States Claims Tribunal in *Amoco International Finance v Iran*, 15 Iran-US CTR 189, 239 (1987) which held that stabilization clauses "contract language which freezes the provisions of a national system of law chosen as the law of the contract as to the date of the contract in order to prevent the application of the contract of any future alterations of this system."

regulation – to the extent that this influences employment cost – environmental and safety standards, accounting rules and certain performance requirements.[117] Stabilization clauses cover changes in host state legislation in the broadest sense, including novel interpretations by domestic courts or the legislative implementation of treaties.[118]

Broadly speaking stabilization clauses may provide that laws adopted after the investment is made (1) do not apply to the investment, or (2) require compensation to be paid to the investor. The former thus freezes the applicable law, while the latter aims to preserve the economic equilibrium.[119] When the host state considers the burden of offsetting the investor too high, however, economic equilibrium clauses may have the same effect as freezing clauses. As long as host states are not financially constrained to introduce new labour laws, economic equilibrium clauses are to be preferred over freezing clauses. However, the financial implications of some types of labour legislation, and hence the amount of damages that could be claimed, will be hard to calculate. There may be a time-lapse between the enactment of new legislation and the financial impact. For example, permitting collective bargaining in EPZs will not automatically lead to an alteration of bargaining power between trade unions and employer organizations. Membership of unions may be low or non-existent in these facilities, or the state may continue to maintain a ban on strikes, which deprives the union of an important tool.

There is great variety in the scope of stabilization clauses. So far there has only been one empirical study, which examined 75 contracts with non-OECD countries and 13 with OECD countries which were signed between 1999 and 2009. Although this is a small sample and the author does not provide an estimation of the total number of such contracts, there is a clear divide between the two regarding the scope of stabilization clauses. OECD countries do not tend to include freezing clauses. A majority does offer investors the possibility to claim compensation, but this is often subjected to certain conditions. In contrast, 59% of the contracts from non-OECD states included explicit exemptions from future social legislation or the possibility to claim compensation for all new legislation. A further 27% contained economic equilibrium clauses

117 Thomas Wälde and George N'Di, 'Stabilizing International Investment Commitments: International Law Versus Contract Interpretation' (1996) 31 Texas International Law Journal 215, 220, 230.

118 One author has compared stabilization clauses with the principle of *rebus sic stantibus* in public international law, and the application of this principle in the context of WTO non-violation complaints, see: Jeffrey Waincymer, 'Balancing Property Rights and Human Rights in Expropriation' in Pierre-Marie Dupuy, Francesco Francioni and Ernst-Ulrich Petersmann (eds), *Human Rights in International Investment Law and Arbitration* (Oxford University Press 2009) 286.

119 Andrea Shemberg, 'Investment Agreements and Human Rights: The Effects of Stabilization Clauses' (Working Paper No. 42, March 2008) 5-9.

that allowed investors to claim compensation for compliance with new social legislation.[120]

The domestic law of the host state may explicitly mandate the government to enter into investment contracts containing stabilization clauses.[121] In some countries stabilization is even provided for in domestic law rather than investment contracts. For example, the Investment Stability Law of Panama reads: "The law provides for a 10 year stability as of registration of the investment that a legal, tax, customs, municipal and labour rules will remain identical to those in force at the time of registration."[122] Other states have explicitly exempted labour or social security legislation from the scope of stabilization, or provide a limitative enumeration of possible areas of stabilization which does not include labour laws.[123]

Investor-state contracts are usually confidential. In 2003, British Petroleum (BP) published its investment contracts regarding two cross-border pipeline projects after heavy pressure from NGOs. The agreements with Turkey and Georgia provide good examples of how labour concerns may be dealt with. The agreement with Turkey contains an economic equilibrium clause, which specifically mentions health and safety legislation as issues that would have to be compensated for.[124] It also stipulates that:

> Subject to requirement that no Project Participant shall be required to follow any employment practices or standards that (i) exceed those international labor standards or practices which are customary in international Petroleum transportation projects or (ii) are contrary to the goal of promoting an efficient and motivated workforce, all employment programmes and practices applicable to citizens of the State working on the Project in the Territory, including hours of work, leave, remuneration, fringe benefits and occupational health and safety standards, shall

120 Ibid 17.

121 Abdullah Al Faruque, 'Relationship between Investment Contracts and Human Rights: A Developing Countries' Perspective' in Sharif Bhuiyan, Philippe Sands and Nico Schrijver (eds), *International Law and Developing Countries: Essays in Honour of Kamal Hossein* (Brill Nijhoff 2014) 232; Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (2nd edn, Oxford University Press 2012) 83.

122 Law No. 54 (22 July 1998) quoted in Munir Maniruzzaman, 'National Laws Providing for Stability of International Investment Contracts: A Comparative Perspective' (2007) 8 The Journal of World Investment & Trade 233, 235. Note that this exemption applies to both domestic and foreign investors.

123 In the literature, Colombia and Russia are mentioned as examples of the former, Venezuela of the latter, see Munir Maniruzzaman, 'National Laws Providing for Stability of International Investment Contracts: A Comparative Perspective' (2007) 8 The Journal of World Investment & Trade 233, 240, fn 30; Abdullah Al Faruque, 'Relationship between Investment Contracts and Human Rights: A Developing Countries' Perspective' in Sharif Bhuiyan, Philippe Sands and Nico Schrijver (eds), *International Law and Developing Countries: Essays in Honour of Kamal Hossein* (Brill Nijhoff 2014) 242-243.

124 Art 7.2(xi) Host Government Agreement Between and Among the Government of the Republic of Turkey and the MEP Participants, Appendix 2, Intergovernmental Agreement (18 November 1999.

> not be less beneficial than is provided by the Turkish labor legislation generally applicable to its citizenry.[125]

In other words: Turkish workers who work on the project enjoy the same benefits as their countrymen in other sectors of the economy, unless this protection exceeds international labour standards (a term which is not substantiated or defined), the norms that are customary in international petroleum projects or when these benefits are contrary to the promotion of an efficient and motivated work force. This gives the investor three vaguely formulated and minimalistic grounds to afford lower labour protection. The provision goes much further than mere stabilization as it does not prevent the application of new standards but provides leeway to deviate from existing ones.

Another noteworthy example is the economic equilibrium clause in the agreement between Georgia and a number of oil companies. It provides that "the state authorities shall take all actions available to them to restore the Economic Equilibrium ... if and to the extent [it] is disrupted or negatively affected, directly or indirectly, as a result of any change ... in Georgian Law," but exempts legislation "with respect to cultural heritage, health, safety, the environment and ... employment/labour relations ... to the extent such Georgian Laws do not impose ... legal terms or conditions more onerous than those generally observed by the member states of the European Union." However, it then specifies that with regard to labour, exemption from stabilization "shall only apply after the later of (i) 1 January 2016, and (ii) the date the state becomes an Official EU Candidate".[126] Apart from being an optimistic statement on the prospects of EU membership for Georgia, the clause is particularly noteworthy for two reasons. First, it singles out labour as area of apparently greater concern than cultural heritage, health, safety and the environment. Second, it demonstrates that investors may also protect themselves against foreseeable future events, instead of merely seeking to use stabilization to prevent arbitrary, discriminatory or unforeseeable changes in host state legislation.[127]

The publication of BP's contracts incurred heavy criticism. In response, BP unilaterally adopted a 'Human Right Undertaking' (HRU) for both projects.[128] The HRU set out conditions under which it will not seek compensation for (1)

125Art 19.2 Turkey-MEP Agreement.

126 Art 7.2(x) Host Government Agreement Between and Among the Government of Georgia and State Oil Company of the Azerbaijan Republic, BP Exploration (Azerbaijan) Limited, TotalFinaElf E&P Caucasian GAS SA, LUKAgip N.V., Statoil Azerbaijan a.s., Naftiran Intertrade Co. (Nico) Limited, Turkish Petroleum Overseas Company Limited (17 April 2002).

127 Andrea Shemberg, 'Investment Agreements and Human Rights: The Effects of Stabilization Clauses' (Working Paper No. 42, March 2008) 27.

128 Art 2(a) The Baku-Tbilisi-Ceyhan Pipeline Company, 'BTC Human Rights Undertaking' (22 September 2003).

changes in the legal framework of the host state that are the result of its obligations under international law or (2) claims by private parties that successfully sought remedy in relation to the human rights impact of the investment. This is subject to two main limitations. First, the HRU refers to host state regulation that is "reasonably required by international labor and human rights treaties to which the relevant Host Government is a party [sic] from time to time."[129] How reasonable requirements should be distinguished from unreasonable ones is unclear.[130] Second, changes in host state regulation will not be challenged provided that "such domestic law is no more stringent than the highest of European Union standards ... World Bank Group standards ... and standards under applicable international labor and human rights treaties." This provision leaves much room for interpretation as well.

The HRU remains one of the few, if not the only declaration by which an investor unilaterally limited the scope of a contractual agreement to the benefit of the host state. The conclusion by Shemberg that "in a number of cases the stabilization clauses are in fact drafted in a way that may allow the investor to avoid compliance with, or seek compensation for compliance with, laws designed to promote environmental, social, or human rights goals" is therefore still a relevant concern.[131] Indeed, there are two reported cases in which an investor challenged host state labour legislation on the basis of contractual obligations: *Centerra v Kyrgyz Republic* and *Veolia Propreté v Egypt*. Whereas the treaty-based arbitrations *Paushok v Mongolia* and *Foresti v South Africa* both concerned hiring requirements, these contract-based arbitrations alleged a breach of the stabilization clause through the increase of minimum wages. The former case was brought by Canadian company Centerra in 2006, which operates one of the largest gold mines in the Kyrgyz Republic. Subsequent to the conclusion of a concession contract, the Kyrgyz government amended its labour legislation regarding the payment of high altitude premiums to workers, raising Centerra's annual labour costs by $6 million. The case was later settled, and the documents remain confidential.[132]

The second case arose from a dispute between the French utility company Veolia and the Egyptian city of Alexandria, concerning a waste-management

129 Emphasis added.

130 It could be argued that under such wording only arbitrary and discriminatory legislation is covered by the stabilization clause, Abdullah Al Faruque, 'Relationship between Investment Contracts and Human Rights: A Developing Countries' Perspective' in Sharif Bhuiyan, Philippe Sands and Nico Schrijver (eds), *International Law and Developing Countries: Essays in Honour of Kamal Hossein* (Brill Nijhoff 2014) 246.

131 Andrea Shemberg, 'Investment Agreements and Human Rights: The Effects of Stabilization Clauses' (Working Paper No. 42, March 2008) 37.

132 'Kumtor Mine Resumes Operations' (News Release by Centerra Gold, 22 December 2006) <https://s3.amazonaws.com/centerragold/news/July2018/GF2XnG0Jn5RXgUp8dY9t.pdf> Accessed 24 June 2018.

contract.[133] Part of Veolia's claim relates to a minimum wage issue.[134] An Egyptian court reportedly ordered the enforcement of the minimum wage in relation to the investor, which appears to violate a contractual stabilization clause.[135] Even in the absence of any details, the case has led to questions in the European Parliament alleging Veolia of "totally disregarding workers' rights and trying to destroy a crucial social asset".[136] Furthermore, it has become the focal point for trade unions and NGOs in their opposition to the further expansion of international investment law.[137] In May 2018 the tribunal allegedly ruled in favour of Egypt, although no documents from the case have been released into the public domain.[138]

Without disclosure of the investment contract and the dispute settlement proceedings it is difficult to assess whether *Centerra* and *Veolia* had particularly protective contractual stipulations, or whether stabilization in general creates an obstacle for the effective implementation of new labour laws. As part of his mandate as UN Special Representative for Business and Human Rights, John Ruggie published a set of ten 'Principles for Responsible Contracts' that aim to balance "necessary investor protection against arbitrary and discriminatory changes in law" with the host state's "*bona fide* efforts to meet its human rights obligations."[139] He proposes, *inter alia*, human rights assessments before the investment is made, specific human rights exemptions in stabilization

133 *Veolia Propreté v Arab Republic of Egypt*, ICSID Case No ARB/12/15, Award, 25 May 2018 (not disclosed).

134 Luke Eric Peterson, 'French company, Veolia, launches claim against Egypt over terminated waste contract and labor wage stabilization promises' (Investment Arbitration Reporter, 27 June 2012).

135 Heba Hazzaa and Silke Noa Kumpf, 'Egypt's Ban on Public Interest Litigation in Government Contracts: A Case Study of 'Judicial Chill'' (2015) 51 Stanford Journal of International Law 147, 158.

136 European Parliament, 'Parliamentary Questions of 12 December 2013 – Marc Tarabella (S&D) and Jean Louis Cottigny (S&D)' (14 August 2014) OJ C 268.

137 See e.g. Communications Workers of America, 'The Impact of Investor State Dispute Settlement Provisions in Trade Agreements' (May 2014); UNCTAD, 'Statement of Ms. Carolin Vollmann, International Trade Union Confederation' (World Investment Forum 2014: Investing in Sustainable Development, 16 October 2014) <http://unctad-worldinvestmentforum.org/wp-content/uploads/2014/10/Vollmann.pdf> accessed 24 June 2018; European Trade Union Confederation, 'Resolution on EU Investment Policy' (Brussels, 5-6 March 2013).

138 Damien Charlotin, 'Egyptian official confirms victory in Veolia case at ICSID, as company remains silent' (IA Reporter, 30 May 2018) <https://www.iareporter.com/articles/egyptian-official-confirms-victory-in-veolia-case-at-icsid-as-company-remains-silent/> accessed 16 September 2018.

139 Human Rights Council, 'Principles for responsible contracts: integrating the management of human rights risks into State-investor contract negotiations: guidance for negotiators' (25 May 2011) A/HRC/17/31/Add.3, para 38.

clauses and disclosure of contracts.[140] It should be kept in mind, however, that the decision to do so ultimately lies with the state. The limitation of a state's right to regulate through the conclusion of investor-state contracts is in itself an expression of legislative sovereignty. That said, it would be possible that by including stabilization clauses in investor-state contracts, the host state violates international law, because it is unable to fulfil its obligations under, for example, ILO conventions.[141]

4.3.3.3 Expectations based on violations of international labour standards

Factors like normal business risk, regulatory patterns and the socioeconomic conditions of the host state all influence whether an investor's expectations are indeed protected under the FET standard.[142] Another factor that may be of influence is whether the expected (in)action of the host state was in accordance with domestic or international law. Case-law and scholarly opinion are split on whether investors may *legitimately* expect the host state to perform *illegal* conduct.[143] Indeed in *MTD v Chile*, the investors could derive legitimate

140 As in his other reports, Ruggie did not clarify the exact scope of human rights applicable to business, but held that: "Human rights refers to internationally recognized human rights – understood, *at a minimum*, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization's Declaration on Fundamental Principles and Rights at Work." ibid 5 fn 2.

