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Advisor: Giorgio SACERDOTI

PhD Thesis by:

Catherine COSTAGGIU

ID number: 3031688

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I. INTRODUCTION

Foreign direct investments ("FDIs") are the largest source of external finance to emerging and developing markets, as well as a key driver of their economic development. FDIs vary on the basis of several elements, including direction flows and strategic motives to invest (i.e., the determinants of the investment decision). On the basis of direction flows, FDIs are divided into FDI inflows and FDI outflows. On the basis of strategic motives, the main distinction (according to Dunning's OLI paradigm) is between natural resource-seeking, market-seeking and efficiency seeking FDIs.

There exists a strong multilevel relationship between FDIs and human rights. On the one hand, in particular in developing countries, FDIs are essential to the progressive full realization of the civil, economic, social, and cultural rights recognized under international human rights law. Indeed, FDIs are normally associated with poverty reduction, decrease in income inequality, positive long-term spillovers (including technology, human resources, and market spillovers), higher quality of public services (which are relevant to guarantee better living conditions), and free movement of goods and people. At the same time, FDIs can have detrimental effects on human rights, including, among other things, breaches of property rights of indigenous communities, human rights violations arising from breach of labour and environmental laws. These issues go straight to the question of corporate social responsibility and to the many initiatives undertaken in this respect at both national and international level, including the UN Guiding Principles on Business and Human Rights.

On the other hand, human rights (in particular, the social, economic and cultural rights recognized under the Covenant on Social Economic and Cultural rights, such as the rights to work, adequate standard of living conditions, and health) may have important implications for FDIs as well. Several studies have shown that respect for human rights can "directly reduce risk to FDI[s] by enhancing political stability and predictability".

However, certain types of FDIs have benefitted (and still benefit) from low human rights standards and some multinational corporations have deliberately invested (and still invest) in countries with repressive governments. This is particularly true for natural-resources seeking FDIs (e.g., investments in the oil and gas sectors). Nevertheless, even for these investors, their "relationship" with repressive governments is becoming increasingly costly. These costs include those related to the: (i) ever present political risk of having their investment expropriated without compensation and of becoming potential targets of political violence (including kidnapping, killing and unlawful imprisonment of investors' management and staff); (ii) potential human rights litigation; and (iii) sanctions and negative effects on reputation, audience, and image deriving from being associated with human rights violations.

Given the overall relevance of FDIs for their economies, host states devote significant efforts in framing investment plans and mechanisms capable of attracting FDIs to their economies, including national investment incentives (which usually guarantee certain advantages to certain foreign investors), and international investment agreements (which guarantee international legal protection to the investment). Interestingly enough, notwithstanding the "two-ways" relationship between FDIs and human rights, human rights standards are generally non included in these investment tools.

National investment incentives (including tax, financial and/or regulatory measures) become an instrument to attract FDIs (generally) by reducing the costs and making it more advantageous for international multinational corporations to invest in the host country. This result is often reached at the expenses of the protection of human rights insofar as, in order to reduce entry costs for investors, these regulatory measures often loosen, among other things, the protection of certain essential values, such as social, labour and environmental standards. National investment incentives so devised often attract "bad" investors, which are generally interested in short-term profit (i.e., speculative investors) or in exploiting and controlling the host state's local population. These investors do not contribute to the social and economic development of the host State. Moreover, national investments incentives so devised my conflict

with the host state's other obligations under international law, including its human rights obligations. Specifically, under international law, host States have the obligation to respect, protect and fulfil, at the very least, the minimum essential levels of human rights, including the social, economic and cultural rights recognized under the Covenant on Social Economic and Cultural rights (as well as other international human rights instruments), such as the rights to work, adequate standard of living conditions, water and health. The normative content of these rights (which are among the most touched by the activities of multinational corporations) and corresponding host states' obligations is clarified in several publicly available documents issued by authoritative UN bodies, including the General Comments of the Committee on Social, Economic and Cultural Rights.