141 The bargaining strategies of investors is addressed in the OECD Guidelines for Multinational Enterprises, which establish non-binding standards of conduct. It provides that enterprises should: "Refrain from seeking or accepting exemptions not contemplated in the statutory or regulatory framework related to human rights, environmental, health, safety, labour, taxation, financial incentives, or other issues." OECD, 'OECD Guidelines for Multinational Enterprises, 2011 edition' (adopted 25 May 2011) 19. This provision has given rise to a number of cases before the OECD's complaints mechanism, including six simultaneously filed complaints against the oil companies that were involved in the BTC pipeline project. Although the use of stabilization clauses was not dismissed, the report of the United Kingdom's National Contact Point, which handles alleged violations of the OECD Guidelines, implied that freezing clauses are to be viewed as an *ipso facto* breach of the Guidelines. OECD, 'UK National Contact Point – Revised Statement, Specific Instance: BTC Pipeline'(22 February 2011) para 26.

142 Jonathan Bonnitcha, *Substantive Protection under Investment Treaties: A Legal and Economic Analysis* (Cambridge University Press 2015) 175, 182.

143 Potestà invokes *ADF v United States* in arguing in favour of the proposition that illegal conduct cannot be legitimately expected, Michele Potestà, 'Legitimate Expectations in Investment Treaty Law: Understanding the Roots and the Limits of a Controversial Concept' (2013) 28 ICSID Review 88, 120. Snodgrass invokes the *MTD v Chile* case, and argues "that the compliance or non-compliance with municipal law of an administrative act that gave rise to expectations should not be determinative of the degree of protection, if any, those expectations will receive in international law." Elizabeth Snodgrass, 'Protecting Investors' Legitimate Expectations: Recognizing and Delimiting a General Principle' (2006) 21 ICSID Review 1, 40.

expectations from the host state's approval of a project, although it was clear that the project contravened domestic policies and legislation.[144]

It does not follow that this argument can be extended to situations in which the host state's actions that give rise to the investor's expectations are governed by international law. For example, in 2006 the Prime Minister of Bahrain issued a decision which listed the oil and gas sector as an essential service in which strikes were prohibited.[145] This is contrary to the jurisprudence of the ILO's Committee on Freedom of Association. The CFA defines 'essential services' as "services whose interruption would endanger the life, personal safety or health of the whole or part of the population." [146]It has specifically held that the petroleum sector does not fall under this definition. [147]The International Confederation of Arab Trade Unions thus raised a complaint, which led the CFA to "[request] the Government to take the necessary measures to amend section 21 of the Trade Union Law so as to limit the definition of essential services to essential services in the strict sense of the term."[148]

Can a foreign investor in the oil & gas industry rely on the Prime Minister's decision to argue that it had a legitimate expectation that it would not face strike action, so that its facilities could operate without disruption? If this is accepted, bringing domestic law in line with its obligations under international labour law would constitute an *ipso facto* violation of another norm of public international law, i.e. the FET standard in the investment treaty between Bahrain

144 *MTD Equity Sdn. Bhd. And MTD Chile SA v Republic of Chile*, ICSID Case No ARB/01/7, Award, 25 May 2004, para 166. Snodgrass argues that this is supported by the rule that states "may not invoke the provisions of its internal law as justification for its failure to perform a treaty." Art 27 VCLT, the rule was considered a generally accepted principle already by the PCIJ, see: *Treatment of Polish Nationals and other Persons or Polish Origin or Speech in the Danzig Territory* (Advisory Opinion) PCIJ Rep Series A/B No 44 (4 February 1932) 24. The validity of this argument is doubtful. Art 27 VCLT is the corollary of Article 26, which contains the general principle of *pacta sunt servanda*. It assumes that the international obligation is clear, and that a state may not use internal law as an "escape clause." See: Annemie Schaus, 'Article 27 – Convention of 1969' in Olivier Corten and Pierre Klein (eds), *The Vienna Convention on the Law of Treaties: A Commentary – Vol. I* (Oxford University Press 2011) 689-690. In the scenario at hand, there is no inherent conflict between domestic law and international law. Instead, the act of observing an otherwise compliant domestic law triggers the violation of a broad and indeterminate international standard. This dynamic relationship is not foreseen in Article 27 VCLT.

145 See e.g.: Yannick Radi, 'The Tripartite Dimension of Conflicts of Interest: Workers, Foreign Investors and Host States in the Energy Sector' in: Eric de Brabandere and Tarcisio Gazzini (eds) *Foreign Investment in the Energy Sector: Balancing Private and Public Interests* (Brill Nijhoff 2014) 224-225.

146 International Labour Organization, 'Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO' (5th edn, International Labour Office 2006) para 583.

147 Ibid, para 586.

148 *Bahrain (Case No 2552)* (22 February 2007) Report of the Committee on Freedom of Association No 349 (Vol XCI 2008 Series B No 1) para 339. The CFA has closed the case after the government announced an amendment to its Trade Union Law.

and the home state of the foreign investor. There is a clear difference between representations that contradict domestic law and those that contradict international law. States are free to amend their domestic law as they please. Representations by officials that the law will be changed, not enforced, or otherwise altered can in fact be put into practice. When this does not happen, one could argue that a legitimate expectation has been violated. If, on the other hand, the representation made is contrary to a norm of public international law, the investor should act more diligently. Unless the host state makes a concomitant representation that it will withdraw from the treaty with which the primary representation is at odds, the investor cannot derive a legitimate expectation.

Although some treaties have begun to narrow the FET standard, this element of legitimate expectations is not addressed. There is one notable example, however, which was included in the Draft United Nations Code of Conduct on Transnational Corporations. The document, which has never been formally adopted, provides that fair and equitable treatment should be consistent with domestic as well as international law.[149] Adopting similar language in new IIAs could help to provide a clear answer on the question raised in this section.

4.3.3.4 Violations of labour standards as a breach of the FET standard

A different type of labour-related FET claim was advanced in *UPS v Canada*. In this case, which was brought under Chapter 11 of NAFTA, the claimant pursued several arguments concerning unfair competition between UPS Canada and Canada Post, a state-owned enterprise, which allegedly violated the FET standard contained in Article 1105 NAFTA. One of the claims concerned an exemption in Canada's labour legislation to the effect that rural postal workers were not allowed to join a union and bargain collectively. UPS thus argued that: "Canada's failure to respect core labour standards for Canada Post's workers violates Canada's Article 1105 obligation. The resulting effects create unfairly low wages to be paid by Canada Post which it uses to compete against UPS Canada."[150] The memorial of UPS contains an analysis of five pages listing Canada's obligations under ILO Convention 87, including jurisprudence of the Committee on Freedom of Association, as well as the Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights.[151] Eventually the Tribunal dismissed the claim as "UPS has demonstrated no sufficient interest" to justify its pursuit, "nor any substantive ground which

149 Commission on Transnational Corporations, 'Report on the Special Session: Official Records of the Economic and Social Council, 1983, Supplement No. 7' (7-18 March and 9-21 May 1983) UN Doc E/1983/17/Rev. 1, Annex II, para 48.

150 *United Parcel Service of Amercia Inc. v Government of Canada*, UNCITRAL Arbitration (NAFTA), Investor's Memorial (Merits Phase), 23 March 2005, para 647.

151 The memorial also discusses the 1998 ILO Declaration and the Universal Declaration of Human Rights, but fails to acknowledge that these instruments are not legally binding.

could begin to show a breach of the minimum standard reflected in Article 1105."[152]

The claimant in *Allard v Barbados* pursued a similar argument in relation to environmental protection. Mr. Allard had invested US$35 million in an eco-tourism project in a protected nature sanctuary. According to the claimant, both the Convention on Wetlands of International Importance and the UN Convention on Biological Diversity applied to the site. Subsequent to the investment, the host state adopted a new 'National Physical Development Plan' which revoked certain protective buffers. Allard argued that the actions of the host state damaged the environment and *ipso facto* his investment. The tribunal disagreed on the environmental claims, making the legal consequences moot.[153]

While these types of claims are somewhat counterintuitive, it could well be the case that other investors will advance similar claims. For example, companies that are subjected to NGO scrutiny over labour conditions benefit from strong enforcement actions by their host states. Insufficient action could eventually damage the company brand. But as this type of claim is premised on economic damage to the investor, these 'level-playing field cases' are by no means a substitute for the regular mechanisms by which states can be held accountable for non-compliance with international obligations.

4.3.4 Full protection and security

Another protection standard that has given rise to concern is the obligation to provide the investor with full protection and security (FPS). The standard often features in the same treaty provision as the FET standard. Language is typically very succinct, providing that "each Contracting Party shall accord to such investments full security and protection"[154] or that "each Party shall accord to covered investments treatment in accordance with customary international law, including ... full protection and security."[155]

Analysis of the FPS standard focuses on three elements: against whom, and against what actions should the host state protect the investor, and what measures must it take to fulfil its obligation?[156] Because workers are one of the main groups that investors may need to be protected against, the FPS standard has a more straightforward connection to labour than other invest-

152 *United Parcel Service of Amercia Inc. v Government of Canada*, UNCITRAL Arbitration (NAFTA), Award on the Merits, 24 May 2007, para 187.

153 *Peter A. Allard v The Government of Barbados*, UNCITRAL Arbitration (NAFTA), PCA Case No 2012-06, Award, 27 June 2016, paras 139 and 166.

154 Art 3.1 Bahrain-Netherlands BIT.

155 Art 5.1 United States-Rwanda BIT.

156 Jeswald Salacuse, *The Law of Investment Treaties* (2nd edn, Oxford University Press 2015) 231.

ment protection standards. The standard does not infringe upon domestic labour legislation or other measures that are intended to protect the rights of workers, however. In various disputes, claimants have argued a breach of the FPS standard in the context of strikes or other forms of labour unrest. While such circumstances could indeed lead to a breach of the FPS standard, issues like the legality of strikes should be considered separately from possible security issues, as this does not fall under the jurisdiction of an investment tribunal. Indeed, both the ICJ and investment tribunals have been careful not to pass judgement on the underlying labour disputes in FPS cases.

The 1989 *ELSI* judgment by a chamber of the International Court of Justice, for example, concerned the closure of an Italian factory owned by Raytheon, an American company. The dismissal of workers led to strikes, and eventually the occupation of the factory premises. The Mayor of Palermo did not end the occupation, but instead requisitioned the plant and the company assets for a period of six months. The ICJ sided with Italy, noting that:

> The reference in Article V [of the 1948 Treaty of Friendship, Commerce and Navigation between Italy and the United States] to the provision of "constant protection and security" cannot be construed as the giving of a warranty that property shall never in any circumstances be occupied or disturbed. The dismissal of some 800 workers could not reasonably be expected to pass without some protest. Indeed, the management of ELSI seems to have been very much aware that the closure of the plant and dismissal of the workforce could not be expected to pass without disturbance.[157]

There have been a number of similar claims in investor-state arbitrations. In *Noble Ventures v Romania*, the privatization of a steel mill and its subsequent acquisition by an American investor led to trade union demonstrations and strikes.[158] The award is not clear on the precise nature of the strike, nor the activities that occurred during the labour unrest. The claimant consistently referred to "unlawful strikes" without an indication whether courts had indeed intervened. Apart from this, the allegations concern occupation of the company's premises, theft of files and cash accounts, sabotage of facilities and equipment and confinement and physical assault of managers.[159] The tribunal firstly noted that the claims were similar to those in the *ELSI* case decided by the International Court of Justice. As the ICJ dismissed the claims made by the United States in that case, and it did not see how the actions of Romania in the case at hand were more harmful than the facts in the *ELSI* case, it held that no breach of the protection standard could be found.[160]

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157 *Case Concerning Elettronica Sicula S.p.A (ELSI) (United States of America v Italy)* (Judgment) [1989] ICJ Rep 15, para 108.

158 *Noble Ventures v Romania*, ICSID Case No. ARB/01/11, Award, 12 October 2005.

159 Ibid, para 17.

160 Ibid.

Also in *Tecmed v Mexico* and *Plama v Bulgaria*, the investor claimed that the host state should have taken measures to prevent "adverse social demonstrations"[161] and "worker riots"[162] because they threatened the economic viability of the investment. Both tribunals dismissed the claims. While in *Techmed* the main problem was a lack of factual evidence, the *Plama* tribunal considered the evidence submitted by the parties "in virtually all respects contradictory."[163] Importantly, the investors at no point claimed that their respective host states had an obligation to prevent strikes as such.

4.3.5 Non-discrimination

IIAs typically include two types of non-discrimination provisions: the obligation not to discriminate vis-à-vis other foreign investors, known as most favoured nation treatment (MFN) and the obligation not to discriminate vis-à-vis domestic investors, known as national treatment (NT). The wording of IIAs is rather homogeneous compared to other protection standards. Treatment of foreign investors should not be "less favourable" than what is accorded to own or third-party investors. Some treaties, including most US ones, add a qualification, namely that comparisons can only be made when investors are "in like situations" or "in like circumstances".[164]

Nonetheless, as with the other IIA-standards that were discussed above, the case-law on non-discrimination shows "substantial levels of inconsistency in the interpretation of the meaning and function of key concepts underlying the application of this standard."[165] There are four areas of contention: (1) the scope of the comparison, (2) the definition of a differentiation, (3) justifications for differentiation, and (4) the relevance of intent or effect.[166] The latter two are especially relevant for the purpose of the present study. Dolzer and

161 *Técnicas Medioambientales Techmed, SA v United Mexican States*, ICSID Case No ARB(AF)/00/2, Award, 29 May 2003, 43 ILM 133 (2004) para 175.

162 *Plama Consortium Limited v Republic of Bulgaria*, ICSID Case No ARB/03/24, Award, 27 August 2008, para 236.

163 Ibid, para 248.

164 Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (2nd edn, Oxford University Press 2012) 198. Van Harten raises the point that labour issues may play a role in the determination of likeness. He specifically asks whether a domestic investor that "has a better record of employing disadvantaged minorities" are "in like circumstances" with foreign investors that do not have a similar track record. If they are not, the host State may treat the companies differently, for example by providing grants to the former company. Gus van Harten, *Investment Treaty Arbitration and Public Law* (Oxford University Press 2007) 84.

165 Federico Ortino, 'Non-discriminatory Treatment in Investment Disputes' in Pierre-Marie Dupuy, Ernst-Ulrich Petersmann and Francesco Francioni (eds), *Human Rights in International Investment Law and Arbitration* (Oxford University Press 2009) 363-364.

166 Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (2nd edn, Oxford University Press 2012) 199-204

Schreuer argue that "[although] most investment treaties do not explicitly say so, it is widely accepted that differentiations are justifiable if rational grounds are shown."[167] In the *S.D. Myers* case, for example, the tribunal considered that "[t]he assessment of "like circumstances" must also take into account circumstances that would justify governmental regulations that treat them differently in order to protect the public interest."[168] Under this reasoning, host states could impose more stringent labour legislation or increase labour inspections for sectors that experience particular problems. An example could be an increase in minimum wage levels for mine workers due to the dangerous nature of the occupation. Consequently, foreign investors in the mining sector could not claim a violation of the NT standard simply because the minimum wage in the agricultural sector, in which predominantly local companies are active, is not raised.[169]

Arguably, when it is accepted that there are certain public interest justifications that allow for a differentiation, discriminatory intent would still lead to a breach of the NT standard. This point is explicitly included in the 2007 Model BIT of Norway, which states that:

> a measure applied by a government in pursuance of legitimate policy objectives of public interest such as the protection of public health, human rights, labour rights, safety and the environment, although having a different effect on an investment or investor of another Party, is not inconsistent with national treatment and most favoured nation treatment when justified by showing that it bears a reasonable relationship to rational policies not motivated by preference of domestic over foreign owned investment.[170]

Other IIAs include more specific carve-outs. There are a number of IIA that exempt affirmative (employment) action, labour mobility, social welfare arrangements and domestic hiring requirements from the scope of the MFN and NT obligation. The 1998 South Africa-Czech Republic BIT, which is not in force, thus notes that:

> The provisions of paragraph 1 and 2 of this Article shall not be construed so as to oblige one Party to extend to the investors of the other the benefit of any treatment preference or privilege which may be extended by the former Party by virtue of ... any law or other measure the purpose of which is to promote the achievement

167 Ibid 202.

168 *S.D. Myers Inc v Canada*, UNCITRAL Arbitration (NAFTA), First Partial Award, 13 November 2000, para 250.

169 In this example, it is assumed that the sector in which the foreign and local companies operate is immaterial. This follows from the *Occidental v Ecuador* case, see: *Occidental Exploration and Production Co. v Ecuador*, LCIA Case No UN 3467, Award, 1 July 2004, para 173. This is not uncontroversial, however, see e.g. *Marvin Roy Feldman Karpa v United Mexican States*, ICSID Case No ARB(AF)/99/1 Award, 16 December 2002, para 171.

170 Art 3 Norway Model BIT 2007, at 5, fn1. This Model BIT has never been used in practice.

> of equality in its territory, or designed to protect or advance persons, or categories of persons, previously disadvantaged by unfair discrimination.[171]

Other carve-outs are concerned with either the NT or the MFN obligation. An example of the former can be found in the BIT between Canada and the Philippines, in which Canada "reserves the right to make and maintain exceptions [with regard to] social services (i.e. public law enforcement; correctional services; income security or insurance; social security or insurance; social welfare; public education; public training; health and child care)."[172] This provision can also be found in the BIT between Canada and Venezuela. In addition, it is stipulated that: "Venezuela may require that up to 90 percent of manual labourers and 90 percent of non-manual labourers employed by an enterprise in its territory be nationals of Venezuela provided that the requirement does not materially impair the ability of the investor to exercise control over its investment."[173] Following the *Paushok* arbitration, however, such exemptions do not seem to be necessary as states are generally free to impose labour-related performance requirements.[174]

With regard to MNF treatment specifically, Singapore has concluded a number of agreements between 1985 and 2003 that exempt from the MFN obligation: "the benefit of any treatment, preference or privilege resulting from … any arrangement with a third state or states in the same geographical region designed to promote regional cooperation in the economic, social, labor, industrial or monetary fields within the framework of specific projects."[175] This may be particularly relevant in the case of labour migration. Regional liberalization of high-skilled labour migration is set to become an integral part of the ASEAN Economic Community. This may lead to *de facto* discrimination between investors from ASEAN member states, which will have more opportunities to post workers in Singapore compared to investors whose labour force will predominantly not have the nationality of an ASEAN member state.

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171 Art 3.3 Agreement between the Czech Republic and the Republic of South Africa for the Promotion and Reciprocal Protection of Investment (14 December 1998). Notably, the BITs which formed the basis for the claim in the *Foresti* case did not contain a similar provision.

172 Section 1(a) Annex of the Agreement between the Government of Canada and the Government of the Republic of the Philippines for the Promotion and Reciprocal Protection of Investments (1 November 1996).

173 Article 11(d)(iii) Annex of the Agreement between the Government of Canada and the Government of the Republic of Venezuela for the Promotion and Protection of Investments (28 January 1998).

174 Only few IIAs explicitly prohibit employment performance requirements, see: UNCTAD, 'World Investment Report 2003: FDI Policies for Development: National and International Perspectives' (United Nations 2003) 119-123.

175 Art 5.1(b) Agreement Between the Government of the People's Republic of China and the Government of the Republic of Singapore on the Promotion and Protection of Investments (7 February 1986), similar provisions can be found in Singapore's BITs with Uzbekistan, Egypt, Mauritius, Cambodia, Hungary, Mongolia, Pakistan and Vietnam.

4.4 STRATEGIES TO INCREASE HOST STATES' REGULATORY AUTONOMY

4.4.1 Introduction

Labour-related investment disputes are rare and, when advanced, mostly unsuccessful. Except when the host state has provided pre-existing commitments to the contrary, it is highly unlikely that (enforcement of) labour legislation could be classified as a breach of an IIA.[176] Nonetheless, this part will consider strategies aimed at increasing host states' regulatory autonomy or 'policy space'. While these do not (necessarily) originate from specific human rights or labour-related concerns, they do influence the broad spectrum of 'public welfare measures' and can play a role in the assessment of labour-related investment disputes. There are four ways through which regulatory autonomy could be regained: (1) exiting the system,[177] (2) constructing procedural barriers for claimants,[178] (3) adaptation of the content of IIAs, and (4) refining the means of interpretation. This part will focus on the latter two. Section 4.4.2 discusses a broad range of legislative strategies that states have adopted. Section 4.4.3 then discusses interpretative strategies, which has been the main focus of legal scholarship.

Arguably, there are two explanations for the increase of exceptions in IIAs. First, they respond to the perception that the imprecise language of IIAs – both the substantive rights and the (preambular) provisions from which tribunals deduce an IIA's object and purpose – has enabled investors to bring claims against measures which states had never considered to fall under the scope of their investment obligations. Notably, this is not supported by statistics, as in fact host states prevail in the majority of investment cases.[179] This is not to say that concerns are unwarranted, as (the threat of) arbitration in itself could dissuade countries to postpone or forego certain policies. One of the

176 Given the variety of fact-patterns that may lead an investor to claim compensation against labour measures by the host state and the few cases that have so far been brought, one should be cautious to construct an inductive argument that only pre-existing commitments could lead to a successful outcome for the investor.

177 For example, by terminating IIS, denouncing the ICSID Convention, and failure to comply with awards. See Caroline Henckels, 'Protecting Regulatory Autonomy through Greater Precision in Investment Treaties: The TPP, CETA, and TTIP' (2016) 19 Journal of International Economic Law 27, 28.

178 Susan Franck has classified such approaches as the 'legislative attempt' to overcome the legitimacy crisis in international investment law, as opposed to the 'barrier building approach' that proposes procedural barriers to investor claims. Susan Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions' (2005) 73 Fordham Law Review 1521, 1587-1588.

179 Armand de Mestral, 'When Does the Exception Become the Rule? Conserving Regulatory Space under CETA' (2015) 18 Journal of International Economic Law 641, 652 on the experience of Canada with NAFTA investment disputes. Out of 31 cases brought by American investors, Canada lost only 4 on which one was, according to Mestral "questionable in law."

most salient examples has been the postponement of tobacco plain packaging legislation by New Zealand to await the outcome of the various legal challenges – under both international investment and trade law – to similar measures taken by Australia.[180] Second, the scope of PTIAs is expanding. This is especially true for the so-called 'mega regionals'. They cover regulatory cooperation, free movement of people, competition policy, state enterprises and rules on trade in services that go far beyond the scope of the GATS. As agreement broaden, their "extensive new provisions are accompanied by an unprecedented number of exceptions."[181]

4.4.2 Legislative strategies

4.4.2.1 The object and purpose of IIAs

The construction of the object and purpose of a treaty is important in three ways: (1) it defines the obligations of the parties, including the phase prior to ratification,[182] (2) it determines the acceptability of reservations to, and modifications and suspensions of treaties,[183] and (3) it assists in the interpretation of the substantive provisions of the treaty.[184] The principal interest of this section is the interpretative function. The rules on treaty interpretation are laid down in Articles 31 to 33 of the Vienna Convention on the Law of Treaties (VCLT), which reflect customary international law.[185] Article 31 contains the general rule of treaty interpretation. It provides that: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." There is no hierarchical order between the textual, contextual and teleological element.[186] As most IIAs do not include textual references to labour standards, the latter two elements are of particular importance.[187]

180 'Minister defends plain packaging' (*Radio New Zealand*, 10 February 2014) <http://www.radionz.co.nz/news/national/235694/minister-defends-plain-packaging> accessed 24 June 2018.

181 Armand de Mestral, 'When Does the Exception Become the Rule? Conserving Regulatory Space under CETA' (2015) 18 Journal of International Economic Law 641, 642.

182 Art 18, VCLT. Please note that treaties are not always subject to the VCLT.

183 Arts 19, 41 and 58 VCLT.

184 Arts 31 and 33 VCLT.

185 *Case Concerning Kasikili/Sedudu Island (Botswana v Namibia)* (Judgment) [1999] ICJ Rep 1045, 1059.

186 Michael Waibel, 'Demystifying the Art of Interpretation' (2001) 22 European Journal of International Law 571, 575; Valentina Vadi, *Cultural Heritage in International Investment Law and Arbitration* (Cambridge University Press 2014) 263-264.

187 Cf. Valentina Vadi, *Cultural Heritage in International Investment Law and Arbitration* (Cambridge University Press 2014) 263-264.

A treaty's preamble, in which the parties express the motives that have led to the conclusion of the treaty and the results that they expect from it, forms a starting point for the identification of the object and purpose.[188] However, the objectives of a treaty should be distinguished from the assumptions on which it is based.[189] This may limit the value of preambular statements in which parties, for example, note that they are: "Committed to achieving these objectives in a manner consistent with the protection of health, safety, and the environment, and the promotion of internationally recognised labour standards."[190] In general, preambles are insufficient to discern a treaty's object and purpose. Indeed, the picture that emerges from the practice of investment tribunals is diverse. An empirical study of ninety-eight ICSID decisions found that in forty-eight instances the tribunal explicitly used the object and purpose to interpret the agreement. In thirty-one decisions, however, the source of the object and purpose was not identified. The seventeen other tribunals relied upon the preamble, substantive provisions, the title of the treaty, and the *travaux préparatoires*, but also to 'external' sources including literature, case law and the preamble of the ICSID Convention.[191]

The diverse approaches to the identification of the object and purpose of IIAs does not mean that the outcomes of these inquiries are equally diverse. Rather, two different outcomes can be distinguished: one that conceptualizes investment law as a means to protect investors, and one that conceptualizes investment law as a means to foster the (economic) development of states.[192]

A number of tribunals have thus constructed the object and purpose in a narrow sense.[193] This has implications for the interpretation of the substantive protections offered to investors. In *SGS Société Générale de Surveillance S.A. v Republic of the Philippines* the tribunal concluded that:

> The object and purpose of the BIT supports an effective interpretation of [the BIT provision]. The BIT is a treaty for the promotion and reciprocal protection of investments. According to the preamble it is intended "to create and maintain favourable

188 Mark Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff Publishers 2009) 428; Richard Gardiner, *Treaty Interpretation* (Oxford University Press 2008) 196-197.

189 Lorand Bartels, *Human Rights Conditionality in the EU's International Agreements* (Oxford University Press 2005) 83-84.

190 Preamble, Austria-Tajikistan BIT.

191 Ole Kristian Fauchald, 'The Legal Reasoning of ICSID Tribunals – An Empirical Analysis' (2008) 19 European Journal of International Law 301, 322-324.

192 This represents, what Radi calls, "the schizophrenia of the objectives of the international investment system." Yannick Radi, 'Realizing Human Rights in Investment Treaty Arbitration: A Perspective from within the International Investment Law Toolbox' (2012) 37 North Carolina Journal of International Law & Commercial Regulation 1107, 1138.

193 See e.g. *MTD Equity Sdn. Bhd. And MTD Chile SA v Republic of Chile*, ICSID Case No ARB/01/7, Award, 25 May 2004, 104, this arbitration was based on the BIT between Chile and Malaysia, and also referred to "la prosperidad económica" instead of some notion of (economic) development.

> conditions for investments by investors of one Contracting Party in the territory of the other". It is legitimate to resolve uncertainties in its interpretation so as to favour the protection of covered investments.[194]

The other elements of the preamble, which *inter alia* stated that the promotion and protection had "the aim to foster the economic prosperity of both states," were not taken into consideration.[195]

The *Lemire* case is an example in which a tribunal has constructed a more holistic object and purpose, which affected the interpretation of the substantive standards in a way that was more deferential to the host state. It stated that:

> The main purpose of the BIT is thus the stimulation of foreign investment and of the accompanying flow of capital. But this main purpose is not sought in the abstract; it is inserted in a wider context, the economic development for both signatory countries. Economic development is an objective which must benefit all, primarily national citizens and national companies, and secondarily foreign investors. Thus, the object and purpose of the Treaty is not to protect foreign investments per se, but as an aid to the development of the domestic economy. And local development requires that the preferential treatment of foreigners be balanced against the legitimate right of Ukraine to pass legislation and adopt measures for the protection of what as a sovereign it perceives to be its public interest.[196]

The *Lemire* arbitration was based on the BIT between the United States and Ukraine. Its preamble referred to 'economic development' instead of 'economic prosperity' and further noted that: "the development of economic and business ties can contribute to the well-being of workers in both Parties and promote respect for internationally recognized worker rights." Overall, however, the language of the BITs underlying both cases does not explain the radically different construction of the object and purpose.

The approach taken by the arbitrators in *Lemire* is supported in legal scholarship. Waibel points to the indeterminacy of investment protection standards, which causes some arbitral tribunals to embrace a narrowly constructed object and purpose and consequently interpret the substantive obliga-

194 *SGS Société Générale de Surveillance SA v Republic of the Philippines*, ICSID Case No ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction, 29 January 2004, para 116. See also: *Siemens A.G. v the Argentine Republic*, ICSID Case No ARB/02/8, Decision on Jurisdiction, 3 August 2004, para 81; *Azurix Corp. v The Argentine Republic*, ICSID Case No ARB/01/12, Award, 14 July 2006, para 307.

195 Philippines-Switzerland BIT 2.

196 *Joseph Charles Lemire v Ukraine*, ICSID Case No ARB/06/18, Decision on Jurisdiction and Liability, 21 January 2010, paras 272-273. See also: *Saluka v Czech Republic*, UNCITRAL Arbitration, Partial Award, 17 March 2006, para 300.

tions in favour of the investor.[197] Schill argues that (preambular) treaty language should not be relied upon too much in the construction of the object and purpose of a treaty, as the "general purpose of international investment law (i.e. to foster economic development) should also reflect in the conceptualization of every substantive standard of treatment ... as a guiding principle for structuring the relations between states and foreign investors."[198]

Nonetheless, states have begun to draft more holistic language in their IIAs' preambles. The 2012 US-Korea FTA, which also includes an investment chapter, states that both parties:

> [desire] to strengthen the development and enforcement of labor and environmental laws and policies, promote basic workers' rights and sustainable development, and implement this Agreement in a manner consistent with environmental protection and conservation.

Given the support for trade-labour linkage from the US and various EU countries this reference may not come as a surprise. Importantly, however, the inclusion of such language in investment agreements has gained much broader attraction. Various Asian countries, including China, India and Japan, have ratified trade and investment that refer to the enhancement of social benefits, improving living standards, environmental protection, sustainable development and the right to regulate.[199] Similar references are found in agreement between developing states that are not geographically proximate.[200]

Not only is the number of IIAs that include preambular references to social or environmental concerns growing, the language that is used has also undergone significant change. The assumption that increased inward FDI automatically leads to improvements of labour standards is no longer widely propagated, most importantly by the United States. The 1994 US Model BIT noted that the parties "[recognize] that the development of economic and

197 Michael Waibel, 'International Investment Law and Treaty Interpretation' in Rainer Hoffman and Chirstian Tams (eds), *International Investment Law and General International Law: From Clinical Isolation to Systemic Integration* (Nomos 2011) 40.

198 Stephan Schill, 'International Investment Law as International Development Law' in Andrea Björklund (ed), *Yearbook on International Investment Law and Policy 2012-2013* (Oxford University Press 2014) 349-350. See also: Franklin Berman, 'Evolution or Revolution?' in Chester Brown and Kate Miles (eds), *Evolution in Investment Treaty Law and Arbitration* (Cambridge University Press 2011) 668.

199 Comprehensive Economic Agreement Between the Government of Malaysia and the Government of the Republic of India (1 July 2011); Comprehensive Economic Cooperation Agreement between the Republic of India and the Republic of Singapore (1 August 2005); Comprehensive Economic Partnership Agreement Between Japan and the Republic of India (1 August 2011); Comprehensive Economic Partnership Agreement between India and South-Korea (1 January 2010); Agreement on Investment of the Framework Agreement on Comprehensive Economic Co-operation between the Association of Southeast Asian Nations and the People's Republic of China (15 August 2009).

200 See e.g. Republic of China-Panama FTA.

business ties can promote respect for internationally recognized worker rights."[201] The updated 2012 Model takes a more cautious approach and states that the parties "[desire] to achieve these objectives in a manner consistent with the protection of health, safety, and the environment, and the promotion of internationally recognized labor rights."[202] Unlike the 1994 Model, the language in the 2012 Model expresses a normative 'desire' to avoid the substantive provisions being interpreted in a way that impedes the realization of labour standards.

The effect of these developments should not be overstated. Various IIAs still refer to labour standards as the desired or expected result of economic cooperation rather than something that could conflict with investor protection standards. Most IIAs do not mention the issue at all. Furthermore, in *CMS v The Republic of Argentina* the tribunal constructed the object and purpose of the BIT between the United States and Argentina narrowly, although it is identical to the US-Ukraine BIT which formed the basis for the *Lemire* arbitration. Whereas in *Lemire* the tribunal had stated that the object and purpose of the treaty was "to aid the development of the domestic economy," the *CMS* tribunal held that:

> The Treaty Preamble makes it clear, however, that one principal objective of the protection envisaged is that fair and equitable treatment is desirable "to maintain a stable framework for investments and maximum effective use of economic resources."[203]

The divergence between the two tribunals highlights the risk of inconsistent arbitral decisions and points to the fact that more holistic and development-oriented preambular language does not automatically translate into a larger degree of deference to the host state.

4.4.2.2 General right to regulate provisions

The second mechanism is the use of 'right to regulate provisions' that are applicable to the treaty as a whole. The importance of general clauses has been attested to in the *Lemire* arbitration, in which the tribunal considered that carve-outs for specific standards cannot be extended to others.[204] The dissenting arbitrator noted that the limitation of the right to national treatment could

201 Preamble US Model BIT 1994.

202 Preamble US Model BIT 2012.

203 *CMS Gas Transmission Company v The Republic of Argentina*, ICSID Case No ARB/01/8 CMS, Award, 12 May 2005, para 274.

204 *Joseph Charles Lemire v Ukraine*, ICSID Case No ARB/06/18, Award, 28 March 2011, paras 46-47; Lise Johnson and Lisa Sachs, 'Trends in International Investment Agreements, 2011-2012: A Review of Trends and New Approaches' in Andrea Björklund (ed), *Yearbook of International Investment Law and Policy 2012/2013* (Oxford University Press 2014) 232-233.

be extended to the right to fair and equitable treatment. He argued that at the time of drafting the state parties had not foreseen that the FET standard could have implications for the interest that the parties intended to protect, and the NT limitation could thus be applied *a fortiori*.[205] But given the majority opinion, the better strategy from the perspective of host states is to include provisions that apply to the IIA as a whole.

A good example of a right to regulate provision that aims to safeguard the regulatory autonomy of the host state can be found in the BIT between the Belgian Luxembourg Economic Union (BLEU) and Oman. It provides in Article 5.1: "Recognising the right of each Contracting Party to establish its own domestic labour standards, and to adopt or modify accordingly its labour legislation." Article 23.3 of CETA, which has not yet entered into force, does make a reference to *international* labour standards. It holds that:

> Recognising the right of each Party to set its labour priorities, to establish its levels of labour protection and to adopt or modify its laws and policies accordingly in a manner consistent with its international labour commitments, including those in this Chapter, each Party shall seek to ensure those laws and policies provide for and encourage high levels of labour protection and shall strive to continue to improve such laws and policies with the goal of providing high levels of labour protection.

Notably, the treaty's investment chapter contains a separate right to regulate provision, in which Canada and the EU "reaffirm their right to regulate within their territories to achieve legitimate policy objectives, such as the protection of public health, safety, the environment or public morals, social or consumer protection or the promotion and protection of cultural diversity."[206]

The frequent use of the word 'reaffirm' in right to regulate provisions implies that they do not alter obligations towards foreign investors.[207] Absent rules of international law to the contrary, a state's legislative sovereignty (their 'right to regulate') is unrestricted. The restrictions that are imposed by international law have different characters. They originate from the customary principle of non-intervention, *ius cogens* obligations, and treaty obligations to which the state itself has consented. The rights granted to foreign investors

205 *Joseph Charles Lemire v Ukraine*, ICSID Case No ARB/06/18, Dissenting Opinion of Arbitrator Dr. Jürgen Voss, 16 July 2013, para 338.

206 Art 8.9(1) CETA.

207 Art 2.1 European Commission, 'Draft Text TTIP – Investments' (2015) <http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf> accessed 24 June 2018, emphasis added). The 2015 proposal by the European Union for the TTIP investment chapter appears to be more stringent, where it holds that: "The provisions of this section *shall not affect* the right of the Parties to regulate within their territories through measures necessary to achieve legitimate policy objectives, such as the protection of public health, safety, environment or public morals, social or consumer protection or promotion and protection of cultural diversity."

under IIAs, falling in the latter category, undoubtedly limit the state's legislative powers. But how do these restrictions relate to 'right to regulate' provisions, which appear to deny such limitations?

Arguably, these provisions do not negate the effect of investor rights with respect to host state actions in certain policy areas, but merely mandate a lower degree of scrutiny, i.e. the standard of review that arbitral tribunals apply when examining claims. To suggest that investor rights do not apply when a host state measure falls within a certain policy area that is 'carved-out' could have far-reaching consequences. Taken to the extreme, it would mean that host states could, for example, impose higher minimum wages on foreign-owned companies than on domestic ones. Albeit discriminatory, minimum wage legislation clearly falls within the labour domain and is thus exempted from the scope of the IIA. Indeed, in the area of environmental measures scholars have argued that many cases "involve acts of protectionism or mistreatment of unwary foreign investors ... camouflaged in the much more palatable clothes of sacred environmental causes."[208]

If the purpose of right to regulate provisions is to fully exempt certain areas from scrutiny, states could have adopted more precise language. Right to regulate provisions thus do not give host states a *carte blanche* with regard to measures that fall within certain policy areas. On the other hand, however, it cannot be presumed that they are without any legal effect, as it is a general principle of international law that "that no word or provision may be treated as or rendered superfluous."[209] Their relevance should therefore be sought in the degree of deference that arbitral tribunals should grant host states and the standard of review they apply when assessing whether host states' actions have violated investor rights.

4.4.2.3 General exception clauses

A final mechanism that is used in IIAs to restrict the scope of investment protection is the inclusion of general exception clauses.[210] These differ from specific carve-outs and general right to regulate provisions in two ways. Firstly, general exception clauses are interpreted narrowly.[211] Secondly, whereas a claimant has to satisfy the burden of proof of carve-outs and right to regulate

208 Thomas Wälde and Abba Kolo, 'Environmental Regulation, Investment Protection and 'Regulatory Taking' in International Law' (2001) 50 International and Comparative Law Quarterly 811, 820.

209 Edward Gordon, 'The World Court and the Interpretation of Constitutive Treaties' (1965) 59 American Journal of International Law 794, 814.

210 Some general exception clauses do not cover expropriation, e.g. the Energy Charter Treaty and the Agreement on Free Trade and Economic Partnership Between Japan and the Swiss Confederation (1 September 2009).

211 Alexander Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (Oxford University Press 2008) 424-430.

exceptions, the invocation of exceptions clauses is the responsibility of a respondent.

Most exception clauses resemble Article XX GATT. The 2004 Canadian Model BIT, for example, starts with a *chapeau* that prevents the application of the general exceptions clause when measures are (1) "applied in a manner that would constitute arbitrary or unjustifiable discrimination between investments or between investors," and (2) when they constitute "a disguised restriction on international trade or investment."[212] The list of policy areas includes (1) the protection of "human, animal or plant life or health," (2) "compliance with laws and regulations that are not inconsistent with the provisions of [the BIT]," and (3) "the conservation of living or non-living exhaustible natural resources." It furthermore includes a range of acceptable measures for prudential and national security reasons, which are not subjected to the *chapeau*.[213]

Whereas most general exception clauses, like their WTO counterparts, require that measures must be 'necessary' to fulfil the stated objective, some IIAs have taken a different approach. The COMESA Investment Agreement only requires measures to be "designed and applied"[214] for their stated purpose and the Colombia Model BIT exempts challenges against environmental measures that are "proportional to the objective sought."[215] Importantly, there is no exception for the protection of public morals.[216] This is true for a substantial number of general exception clauses in IIAs. Furthermore, while some refer to prison labour, no general exception clause includes a broader labour reference. This may be changing, however. The initial draft of the 2015 Model BIT of India, which like Colombia is a capital-importing state, held that: "Nothing in this Treaty precludes the Host State from taking actions or measures of general applicability which it considers necessary with respect to the following, including: ... (vi) improving working conditions."[217] For no apparent reason this provision was not included in the final version. The final Model BIT does include a public morals exception, however. In chapter 3 it was argued that the public morals exception in Article XX(a) GATT can be used to justify labour-related measures that would otherwise be inconsistent with the GATT. This is caused by the fact that the standard is highly deferential to different conceptions of morality. The definition developed by the WTO Panel in the first case that concerned the public morality exception, which held that "the term public morals denotes standards of right and wrong conduct by or on

212 Art 10 Canada Model BIT 2004.
213 Measures in the former category should be "reasonable".
214 Art 22 COMESA Investment Agreement.
215 Art VIII Colombia Model BIT 2008.
216 All Canadian BITs that were concluded after 1994 contain a general exception clause along these lines.
217 Art 16 India Model BIT 2015.

behalf of a community or nation,"[218] has been consistently applied in later case law. In investment law the public morals exception would be used to justify domestic labour regulation instead of trade measures in response to low labour standards in another state with the purpose to force this state to adhere to higher standards or to shield its domestic market from these goods to avoid moral complicity. But given the fact that the term has been interpreted so broadly, there is no reason to assume that the public morals exception could not be used in this context.[219] Arguably, domestic labour law may be more readily accepted as *necessary* to protect public morals than trade restrictions that protect the moral conscience of consumers.[220]

The use of general exception clauses as a strategy to 'rebalance' investment law has met with some criticism. While some authors have questioned their usefulness,[221] others have gone further and argue that general exception clauses may provide less instead of more policy space. The reason for this is that investor rights are to be balanced against the societal purpose of the disputed measure to determine whether there is an infringement. In this 'build-in' balancing mechanism, which is the first phase of assessing whether a particular measure breaches the protection standards, "there are no limited or closed lists of topics covered by the exception, no necessity requirements and no *chapeau* to constrain the interpreter."[222] It is thus doubtful whether

218 WTO, *United States: Measures Affecting the Cross-Border Supply of Gambling and Betting Services* – Report of the Panel (10 November 2004) WT/DS285/R, para 6.465 (internal quotation omitted).

219 Cf. William Burke-White and Andreas von Staden, 'Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties' (2008) 48 Virginia Journal of International Law 364, who argue that the case-law of the EctHR, the ECJ and the WTO may be taken into account when interpreting the term public morality in investment law.

220 The 2018 consultation draft of the Netherlands Model BIT also mentions public morals and labour separately, although not in a general exception clause but in a right to regulate provision delimiting the scope of the agreement. Art 2.2 states that: "The provisions of this Agreement shall not affect the right of the Contracting Parties to regulate within their territories necessary to achieve legitimate policy objectives such as the protection of public health, safety, environment, public morals, labor rights, animal welfare, social or consumer protection or for prudential financial reasons."

221 Barton Legum and Ioana Petculescu, 'GATT Article XX and international investment law' Roberto Echandi and Pierre Sauvé (eds), *Prospects in International Investment Law and Policy* (Cambridge University Press 2013) 340-362.

222 Céline Lévesque, 'GATT Article XX exceptions in IIAs: a potentially risky policy' in Roberto Echandi and Pierre Sauvé (eds), *Prospects in International Investment Law and Policy* (Cambridge University Press 2013) 366. See also on general exception clauses in international investment law: Andrew Newcombe, 'General Exceptions in International Investment Agreements' in Marie-Claire Cordonier Segger, Markus Gehring and Andrew Newcombe (eds), *Sustainable Development in World Investment Law* (Kluwer Law International 2011) 365-370; Nicholas DiMascio and Joost Pauwelyn, 'Nondisrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?' (2008) 102 American Journal of International Law 48, 82-83; Susan Spears, 'Making way for the public interest in international investment agreements' in Chester Brown and Kate Miles (eds), *Evolution in Investment Treaty Law and*

a general exceptions clause has any added value for host states. There have been no cases in which a measure that constituted a breach of the substantive protection standards was nonetheless upheld under the general exceptions clause. There is no clear objection against them either, as long as the inclusion of a general exceptions clause does not affect the initial assessment whether a state acted within its sovereign right to regulate.[223] But as this would run counter the very purpose of general exception clauses, which is too enlarge domestic policy space instead of shrinking it, it is unlikely that this risk will materialize.[224]

4.4.2.4 The effect of inter-state labour obligations on investor protection standards

An increasing number of IIAs include labour provisions that oblige the state parties to effectively enforce domestic legislation, refrain from legislative derogations, and make a continuous effort to improve those standards. This is a response to the risk that states provide labour-related incentives to attract or retain foreign investment. As these clauses do not expressly address the relationship between investors and host states they are not discussed in this chapter. However, recent case-law in the area of environmental regulation makes clear that inter-state obligations of this kind may affect the interpretation of investor protection standards.

In the *Adel A Hamadi Al Tamimi v Oman* case, a US national brought a claim after his company that operated a limestone quarry was fined for certain violations of Oman's environmental legislation, which ultimately led to the termination of the project and criminal charges against Mr. Al Tamini. Oman's conduct, he argued, violated his rights under the investment chapter of the US-Oman FTA relating to indirect expropriation, the minimum standard of treatment and national treatment. When determining the state's conduct under the latter two standards, the tribunal referred to the environmental chapter in the US-Oman FTA, which: "although it does not fall directly within the Tribunal's jurisdiction, provides further relevant context in which the provisions of [the investment chapter] must be interpreted."[225] The tribunal subsequently argues that:

Arbitration (Cambridge University Press 2011) 287. On the concept of necessity in international investment law, see for example: August Reinisch, 'Necessity in Investment Arbitration,' (2010) 41 Netherlands Yearbook of International Law 137.

223 Suzanne Spears, 'Making way for the public interest in international investment agreements' in Chester Brown and Kate Miles (eds), *Evolution in Investment Treaty Law and Arbitration* (Cambridge University Press 2011) 287.

224 Suzanne Spears, 'The Quest for Policy Space in a New Generation of International Investment Agreements' (2010) 13 Journal of International Economic Law 1037, 1064.

225 *Adel A Hamadi Al Tamimi and the Sultanate of Oman*, Award, ICSID Case No ARB/11/33, Award, 3 November 2015, para 388

> The very existence of [the environmental chapter] exemplifies the importance attached by the US and Oman to the enforcement of their respective environmental laws. It is clear that the State Parties intended to reserve a significant margin of discretion to themselves in the application and enforcement of their respective environmental laws – indeed, Article 17.2.1 compels each State to ensure the effective enforcement of environmental laws.[226]

Based on the notion that the US-Oman FTA embraced a "forceful defence of environmental regulation and protection," the tribunal noted that the standard for a breach of the minimum standard of treatment pertains to "a gross or flagrant disregard for the basic principles of fairness, consistency, even-handedness, due process, or natural justice expected by and of all states under customary international law" and "requires a failure, wilful or otherwise egregious, to protect a foreign investor's basic rights and expectations."[227] This resembled the award in *SD Myers v Canada*, in which the tribunal had noted that the North American Agreement on Environmental Cooperation (NAAEC) as well as the 1992 Rio Declaration on Environment and Development, the principles of which were "affirmed" in the NAAEC, was part of the "legal context" of the investment protection standards and thus relevant to their interpretation.[228]

There are no conceptual arguments why the reasoning in the *SD Myers v Canada* and the *Al Tamini v Oman* cases cannot be extended to the labour

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226 Ibid, para 389. Article 17.2.1 reads: "(a) Neither Party shall fail to effectively enforce its environmental laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the Parties, after the date of entry into force of this Agreement. (b) The Parties recognize that each Party retains the right to exercise discretion with respect to investigatory, prosecutorial, regulatory, and compliance matters and to make decisions regarding the allocation of resources to enforcement with respect to other environmental matters determined to have higher priority. Accordingly, the Parties understand that a Party is in compliance with subparagraph (a) where a course of action or inaction reflects a reasonable exercise of such discretion, or results from a bona fide decision regarding the allocation of resources."

227 Ibid, para 390. The investment chapter in the US-Oman FTA provides in Article 10.2 that: "In the event of any inconsistency between this Chapter and another Chapter, the other Chapter shall prevail to the extent of the inconsistency." The tribunal did not refer to this clause, in line with the proposition that there is indeed no such inconsistency. However, had it not used the environmental provisions to construct a high threshold for a violation of the minimum standard of treatment, it could have argued that a restriction on the government's ability to regulate in environmental concerns would be inconsistent with its obligation under the Article 17.1 of the environmental chapter to "ensure that [environmental] laws and policies provide for and encourage high levels of environmental protection and shall strive to continue to improve those laws and policies." Arguably, the outcome of this approach would have been the same.

228 *S.D. Myers Inc v Canada*, UNCITRAL Arbitration (NAFTA), First Partial Award, 13 November 2000, para 247 (on the NAAEC) and paras 201-202 (on the application of the Vienna Convention on the Law of Treaties).

context.[229] Labour provisions in IIAs that establish obligations between the state parties are part of the agreement and have to be taken into consideration when interpreting the provisions that regulate the relationship between those parties and foreign investors. Like in *Al Tamini v Oman*, they do not provide a general exception on which the host state can rely, but influence the material scope of the investment protection standards.

The number of "new generation IIAs" that include references to non-investment policies in their preambles, substantive provisions or general interpretative provisions or general exception clauses remains relatively small.[230] References that, either directly or indirectly, affirm the host state's right to regulate labour are even scarcer.[231] This raises the question whether the conclusions in *Lemire* that carve-outs for specific standards cannot be extended to other standards could have broader ramifications. The maxim *expressio unius est exclusio alterius* suggests that the absence of references to labour in general interpretative provisions and general exception clauses means that states did not intend to assert a broader right to regulate in this specific area.[232] This argument is especially relevant when a state has previously concluded IIAs or has a Model BIT which contains specific language on the right to regulate, but this is not included in subsequent IIAs. Ultimately, however, it is a basic principle of international law that restrictions on the sovereign rights of a state are the exception and have to be interpreted narrowly. It would be wrong to suggest that right to regulate provisions and general exception clauses are necessary to preserve policy space.

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229 Notably, the investment chapter of the US-Oman FTA provides in Article 10.10 that: "Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns." The tribunal in *Al Tamini v Oman* referred to this clause on several occasions in conjunction with the environmental chapter. There is no similar clause with regard to labour, which could invoke the question whether the *Al Tamini v Oman* award has any relevance in the context of labour regulation. However, the tribunal paid substantially more attention to the legal significance of the environmental chapter than to Article 10.10. As has been pointed out in the literature, provisions which require *prima facie* consistency with investment protection standards "legally useless." See Howard Mann, 'International Investment Agreements, Business and Human Rights: Key Issues and Opportunities (International Institute for Sustainable Development 2008) 19.

230 See e.g. Suzanne Spears, 'Making way for the public interest in international investment agreements' in Chester Brown and Kate Miles (eds), *Evolution in Investment Treaty Law and Arbitration* (Cambridge University Press 2011) 275.

231 Indirect labour references includes references to sustainable development or public morals which may be interpreted in a way that covers labour standards.

232 '"[E]xpress mention excludes other items[.]" Ian Brownlie, *Principles of Public International Law* (Oxford University Press 2003) 604.

4.4.3 Interpretative issues

4.4.3.1 Standard of review and deference

The legislative strategies discussed above all seek to create more policy space for states vis-à-vis foreign investors. They do so at a general level; not connected to one specific protection standard. Apart from inconsistent application of protection standards by tribunals, states' efforts to include right to regulate exceptions and general exception clauses in their IIAs can be explained by the lack of a coherent framework or approach to determine the method and standard of review. While not always treated separately, "[m]ethods of review are techniques used to determine the permissibility of interference with the primary norm, whereas standards of review refer to the intensity with which the method of review is applied."[233]

The standard of review falls on a continuum bounded by total reliance on the primary decision-maker and *de novo* review by the arbitral tribunal.[234] Often, adjudicators will grant the primary decision-maker some degree of deference, or margin of appreciation, so that its "conduct is exempt from fully fledged review."[235] In other words: the degree of deference determines the standard of review that a tribunal applies. This, in turn, influences the likelihood that a particular measure may be upheld.

According to Schill: "arbitral jurisprudence is not settled on how to conceptualize deference, on the level of deference to accord when reviewing different types of host state conduct, and on the factors that should influence the standard of review."[236] Indeed, tribunals do not tend to explain why they do, or why they do not provide deference to the host state. Some tribunals appear to perceive deference as a "strategic approach,"[237] for example by emphasising the necessity of maintaining "both governmental and public faith in the integrity of the process of arbitration."[238] Differences in institutional

233 Caroline Henckels, 'Balancing Investment Protection and the Public Interest: The Role of the Standard of Review and the Importance of Deference in Investor-State Arbitration' (2013) 4 Journal of International Dispute Settlement 197, 199 fn 8.

234 Caroline Henckels, *Proportionality and Deference in Investor-State Arbitration: Balancing Investment Protection and Regulatory Autonomy* (Cambridge University Press 2015) 29-30.

235 Stephan Schill, 'Deference in Investment Treaty Arbitration: Re-conceptualizing the Standard of Review' (2012) 3 Journal of International Dispute Settlement 577, 582.

236 Ibid 585.

237 Caroline Henckels, 'Balancing Investment Protection and the Public Interest: The Role of the Standard of Review and the Importance of Deference in Investor-State Arbitration' (2013) 4 Journal of International Dispute Settlement 197, 202

238 *Glamis Gold, Ltd. v United States of America*, UNCITRAL Arbitration (NAFTA), Award, 8 June 2009, 48 ILM 1039, para 8.

competence and expertise are also invoked as reasons why tribunals should refrain from 'second-guessing' governmental measures.[239]

It is impossible to categorize the standard of review continuum. Some treaties do guide the adjudicator towards a particular standard of review. Henckels notes that Article 1 of the 1st Protocol to the European Convention on Human Rights stipulates that the right to property "shall not ... in any way impair the right of a State to enforce such laws *as it deems necessary* to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."[240] The italicised wording indicates the large degree of deference to the host state. However, many treaties, including IIAs, do not contain similar wording.[241] The degree of scrutiny that a tribunal applies could certainly be influenced by differences in the wording of IIAs. Preambles that indicate an IIA is intended to foster sustainable development rather than economic integration, or right to regulate provisions, can steer adjudicators to a more deferential approach when they are called upon to determine whether interferes by host states with legally protected rights of investors are permissible.

Henckels further argues that "the degree of international harmonization or consensus with respect to the subject matter of the measure" influences the degree of deference.[242] In some legal regimes, the existence of international consensus limits states in their ability to adopt certain measures that go beyond the level of protection afforded in the international standard. This is true, for example, in the WTO regime on Sanitary and Phytosanitary Measures.[243] Also in the European Court of Human Rights' case-law, the more consensus on the specific right at issue, the narrower the state's margin of appreciation.[244] Importantly, however, ECtHR cases involve a claim that a human right is being violated, and a broad margin of appreciation would prevent the ECtHR from finding such a violation. In the scenarios that are discussed in this chapter the situation is reverse: the host state defends a measure taken to improve labour standards, and a broad margin of appreciation could prevent an investor from successfully claiming damages. In other words: a broad margin

239 Caroline Henckels, 'Balancing Investment Protection and the Public Interest: The Role of the Standard of Review and the Importance of Deference in Investor-State Arbitration' (2013) 4 Journal of International Dispute Settlement 197, 210-213. See for example: *Continental Casualty Company v Argentine Republic*, ICSID Case No ARB/03/9, Award, 5 September 2008, para 233, fn 351.

240 Emphasis added.

241 Notable exceptions are provisions concerning essential security interests.

242 Caroline Henckels, 'Balancing Investment Protection and the Public Interest: The Role of the Standard of Review and the Importance of Deference in Investor-State Arbitration' (2013) 4 Journal of International Dispute Settlement 197, 199.

243 Benn McGrady, *Trade and Public Health: The WTO, Tobacco, Alcohol, and Diet* (Cambridge University Press 2011) 182.

244 Yuval Shany, 'Toward a General Margin of Appreciation Doctrine in International Law' (2006) 16 *The* European Journal of International Law 907, 927.

of appreciation at the ECtHR would work against a labour standards claim, while a broad margin of appreciation at an investment tribunal would protect labour standards.

When a host state measure is taken with the purpose of implementing an international convention, it is thus expected that a tribunal provides a large degree of deference.[245] This applies irrespective of the investment protection standard at issue. The next session will examine to what extent international labour law could be invoked in the interpretation of specific investment treaty provisions.

4.4.3.2 Systemic integration of international law

Most of the analysis so far has focused on the question to what extent international investment law limits states in the regulation of labour. It has not considered the role of *international* labour law. Does it make a difference whether states implement measures at their own discretion, or whether these measures are based on, or prescribed by, international obligations? Tribunals have long held that investment treaties do not constitute self-contained legal regimes. Instead, they have to be "envisaged within a wider juridical context in which rules from other sources are integrated through implied incorporation methods, or by direct reference to certain supplementary rules, whether of international law character or of domestic law nature."[246] Another tribunal held that "resort to authorities stemming from the field of human rights ... is a legitimate method of treaty interpretation."[247]

There are many ways in which international investment law interacts with other fields of public international law. Both claimants and defendants have pursued arguments that investment protection standards should be interpreted in light of non-IIA sources. The present analysis is restricted to the question whether international obligations in the area of human rights and labour rights influence the interpretation of investment protection standards in a way that is beneficial to host states.

Host states have defended their contested measures by reference to international obligations on several occasions. In *Suez and Vivendi v Argentina*, the

245 Cf. Weiner who argues that "International conventional and customary law, in addition to state practice, will shed light on the legitimacy of regulatory purposes. For example, the widespread adherence of states to International Labor Organization treaties demonstrates general acceptance of the notion of workers' rights, which in turn suggests that regulatory measures aimed at protecting employee and worker safety and guaranteeing suitable working conditions are unlikely to constitute indirect expropriations." Allen Weiner, 'Indirect Expropriations: The Need for a Taxonomy of "Legitimate" Regulatory Purposes' (2003) 5 International Law FORUM du Droit International 166, 174.

246 *Asian Agricultural Products LtD (AAPL) v Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award, 27 June 1990, para 21.

247 *Tulip Real Estate and Development Netherlands B.V. v Republic of Turkey*, ICSID Case No ARB/11/28, Decision on Annulment, 30 December 2015, para 92.

respondent argued that its conduct – Argentina refused to renegotiate a concession for water distribution and waste water treatment services after the country implemented certain economic measures that significantly affected the investment – was justified as a necessary measure to safeguard the right to water. Indeed, "[since] human rights law provides a rationale for the crisis measures, (the respondent and the *amici curiae*) argue that [the] Tribunal should consider that rationale in interpreting and applying the provisions of the BITs in question."[248] The tribunal disagreed. It held that:

> Argentina is subject to both international obligations, i.e. human rights and treaty obligation, and must respect both of them equally. Under the circumstances of these cases, Argentina's human rights obligations and its investment treaty obligations are not inconsistent, contradictory, or mutually exclusive. Thus, ... Argentina could have respected both types of obligations.[249]

Arbitrators that are asked to adjudicate whether a state has fulfilled its obligations under an IIA have no jurisdiction to determine whether it complied with its obligations under a particular human rights convention. However, when interpreting an investment obligation, it is, unless the parties provide otherwise, bound to follow the rules on treaty interpretation that are found in Articles 31-33 of the Vienna Convention on the Law of Treaties. These rules are widely considered to reflect customary international law.[250] Article 31.3(c) requires treaty interpreters to take into account "any relevant rules of international law applicable in the relations between the parties." The article thus allows for the "systemic integration" of public international law,[251] which is "aimed at limiting normative conflicts and at coordinating parallel treaty obligations."[252] Various authors have expressed confidence in Article 31.3(c) VCLT as a mechanism through which "harmonious interpretation of investment and human rights instruments" can be realized.[253]

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248 *Suez, Sociedad General de Aguas de Barcelona SA, and Vivendi Universal SA v Argentine Republic*, ICSID Case No ARB/03/19, Decision on Liability, 30 July 2010, para 267.

249 Ibid, para 262.

250 *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France)* (Judgment) [2008] ICJ Rep 177, para 112.

251 International Law Commission, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law – Report of the Study Group of the International Law Commission' (13 April 2006) UN Doc A/CN.4/L.682, as corrected (11 August 2006) UN Doc A/CN.4/L.682/Corr.1, 206.

252 Hervé Ascensio, 'Article 31 of the Vienna Convention on the Law of Treaties and International Investment Law' (2016) 31 ICSID Review 366, 383.

253 Jan Wouters and Nicolas Hachez, 'When Rules and Values Collide: How Can a Balanced Application of Investor Protection Provisions and Human Rights be Ensured' (2009) 3 Human Rights & International Legal Discourse 301, 334. In earlier scholarship, however, its added value to treaty interpretation had been doubted, see e.g. Hugh Thirlway, 'The Law and Procedure of the International Court of Justice 1960-1989 Part Three' (1991) 62 British Yearbook of International Law 1, 58.

The application of Article 31.3(c) VCLT is not straightforward, however. Several questions are open for debate, for example whether the external source that is being used for the interpretation of the norm over which the tribunal has jurisdiction needs to be ratified by the disputing parties, or by all parties to the treaty that forms the basis for the dispute. In the context of the WTO, a panel has held that all WTO member states must be parties to the Cartagena Protocol on Biosafety to the Convention on Biological Diversity for the latter instrument to be considered "international law applicable between the parties".[254] This issue is less relevant in the investment law context, as most arbitrations are based on bilateral agreements. The likelihood that two parties to a BIT are also party to a particular ILO convention is much higher than the likelihood of overlapping membership between two multilateral treaties. Nonetheless, difficulties in the wording of Article 31.3(c)VCLT have not withheld the European Court of Human Rights to make use of its "international normative environment" in a rather creative fashion.[255] This applies in particular to the ECtHR's relationship to ILO law, which will be discussed in chapter 5.

Furthermore, Article 31.3(c) VCLT refers to 'relevant' rules of public international law. International investment law and international labour law are two profoundly distinct areas of international law. How 'relevant' can the latter be to the interpretation of the former? To examine the ways in which international labour law may influence the interpretation of international investment law, one needs to look at both sets of norms in more detail. ILO conventions contain different types of substantive provisions. Broadly speaking, one could distinguish between:

1. Obligations with a large degree of discretion in their implementation. For example, Article 2 of Convention 111 concerning Discrimination in Respect of Employment and Occupation requires states "to declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof."
2. Obligations with a clear basic requirement, although with some discretion on their further implementation. For example, Article 1.1 of Convention 131 concerning Minimum Wage Fixing requires states to "establish a system of minimum wages which covers all groups of wage earners whose terms of employment are such that coverage would be appropriate."

254 WTO, *European Communities: Measures Affecting the Approval and Marketing of Biotech Products – Reports of the Panel* (29 September 2006) WT/DS291/R and WT/DS292/R and WT/DS293/R, para 7.68.

255 Jean-Marc Sorel and Valérie Boré Eveno, 'Article 31 – Convention of 1969' in Olivier Corten and Pierre Klein (eds), *The Vienna Convention on the Law of Treaties: A Commentary – Vol. I* (Oxford University Press, 2011) 828.

3. Subjective rights for individuals or groups, which would have direct effect in countries with a monist legal system. For example, Article 2 of Convention 87 concerning Freedom of Association and Protection of the Right to Organise provides that "Workers and employers, without distinction whatsoever, shall have the right to establish and ... to join organisations of their own choosing without previous authorisation."

Contributions that comment upon the use of Article 31.3(c) VCLT in relation to international investment law do not always distinguish between the types of norms, or elements of norms, that could be interpreted by taking into account external sources of international law. Most often, the analysis focuses on protection standards as such; i.e. the question whether international labour law can be taken into account when interpreting 'the FET standard', or 'the obligation to provide national treatment'. In reality, however, a fact-pattern and the concomitant legal questions are more specific. In *Parkerings-Compagniet v Lithuania*, for example, the host state's ratification of the UNESCO World Heritage Convention, and the protected status of the historic centre of Vilnius under this convention, resulted in the finding that investors operating inside and outside this area were not "in like circumstances".[256] In other words: an external international legal instrument was used to interpret only an *element* of the NT and MFN obligation, albeit an important one.

It is also possible that international labour law is used to aid the interpretation of IIA provisions other than the material obligations. For example, the question could arise whether the term "law enforcement" in an IIA also encompasses labour inspectorates. ILO Convention 81 states that the function of a labour inspection system is "to secure the enforcement of the legal provisions relating to conditions of work and the protection of workers while engaged in their work."[257] This argues against a narrow interpretation of law enforcement as being merely related to security and criminal activity. Similarly, Article 31.3(c) VCLT could be used to determine what "legitimate policy objectives" in right to regulate provisions are.[258]

The interpretative questions arising from IIAs which ILO conventions could help resolve are diverse. Arguably, a "basic situation of incompatibility"[259] is unlikely to arise. The presumption in favour of coherence is well-established

256 *Parkerings-Compagniet AS v Lithuania*, ICSID Case No ARB/05/8, Award, 11 September 2007, para 396

257 Art 3.1(a) ILO Convention 81.

258 Art 8.9 CETA.

259 This term was used by the International Law Commission in its report on fragmentation in international law, see: International Law Commission, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law – Report of the Study Group of the International Law Commission' (13 April 2006) UN Doc A/CN.4/L.682, as corrected (11 August 2006) UN Doc A/CN.4/L.682/Corr.1, para 24.

in international law.[260] When a contested measure is taken to implement a treaty-obligation, but the treaty itself grants a certain degree of discretion, a tribunal would likely find that alternative measures were available and that states *could* have respected both types of obligations. Tribunals may grant a larger degree of deference to the host state when a measure is taken with the aim to implement an international labour convention, but the presumption of coherence could also steer it towards an inquiry into whether other measures would have been possible. In any case the two obligations will not be deemed incompatible. When a claim concerns subjective labour rights such an inquiry may be impossible. Part of a state's obligations in the area of freedom of association is to refrain from taking certain actions, like prohibiting strikes in non-essential sectors. In this situation, there may be no room to examine whether an alternative course of action for the state may have been available. But this does not mean that the two obligations – non-interference in industrial action and providing security and protection for the investor – are necessarily incompatible.

Theoretically, it would be possible that a host state which is under an ILO-obligation to refrain from interfering with industrial action, later concludes an IIA containing a specific obligation to 'protect investors from industrial action'. Assuming the two provisions cannot be interpreted in a way that allows the fulfilment of both, both the *lex specialis* rule and the *lex posterior* rules do not provide a solution, as the application of the IIA would lead to a modification of the ILO obligations. This is incompatible with the *erga omnes partes* character of ILO obligations. Also in the *travaux préparatoires* of Article 30 of the Vienna Convention on the Law of Treaties, which is concerned with the application of successive treaties relating to the same subject matter, international labour conventions were recognized as 'interdependent obligations' as they "are only meaningful in the context of the corresponding obligations of every other party, so that the violation of its obligations by one party prejudices the treaty regime applicable between them all and not merely the relations between the defaulting State and the other parties."[261] The International Law Commission thus held that: "If the conclusion or application of the [later] treaty constitutes an infringement of the rights of parties to another treaty, all the normal consequences of the breach of a treaty follow with respect to that other treaty."[262] The conclusion of an IIA that conflicts

260 See Vid Prislan, 'Non-investment obligations in investment treaty arbitration: towards a greater role for states?' in Freya Baetens (ed), *Investment Law within International Law: Integrationist Perspectives* (Cambridge University Press 2013) 473-475.

261 Yearbook of the International Law Commission 1966, Vol II, Documents of the second part of the seventeenth session and of the eighteenth session including the reports of the Commission to the General Assembly (United Nations 1967) 216, fn 117.

262 Ibid 217.

with an earlier ILO obligation thus constitutes a breach of the ILO obligation, and should not be applied.[263]

4.5 PROVISIONS ADDRESSING THE CONDUCT OF INVESTORS

4.5.1 Introduction

This part concerns provisions that address the conduct of business enterprises. Although this could be perceived as a 'legislative strategy' it is different from the ones described above, as they do not address investor rights in relation to the conduct of the host state but the host and home states' rights in relation to the investor's conduct.[264] Section 4.5.2 introduces the various types of CSR clauses that have emerged in IIAs. Section 4.5.3 examines their functions. Section 4.5.4 discusses the possibility of binding obligations for corporations under international (investment) law.

263 Fitzmaurice, in his role as Special Rapporteur for the International Law Commission on the law of treaties, argued that later treaties which directly conflict with earlier multilateral treaties embodying indivisible obligations the later conflicting treaty should as a whole be considered invalid. His successor, Sir Humphrey Waldock, shifted the debate from validity to responsibility. In this situation, the later treaty would not be invalid, but would invoke international responsibility. For an overview of the different perspectives of the Special Rapporteurs, see Alexander Orakhelashvili, 'Article 30 – Convention of 1969' in Olivier Corten and Pierre Klein (eds), *The Vienna Convention on the Law of Treaties: A Commentary – Vol. I* (Oxford University Press 2011) 769-771.

264 The EU-Korea FTA contains a CSR provision which is not related to investment but to trade. Art 13.6.2 provides that "the Parties shall strive to facilitate and promote trade in goods that contribute to sustainable development, including goods that are the subject of schemes such as fair and ethical trade and those involving corporate social responsibility and accountability." This provision does not affect trade rules, however, and its effect in practice is unclear. Bartels notes that: "In theory, clauses of this type could have a stronger effect, and permit the EU to regulate in favour of imports of products and services that are produced by corporations that comply with CSR principles. This would ordinarily be prohibited on the grounds that it is not possible to discriminate between products solely on the basis of how a product or service is produced (so-called unincorporated product and production methods). But the situation would be different if the exporting country recognised the legitimacy of regulatory distinctions between products according to whether they are produced according to CSR standards." Lorand Bartels, 'The European Parliament's Role in Relation to Human Rights in Trade and Investment Agreements' (Directorate-General for External Policies, EXPO/B/DROI/2012-09, February 2014) para 56.

4.5.2 Types of CSR clauses

The 2008 EU-CARIFORUM Economic Partnership Agreement was the first to include a CSR clause. It stipulates that:

> (...) the Parties agree to cooperate, including by facilitating support, in the following areas: (...)(d) enforcement of adherence to national legislation and work regulation, including training and capacity building initiatives of labour inspectors, and promoting corporate social responsibility through public information and reporting.[265]

The CSR provision was included in the chapter on 'social aspects.' The EPA's investment chapter also included a provision that addressed the behaviour of investors more directly. This second article imposes an obligation on the state parties to take necessary measures, including legislation, to make sure *inter alia* that investors act in accordance with the fundamental labour norms. However, Article 72 provides that this should be done "within their own respective territories." Consequently, the responsibility of the home state vis-à-vis the conduct of their enterprises abroad does not go further than to 'promote' public information and reporting.

A typical example of a contemporary CSR provision can be found in the investment chapter of the 2013 FTA between Canada and Panama. Article 9.17 provides that:

> Each Party should encourage enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate internationally recognized standards of corporate social responsibility in their internal policies, such as those statements of principle that have been endorsed or are supported by the Parties. These principles address issues such as labour, the environment, human rights, community relations and anti-corruption.[266]

Similar provisions are included in Canada's FTAs with Honduras,[267] Korea,[268] as well as several of its BITs.[269] The term 'statements of principle' is not clarified. It would most likely cover the OECD Guidelines, the ILO MNE Declaration and the UN Guiding Principles. Other CSR provisions are less ambiguous. The 2012 BIT between Austria and Tajikistan explicitly states in

265 Art 196 EU-CARIFORUM EPA.
266 Art 9.17 Canada-Panama FTA.
267 Art 10.16 Canada Honduras FTA.
268 Art 8.16 Canada-Korea FTA.
269 Art 15.3 Canada-Mali BIT; Art 15.2 Canada-Cameroon BIT; Art 16 Canada-Nigeria BIT; Art 16 Canada-Serbia BIT; Art 16 Canada-Senegal BIT adds: "Such enterprises are encouraged to make investments whose impacts contribute to the resolution of social problems and preserve the environment"; Article 16, Canada-Benin-BIT speaks of "their practices and internal policies."

the preamble that the parties: "[express] their belief that responsible corporate behaviour, as incorporated in the OECD Guidelines for Multinational Enterprises, can contribute to mutual confidence between enterprises and host countries" and that they "[take] note of the principles of the UN Global Compact."[270] Although the agreement does contain a labour non-derogation provision, the issue of CSR was not mentioned in the substantive obligations. Compared to the Canada-Panama FTA, these provisions may appear to be more concrete. However, their inclusion in preambles rather than in substantive provisions shows that these references are merely symbolic and do not intend to create any binding obligation.

Other PTIAs do include references to international CSR instruments in their substantive provisions. The 2013 BIT between the Netherlands the United Arab Emirates, which has not yet entered into force, holds that: "Each Contracting Party shall promote as far as possible and in accordance with their domestic laws the application of the OECD Guidelines for Multinational Enterprises to the extent that is not contrary to their domestic laws."[271] For the Netherlands, the BIT's CSR provision does not seem to add additional obligations beyond its existing commitments as an OECD member state. This is different for the UAE. Various norms contained in the OECD Guidelines do conflict with its domestic labour legislation. A 2012 report by the International Trade Union Confederation (ITUC) argued that there are severe inconsistencies between UAE labour law and the fundamental ILO conventions.[272] As the OECD Guidelines "echo all four fundamental principles and rights at work which are contained in the ILO's 1998 Declaration,"[273] inconsistencies between domestic law and ILO standards automatically mean that the application of the OECD Guidelines on those issues would be contrary to domestic laws. For example, UAE's labour legislation prohibits the free formation of trade unions,[274] while the OECD Guidelines hold that enterprises should "(r)espect the right of workers employed by the multinational enterprise to establish or join trade unions and representative organisations of their own choosing."[275]

In addition to substantive labour norms, the OECD Guidelines also address investors' bargaining strategies, as enterprises should "refrain from seeking or accepting exemptions not contemplated in the statutory or regulatory

270 Preamble Austria-Tajikistan BIT.

271 Art 2.3 Netherlands-UAE BIT.

272 International Trade Union Confederation, 'Internationally Recognised Core Labour Standards in the United Arab Emirates' (Geneva, 27 and 29 March 2012) <http://www.ituc-csi.org/IMG/pdf/final-_tpr_uae.pdf> accessed 24 June 2018.

273 OECD, 'OECD Guidelines for Multinational Enterprises, 2011 edition' (adopted 25 May 2011) 38.

274 International Trade Union Confederation, 'Internationally Recognised Core Labour Standards in the United Arab Emirates' (Geneva, 27 and 29 March 2012) 2.

275 OECD, 'OECD Guidelines for Multinational Enterprises, 2011 edition' (adopted 25 May 2011) 35.

framework related to human rights, environmental, health, safety, labour, taxation, financial incentives, or other issues."[276] This provision has given rise to a number of cases before the OECD Guidelines' complaints mechanism, including six simultaneously filed complaints against the oil companies that were involved in the BTC pipeline project. Although the use of stabilization clauses was not dismissed, the report of the United Kingdom's National Contact Point, which handled the alleged violation of the OECD Guidelines in this case, implied that freezing clauses are to be viewed as an *ipso facto* breach of the Guidelines.[277] Consequently, express references to the OECD Guidelines could therefore curtail the practice of stabilization clauses.

However, the current way the provision in the Netherlands-UAE BIT is phrased is problematic. References to instruments like the OECD Guidelines should not be without prejudice to domestic law if they are intended to have any impact. Also the European Union includes ample references to international CSR instruments in ways that does not signify any legal obligation. The 2018 EU-Singapore FTA, which has not yet entered into force, provides that:

> When promoting trade and investment, the Parties should make special efforts to promote corporate social responsibility practices *which are adopted on a voluntary basis*. In this regard, each Party shall refer to relevant internationally accepted principles, standards or guidelines *that it has agreed or acceded to*, such as the Organization for Economic Cooperation and Development Guidelines for Multinational Enterprises, the UN Global Compact, and the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy. The Parties commit to exchanging information and cooperating on promoting corporate social responsibility.[278]

Similar clauses are included in the 2014 Association Agreements between the EU and Georgia, Moldova and Ukraine, which were all signed on the same date, as well as the agreement with Colombia, Peru and Ecuador. The general premise is that the parties should 'encourage' and 'promote' CSR. The EU-Moldova Agreement notes that "The Parties *shall* promote corporate social responsibility and accountability and encourage responsible business practices (…)."[279] It mentions the OECD Guidelines, the UN Global Compact and the ILO Tripartite Declaration as "relevant internationally recognized principles and guidelines."[280] The Agreement contains an enumeration of the types

276 Ibid 19.
277 OECD, 'UK National Contact Point – Revised Statement, Specific Instance: BTC Pipeline' (22 February 2011) para 26.
278 Art 13.11(4) EU Singapore FTA (emphasis added).
279 Art 35 EU-Moldova AA (emphasis added).
280 Arts 35 and 367(e) EU-Moldova AA.

of actions that the parties may take to fulfil their obligations.[281] The EU-Ukraine Association Agreement also refers to the relevant OECD, UN and ILO instruments.[282] Of the three Association Agreement, only the one with Georgia anticipates inter-state action in the field of CSR, as "the Parties agree to promote corporate social responsibility, including through exchange of information and best practices."[283] The CSR clauses Association Agreement with Georgia not only contains a reference to the OECD Guidelines,[284] but also includes a broadly formulated statement concerning the ILO's Decent Work Agenda that mentions CSR as one of the means towards its realization.[285]

4.5.3 Functions of CSR clauses

4.5.3.1 Inter-state dialogue and cooperation

Although the number of CSR clauses in IIAs and PTIAs is on the rise, the commitments contained herein are typically not very demanding. They could be characterised as 'double soft-law' as states "are required to *remind* or *encourage* investors to adopt *voluntary* standards."[286] This does not mean that CSR clauses are redundant. Arguably, there are three possible functions.

Firstly, the most straightforward role of CSR clauses is to stress the importance of the issue and create a basis for inter-state dialogue. The United States and Canada have concluded agreements with similar language as the EU-Georgia Agreement. The 'Labor Cooperation and Capacity Building Mechanism' that is established under the US-Peru FTA is *inter alia* tasked with "dissemination of information and promotion of best labor practices, including corporate social responsibility, that enhance competitiveness and worker welfare."[287] Likewise, the FTA between Canada and Peru establishes a 'Committee on investment,' which "should work to promote cooperation and facilitate joint initiatives, which may address issues such as corporate social

281 Art 375(g) EU-Moldova AA.
282 Art 422 EU-Ukraine AA.
283 Art 231(e) EU-Georgia AA.
284 Arts 231(e) and 352 EU-Georgia AA.
285 Art 348 EU-Georgia AA. Generally, Peels et al. note that, "the majority of these CSR instruments often include references to the same labour instruments that are referred to in the labour provisions, for example the ILO 1998 Declaration on Fundamental Principles and Rights at Work, the ILO Fundamental Conventions, and other instruments." Rafael Peels, Elizabeth Echeverria, Jonas Aissi and Anselm Schenider, 'Corporate social responsibility in international trade and investment agreements: implications for states, businesses, and workers' (ILO Research Paper No 13, April 2016) 1.
286 Vid Prislan and Ruben Zandvliet, 'Labor Provisions in International Investment Agreements: Prospects for Sustainable Development' in Andrea Bjorklund (ed) *Yearbook on International Investment Law and Policy 2012-2013* (Oxford University Press 2014) 387.
287 Annex 17.6(2)(o) US-Peru FTA.

responsibility and investment facilitation."[288] A report by the United Nation Environment Programme (UNEP) has argued that: "Although this Committee does not hold enforcement powers to ensure companies include CSR standards in their practices or mandate reporting requirements, it could increase the likelihood that CSR will remain on the agenda in investment discussions between the countries."[289] This could for example lead to states joining certain CSR initiatives, such as the OECD Guidelines.

4.5.3.2 Host-state regulation of investors

Secondly, CSR clauses could function as a stimulus for unilateral CSR-regulation by the state parties to an agreement. Home states increasingly exercise prescriptive jurisdiction in a way that affects business operations beyond their borders, for example by adopting legislation to incentivize CSR or by providing ways to enforce CSR-commitments made by MNEs themselves.[290] This trend invokes the question whether states are allowed to do so. When the jurisdictional basis for extraterritorial legislation is absent, unclear or contested, a CSR clause in a PTIA could provide for (a clarification of) this legal basis. As Bartels argues in the context of EU agreements, an:

> effect of CSR clauses is to block any objection to the EU's regulation of the activities of EU corporations in the partner country. In principle, the EU is permitted by ordinary principles of public international law to regulate its nationals, including corporations. However, even if lawful, such extraterritorial regulation may create tensions with the other country in certain circumstances. For example, a requirement that EU corporations report on their investment activities in other countries might conflict with confidentiality rules in those countries.[291]

The UN Guiding Principles give an adequate projection of the current state of international law where it is mentioned that: "At present States are not generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and/or their jurisdiction. Nor are they generally prohibited from doing so, provided there

288 Art 817 Canada-Peru FTA.

289 United Nations Environment Programme, 'Corporate Social Responsibility and Regional Trade and Investment Agreements' (2011) 26.

290 The normative question whether home States should adopt complementary CSR regulations is a different matter, see Janet Dine, *Companies, International Trade and Human Rights* (Cambridge University Press 2010) 228-231.

291 Lorand Bartels, 'The European Parliament's Role in Relation to Human Rights in Trade and Investment Agreements' (Directorate-General for External Policies, EXPO/B/DROI/2012-09, February 2014) para 57.

is a recognized jurisdictional basis."[292] The debate on whether there is such a jurisdictional basis has its origins in the *S.S. Lotus* case before the Permanent Court of International Justice (PCIJ), in which the Court held that:

> Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable.[293]

In contemporary international law this principle is contested.[294] However, the definition of extraterritorial legislation has also become increasingly nuanced. According to Crawford: "[W]hat amounts to extraterritorial jurisdiction is to some extent a matter of appreciation."[295] CSR regulation that intended to influence the operations of MNEs operating abroad has thus been characterised as "domestic measures with extraterritorial implications"[296] or "parent-based methods of extraterritorial jurisdiction" which are used to confer "subtler regulatory pressures" regarding MNEs foreign activities.[297] The American Law Institute's 1987 Third Restatement on Foreign Relations Law holds that: "A state may not ordinarily regulate activities of corporations organized under the laws of a foreign state on the basis that they are owned or controlled by nationals of the regulating state. However … it may not be unreasonable for a state to exercise jurisdiction for limited purposes with respect to activities of affiliate foreign entities."[298] This includes, for example, the disclosure of information for the purpose of accounting, informing shareholders and taxation. Indeed, in both the European Union and the United

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292 Human Rights Council, 'Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie: Guiding principles on business and human rights: implementing the United Nations 'Protect, respect and remedy' framework'' (21 March 2011) (A/HRC/17/31) 7.

293 *The Case of the S.S. "Lotus"* (*France v Turkey*) (Merits) PCIJ Rep Series A No 10 (7 September 1927), 19.

294 See Cedric Ryngaert, *Jurisdiction in International Law* (Oxford University Press 2008) 20 who argues that the Lotus-principle has been replaced by a customary rule of international law stating the opposite, namely that absent a permissive rule states cannot exercise jurisdiction in such cases.

295 James Crawford, *Brownlie's Principles of Public International Law 8th edition* (Oxford University Press 2012) 457.

296 Human Rights Council, 'Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie: Guiding principles on business and human rights: implementing the United Nations 'Protect, respect and remedy' framework'' (21 March 2011) (A/HRC/17/31) 7.

297 Jennifer Zerk, *Multinationals and Corporate Social Responsibility: Limitations and Opportunities in International Law* (Cambridge University Press 2003) 105, 134.

298 American Law Institute, 'Restatement of the Law, Third, Foreign Relations' (1987) para 213.

States, mandatory disclosure of CSR information originates in more comprehensive financial legislation: the EU Accounts Modernization Directive and the US Dodd-Frank Act, respectively.[299]

To date, no state has asserted that CSR clauses can be used for the purpose of clarifying the jurisdictional basis of CSR regulation. Indeed, there are good arguments to argue that general public international law provides such a basis already. Three UN treaty bodies have adopted statements that indicate that human rights conventions may even *oblige* states to regulate their MNEs operating abroad.[300] Still, the treaty bodies do not resolve the question how such regulation relates to the sovereignty of host states.[301] CSR provisions in preferential trade and investment agreements provide the host state with an opportunity to expressly consent to the involvement, or to the limits thereof, of the home state in regulating the conduct of MNEs in their territory. Objections against the exercise of extraterritorial CSR regulation are often political rather than legal.[302] Legal limitations are hard to define. Enneking notes that:

299 Art 42(f) Directive 2003/51/EC of the European Parliament and of the Council of 18 June 2003 ... on the annual and consolidated accounts of certain types of companies, banks and other financial institutions and insurance undertakings [2003] OJ L 178; Sec 1502 Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111-203, 111th Congress (124 Stat 1376).

300 Human Rights Committee, 'Concluding observations on the sixth periodic report of Germany, adopted by the Committee at its 106th session (15 October–2 November 2012)' (12 November 2012) CCPR/C/DEU/CO/6, para 16 (emphasis added); Committee on the Rights of the Child, 'General Comment No 16 – On State obligations regarding the impact of business on children's rights' (7 February 2013) CRC/C/GC/16, para 43-46 (emphasis added); Committee on Economic, Social and Cultural Rights, 'General Comment No 24: State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities' (10 August 2017) E/C.12/GC/24, paras 25-37. See also the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights (Heidelberg 2013).

301 According to the CESCR: "States Parties should also take steps to prevent human rights contraventions abroad by corporations which have their main seat under their jurisdiction, without infringing the sovereignty or diminishing the obligations of the host States under the Covenant." Committee on Economic, Social and Cultural Rights, 'Statement on the obligations of State Parties regarding the corporate sector and economic, social and cultural rights' (20 May 2011) E/C.12/2011/1, para 5 The 2017 General Comment of the CESCR also does not provide an answer. The line of argument is very purposive. It notes that "Extraterritorial obligations arise when a State party *may influence* situations located outside its territory, consistent with the limits imposed by international law" and that "State parties must ensure that they do not obstruct another State from complying with its obligations under the Covenant." Committee on Economic, Social and Cultural Rights, 'General Comment No 24: State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities' (10 August 2017) E/C.12/GC/24, paras 28-29.

302 Peter Muchlinski, *Multinational Enterprises and the Law* (2nd edn, Oxford University Press 2007) 116.

> Examples of such limitations are the requirement that assertions of extraterritorial jurisdiction over actors and/or activities abroad should be reasonable; the international prohibition on states to intervene directly or indirectly in the domestic affairs of other states, especially through methods of coercion; the absence of any genuine link between the state exercising extraterritorial jurisdiction and the actor or activity it seeks to regulate; as well as the exercise of extraterritorial jurisdiction in contravention of WTO rules or fundamental norms of public international law.[303]

Whether home state regulation conflicts with the sovereignty of host states thus depends to a large extent on the type of regulation. An obligation to report on companies' approach towards trade union rights and collective bargaining abroad is different from an obligation to negotiate collective agreements. In some host states, the latter would clearly conflict with domestic legislation.[304] With regard to reporting and due diligence obligations, this problem does not exist.

4.5.3.3 Balancing investor rights and obligations

A third role of CSR clauses is their potential effect on the balance of investor rights and obligations. Firstly, they could affect the interpretation of investment protection standards. In this sense, CSR clauses may have the same effect as improvement clauses, which has been discussed above in relation to the *Al Tamini v Oman* arbitration. Importantly, the draft MAI, which 'associated' the investment treaty to the OECD Guidelines on Multinational Enterprises, contained the disclaimer that this connection "shall not bear on the interpretation or application of the Agreement, including for the purpose of dispute settlement; nor change [the Guidelines'] non-binding character."[305] Other agreements do not contain such wording.

Secondly, CSR clauses may determine under what circumstances investors are barred from invoking IIA protection, or prove a basis for counterclaims. The former is a jurisdiction issue, while the latter could be raised during the merits of a case. IIAs typically protect only those investments that have been made "in compliance with" the host state's laws and regulations.[306] The remark of the Tribunal in *Phoenix v Czech Republic*, that "nobody would suggest

303 Liesbeth Enneking, *Foreign Direct Liability and Beyond: Exploring the role of tort law in promoting international corporate social responsibility and accountability* (Eleven International Publishing 2012) 470.

304 Until 1957, US courts gave extraterritorial effect to the 1938 Fair Labor Standards Act, which included minimum standards on a range of issues, including child labour and equal pay. In 1957, however, US Congress adopted an amendment that barred the extraterritorial application. See: James Zimmerman, 'International dimensions of US fair employment laws: Protection or interference,' (1992) 131 International Labour Review 217, 221.

305 Art X, para 1(4) OECD, 'The Multilateral Agreement on Investment: Draft Consolidated Text' (22 April 1998) DAFFE/MAI(98)7/REV1, 95.

306 IIAs use a number of different phrases.

that ICSID protection should be granted to investments made in violation of the most fundamental rules of protection of human rights, like investments made in pursuance of torture or genocide or *in support of slavery* or trafficking of human organs"[307] could arguably be extended to the four fundamental labour rights.[308] So far, no tribunal has declined jurisdiction because the investment was made in violation of host state labour rights.

Thirdly, non-compliance with host state legislation that concern the management of the investment – as opposed to the establishment – is to be considered in the merits phase.[309] Investor misconduct may be taken into account when determining a breach of the protection standards,[310] or provide a basis for counterclaims by the host state. In the *Urbaser v Argentina* award, the tribunal considered a human rights counterclaim by the host state. It alleged that the investor's actions had an adverse effect on the human right to water. Although the claim failed, the tribunal's reasoning has opened rather than closed the door for future host state counterclaims. It dismissed the investor's assertion that IIAs do not impose obligations on investors in the first place.[311] Subsequently, the tribunal elaborated on the corporate responsibility to respect human rights. It stated that:

> international law accepts corporate social responsibility as a standard of crucial importance for companies operating in the field of international commerce. This standard includes commitments to comply with human rights in the framework of those entities' operations conducted in countries other than the country of their seat or incorporation.[312]

This does not mean that there is currently a general obligation to act in accordance with human rights law. It thus concluded that:

> The focus must be ... on contextualizing a corporation's specific activities as they relate to the human right at issue in order to determine whether any international law obligations attach to the non-State individual.[313]

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307 *Phoenix Action Ltd. v The Czech Republic*, ICSID Case No ARB/06/5, Award, 15 April 2009, para 78
(emphasis added).

308 Vid Prislan and Ruben Zandvliet, 'Labor Provisions in International Investment Agreements: Prospects for Sustainable Development' in Andrea Bjorklund (ed) *Yearbook on International Investment Law and Policy 2012-2013* (Oxford University Press 2014) 406-407.

309 *Oostergetel v Slovak* Republic, UNCITRAL, Decision on Jurisdiction, 30 April 2010, para 176.

310 Peter Muchlinski, ''Caveat investor'? The relevance of the conduct of the investor under the fair and equitable treatment standard' (2006) 55 International and Comparative Law Quarterly 527, 536-556.

311 *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergop v The Argentine Republic*, ICSID Case No ARB/07/26, Award, 8 December 2016, paras 1134-1155.

312 Ibid, para 1195 (internal reference omitted).

313 Ibid.

The main reason why the counterclaim in *Urbaser v Argentina* failed was that "the enforcement of the human right to water represents an obligation to perform" which is an obligation for the state and not for individual corporations.[314] Other human rights, however, which do not have to be actively fulfilled but depend on non-interference could arguably provide a basis for counterclaims.[315] Applying this framework to international labour law, it is possible to come up with a large number of fact-patterns in which an investor's failure to abstain from interfering constitutes a human rights violation, such as the hiring of workers to break a strike.[316] Furthermore, some IIAs now include articles on "post-establishment obligations" with references to both national and international labour standards.[317] Also contracts between the host state and a foreign investor may be used as a tool to specify requirements in the area of labour or human rights law.[318]

Returning to the question of whether tribunals can consider counterclaims that arise from violations of international labour standards, including CSR clauses in IIAs may have two effects. First, the question of jurisdiction over

314 Ibid, para 1210.

315 Ibid.

316 International Labour Organization, 'Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO' (5th edn, International Labour Office 2006) para 632. In practice, most fact-patterns will involve more sophisticated tactics to avoid burdensome labour regulations. The award in *Saint-Gobain Performance Plastics Europe v Bolivarian Republic of Venezuela*, for example, explains the company's attitude towards trade unions in the lead-up to severe labour unrest. Under Venezuelan labour law, employees had the right to establish a union if the number of employees of the company exceeded 25. The investor thus set up a new subsidiary, instead of using an existing one, in order to keep the number of permanent employees at 24, which was supplemented by temporary workers. Furthermore, on multiple occasions the company hired a labour outsourcing company to re-hire its previous employees under less generous benefits and little job security. *Saint-Gobain Performance Plastics Europe v Bolivarian Republic of Venezuela*, ICSID Case No ARB/12/13, Decision on Liability and the Principles of Quantum, 30 December 2016, paras. 198-210. The subsequent labour unrest led to a union taking over the factory, well before the government formally expropriated it. The dispute was concerned with the question whether damages had to be calculated from the worker take-over or the formal expropriation. The tribunal sided with the claimant, and did not consider the investor's creative application of domestic labour law which allegedly contributed to the labour unrest in the first place.

317 Art 18 Morocco-Nigeria BIT.

318 Lorenzo Cotula and Kyla Tienhaara, 'Reconfiguring investment contracts to promote sustainable development' in Karl Sauvant (ed), *Yearbook on International Investment Law & Policy 2011-2012* (Oxford University Press 2013) 295-296. The 2011 Model Mining Development Agreement (MMDA) of the International Bar Association provides example of how labour standards can be integrated into concession agreements. The MMDA is rather deferential to the host state's domestic labour law, and only requires compliance with those ILO Conventions that have been ratified by the host state. Exceptions are made with regard to child labour, forced labour and occupational discrimination. While the MMDA is sector specific, its part on employment, labour standards and health and safety can be readily used in other contracts as well. Model Mine Development Agreement: A Template for Negotiation and Drafting (4 April 2011).

such claims would have been more straightforward than in the *Urbaser* case, where the BIT between Spain and Argentina lacked such a provision. Second, it could help "contextualizing a corporation's specific activities as they relate to the human right at issue." For this last purpose, the traditional 'double soft-law' provisions may not be useful. However, some IIAs now explicitly refer to a corporate obligation to respect human rights.

4.5.4 Towards binding obligations for business enterprises

For a long time, companies have not been subjected to direct obligations under international law.[319] However, the idea had been entertained for decades. An ILO report from 1943 concerning commodity control agreements stated that:

> Compliance with the local social legislation *and with certain international requirements* could appropriately be made a condition of the assignment to individual producers or shares of the export quota allotted to the country concerned. Such a device would tend to eliminate the undercutting of standards within each of the countries participating in the control scheme.[320]

And in 1978, European Commissioner Vredeling expressed the EC's desire for a *quid pro quo* with companies benefitting from economic agreements as follows:

> the Commission is of the opinion that aid to investors in countries in development should be conditioned. The companies enjoying aid, should perform according to norms of good behaviour. This is also a matter familiar to the I.L.O., which could, amongst others, be worked out in the [Lomé convention].[321]

Despite the absence of provisions to this effect, there are no conceptual difficulties in international law to impose obligations upon corporations without the intermediate layer of transformation into domestic law. Indeed, criminal responsibility for legal persons has been debated during the negotiations which eventually led to the Rome Statute, establishing the International Criminal

319 See e.g. Eric de Brabandere, 'Human Rights and Transnational Corporations: The Limits of Direct Corporate Responsibility' (2010) 4 Human Rights and International Legal Discourse 66.

320 International Labour Organization, 'Intergovernmental commodity control agreements' (Montreal 1943) xxxi.

321 Speech by Vice-President H. Vredeling to the International Labour Organization, Geneva (15 June 1978) <http://aei.pitt.edu/11204/1/11204.pdf> accessed 24 June 2018.

Court.[322] The ongoing work of the "open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights" that was established by the Human Rights Council in 2014 to consider a new legally binding instrument,[323] has reinvigorated the debate on direct corporate obligations, although there are various other forms a 'business and human rights treaty' could take.[324] The European Parliament has adopted multiple statements in which it supports investor obligations to be included in future agreements.[325]

Three agreements from the African continent already contain binding obligations. The 2008 Community Rules on Investment by the Economic Community of West African States (ECOWAS), which is the only one in force, contains a full chapter laying down obligations for investors. The Rules provide *inter alia* that investors, once established in the host state:

> *shall* uphold human rights in the workplace and the community in which they are located. Investors shall not undertake or cause to be undertaken, acts that breach such human rights. Investors shall not manage or operate the investments in a manner that circumvents human rights obligations, labour standards as well as regional environmental and social obligations, to which the host State and/or home State are Parties[326]

and furthermore, that

> [i]nvestors and investments shall act in accordance with fundamental labour standards as stipulated in the ILO Declaration on Fundamental Principles and Rights of Work, 1998.[327]

322 Desislava Stoitchkova, *Towards Corporate Liability in International Criminal Law* (Intersentia 2010) 108-112, 173-174. On some more recent developments, see: Joana Kyriakakis, 'Corporations before International Criminal Courts: Implications for the International Criminal Justice Project' (2017) 30 Leiden Journal of International Law 221.

323 Human Rights Council, 'Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights' (14 July 2014) A/HRC/RES/26/9.

324 Olivier de Schutter, 'Towards a New Treaty on Business and Human Rights' (2015) 1 Business and Human Rights Journal 41. In July 2018, the first draft was published, which is available on <https://www.business-humanrights.org/en/binding-treaty> accessed 18 November 2018.

325 European Parliament, 'Resolution of 6 April 2011 on the future European international investment policy' (2010/2203(INI)); European Parliament, 'Resolution of 8 July 2015 containing the European Parliament's recommendations to the European Commission on the negotiations for the Transatlantic Trade and Investment Partnership (TTIP)' (2014/2228(INI)).

326 Arti 14.2 ECOWAS Community Rules on Investment (emphasis added).

327 Art 14.4 ECOWAS Community Rules on Investment.

The 2016 BIT between Morocco and Nigeria (an ECOWAS member state) includes similar provisions.[328] This is also true for the 2012 Model BIT of the Southern African Development Community (SADC), which holds that:

> 15.1. Investors and their investments have a duty to respect human rights in the workplace and in the community and State in which they are located. Investors and their investments shall not undertake or cause to be undertaken acts that breach such human rights. Investors and their investments shall not assist in, or be complicit in, the violation of the human rights by others in the Host State, including by public authorities or during civil strife.
>
> 15.2. Investors and their investments shall act in accordance with core labour standards as required by the ILO Declaration on Fundamental Principles and Rights of Work, 1998.
>
> 15.3. Investors and their investments shall not [establish,] manage or operate Investments in a manner inconsistent with international environmental, labour, and human rights obligations binding on the Host State or the Home State, whichever obligations are higher.[329]

Most problematic about the ECOWAS and SADC models is that they demand compliance by corporate entities with treaty law that is meant to apply between states, or in case of the 1998 Declaration, with a document that has no binding effect whatsoever. States bear the responsibility to transpose international obligations into domestic legislation which then becomes binding on that state's nationals, including corporations. This process is important as it concretizes treaty provisions that are vague or deliberately open-ended, and require further interpretation. For example, the ILO Discrimination Convention No 111 gives much leeway to states when they "declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof."[330] Other Conventions are better suited for direct application, in particular those conventions that grant subjective rights to workers.[331]

The problem of the ECOWAS and SADC models is circumvented in the 2005 'Model International Agreement on Investment for Sustainable Development', which was drafted by three scholars under the auspices of the International

328 Art 18 and 24, 2016 Morocco-Nigeria BIT.

329 Ar 15, 2012 Model BIT of the Southern African Development Community.

330 Art 2 ILO Convention 111.

331 Ruben Zandvliet and Paul van der Heijden, 'The rapproachement of ILO standards and CSR mechanisms: towards a positive understaning of the 'privatization' of international labour standards' in Axel Marx, Jan Wouters, Glenn Rayp and Laura Beke (eds), *Global Governance of Labor Rights: Assessing the Effectiveness of Transnational Public and Private Policy Initiatives* (Edward Elgar Publishing 2016) 188.

Institute for Sustainable Development (IISD), a Canadian NGO.[332] The CSR provision directly addresses investors, but relies on CSR frameworks instead of treaty law. Article 16 thus provides that:

> *Corporate social responsibility*
> A) In addition to the obligation to comply with all applicable laws and regulations of the host state and the obligations in this Agreement, and in accordance with the size, capacities and nature of an investment, and taking into account the development plans and priorities of the host state, the Millennium Development Goals and the indicative list of key responsibilities provided in Annex F, investors and their investments should strive to make the maximum feasible contributions to the sustainable development of the host state and local community through high levels of socially responsible practices.
> B) Investors should apply the ILO Tripartite Declaration on Multinational Enterprises and Social Policy and the OECD Guidelines for Multinational Enterprises, as well as specific or sectoral standards of responsible practice where these exist.
> C) Where standards of corporate social responsibility increase, investors should strive to apply and achieve the higher level standards.

However, the IISD model is not without problems either. It relies too heavily on external instruments that may become outdated. The Millennium Development Goals, for example, have been succeeded by the Sustainable Development Goals.[333] The OECD Guidelines are updated from time to time. And the clause excludes CSR frameworks that are developed at a later date. Had the IISD drafted its model after 2011, it would likely have included a reference to the UNGPs.

Despite the long-standing relationship between international economic law and corporate social responsibility, CSR provisions in PTIAs are still "in an embryonic state."[334] Compared to other types of labour clauses that are included in PTIAs, there is more diversity in the language of CSR provisions and they lack a clear purpose. Current CSR provisions are not drafted in order to create or clarify the jurisdictional basis for extraterritorial legislation of home states over their multinational enterprises. Conceptual questions are eschewed, most importantly in the attempts to make ILO obligations directly binding upon investors.

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332 Howard Mann, Konrad von Moltke, Luke Eric Peterson and Aaron Cosbey, 'IISD Model International Agreement on Investment for Sustainable Development' (April 2005).

333 UNGA Res 70/1 (21 October 2005) 'Transforming our world: the 2030 Agenda for Sustainable Development' UN Doc A/RES/70/1.

334 Rafael Peels, Elizabeth Echeverria, Jonas Aissi and Anselm Schenider, 'Corporate social responsibility in international trade and investment agreements: implications for states, businesses, and workers' (ILO Research Paper No. 13 April 2016) 8.

4.6 Concluding remarks

While multilateral trade law may constrain states in implementing certain trade measures in response to violations of labour standards abroad, international investment law is solely concerned with states' domestic labour markets. International investment law does not prohibit states to adopt labour laws, and arbitrators cannot order their repeal. Rather, the system consists of liability rules which allow foreign investors to claim damages.[335] The fear that investors could claim damages arising from labour-related measures by the host state has led to various legislative and interpretative responses. However, the principle embodied in the 1927 *Lotus* case before the Permanent Court of International Justice still holds true today: states "should not overstep the limits which international law places upon its jurisdiction; within these limits, its title to exercise jurisdiction rests in its sovereignty."[336] Right to regulate provisions merely reaffirm the state's sovereignty and should not be seen as solutions to a problem.

Investors have attempted to claim compensation for various labour-related measures taken by their host state. These concerned affirmative employment actions, increase in social security payments by the employer, restrictions on foreign workers, revocation of 'free zone' status including the labour exemptions, failure of the host state to protect the investor against violent acts during an industrial dispute, wage increases for specific categories of workers and minimum wage increase. None of these cases has led to a finding of an arbitral tribunal that the host state indeed violated the terms of an investment agreement, and in none of these cases was this decision reached by relying on a right to regulate provision or the legal framework of the ILO via Article 31.3(c) VCLT.

Including right to regulate clauses in IIAs merely puts the spotlight on treaties that lack one. This applies *mutatis mutandis* to clarifications of treaties' object and purpose in preambles and general exception clauses. It is therefore important for the debate to be reoriented back to the meaning and scope of 'indirect expropriations or 'fair and equitable treatment'. This will not immediately reassure trade unions that are IIAs do not pose a threat, or discourage investors who see arbitration as an opportunity to litigate against burdensome measures by the host state. But in the long-term it has more potential to clarify the interactions between investment law and labour standards than resorting to legislative strategies and interpretative techniques. This is different for treaty

335 Jonathan Bonnitcha, *Substantive Protection under Investment Treaties: A Legal and Economic Analysis* (Cambridge University Press 2015) 114. See generally on the consequences of violations of investment treaties: Jeswald Salacuse, *The Law of Investment Treaties* (2nd edn, Oxford University Press 2015) 436-451.

336 *The Case of the S.S. "Lotus"* (*France v Turkey*) (Merits) PCIJ Rep Series A No 10 (7 September 1927) 3.

provisions addressing the conduct of foreign investors. Express assertions of the home state's extraterritorial right to regulate and direct corporate obligations under international law have the greatest potential in this regard, although a multilateral approach is to be preferred for the sake of legal coherence.