According to these documents, host states are under an obligation to protect their population against activities of third parties (including business entities), which might have a negative impact on the full enjoyment of their human rights. To this end, the host state might need to take positive actions, such as legislative measures (including, corrective measures) and sanctions. For instance, the host state might revoke certain public service concessions or impose sanctions if a private entity in charge with the distribution of certain public services (such as water and energy) fails to do so at the minimum essential levels. By the same token, the host state might adopt measures aimed at protecting the property rights of indigenous communities vis-à-vis extractive industries, if the respective lands are subject to concession agreements. The above-mentioned initiatives and measures can clearly have negative consequences on investors, which might be entitled to challenge the State's legitimately exercised power (and seek damages) under a bilateral investment treaty ("BIT").

BITs are interstate international agreements executed between two countries (generally between a developed and a developing country) containing reciprocal undertakings for the promotion and protection of private investments made by nationals of the signatories in each other's territories. As noted above, they are also one of the tools used by host state to attract FDIs. Specifically, BITs guarantee protection against the so-called political risk, i.e., the risk that the host swill intervene

in a detrimental way in the investment (by reneging a commitment previously undertaken) or expropriate the same either directly or indirectly.

Political risk is indeed one of the major concerns of investors investing abroad. Economic theories explain this risk in terms of time-inconsistency problem by using a two-stage game. In the first stage, the investor allegedly attracted by a favourable legislation invests in the host state. In the second stage, the host state, which is already benefiting from the investment, might have an incentive to revoke or change (in pejorative ways) the terms of the commitment. Depending on the type of intervention, the investor may incur in severe losses or even completely lose its investment.

According to this same economic theory, the political risk may materialize whenever the net benefit for the host state from intervening and reneging its promise is higher than the net benefit of complying with the same. Knowing that under "certain circumstances" the investor will not invest (and this can result in socially undesirable investment levels), BITs mitigate the political risk by: (i) imposing on host states obligations (unaccompanied by any substantive rights) that ultimately result in constraints of the host state's regulatory powers; and (ii) granting investors a broad set of rights (unaccompanied by obligations), including the right to commence arbitration against the host State should the political risk materialize.

The general narrative is that BITs so devised allow host states to "credibly commit" themselves vis-à-vis the investors insofar as they submit the host state to the credible "threat" of investment arbitration. The commitment is made particularly forceful by the fact that the constraint on the regulatory power applies (generally) irrespective of the reasons underlying a potential intervention by the host state. Indeed, traditional BITs do not differentiate between lawful regulatory interventions (including actions undertaken by the host State in furtherance of its obligation to respect human rights) and unlawful regulatory interventions (moved by purely opportunistic behaviors of the host state), nor do they provide for a right to regulate provisions. Moreover, the commitment is further reinforced by the threat of arbitration proceedings and related costs. If an arbitral tribunal is called to decide, it will render

a binding and enforceable award, which (if in favour of the investor) may impose on the relevant host state exorbitant costs. These costs would include not only those arising from liability (which may be particularly high and can significantly weight on the budget of the host state), but also reputational costs, such as those related to the loss of future cooperation with other investors (which might refrain from investing in the future), and other host states (which might refuse to sign additional BITs).

The threat of very high legal costs may in some cases inhibit and/or discourage the host state from exercising certain rights or implementing certain activities aimed at discharging their human rights obligations. In turn, this may lead to additional costs, including the costs of unfulfilled human rights and those arising out of human rights litigation, to which the host state might be exposed for having failed to discharge its human rights obligations.

BITs make it less costly for the investor to invest, and more costly for the host State to expropriate and/or to otherwise intervene in the investment. This result reinforces the incentive to invest, but may often be reached at the expenses of the protection of human rights, insofar as, in order to make the host states' commitment more credible and reduce the costs for investors, BITs overlook several risks (and corresponding costs) faced by the host State, ultimately impacting the human rights of the population.

Moving from a contract theory approach, this thesis argues that BITs could be more effective and efficient if they effectively incorporated human rights standards. The thesis contributes to the debate on a topic that has attracted increasing attention from public and private law scholars and economists, by combining legal and economic approaches, with a view to providing practical guidelines for linking human rights and investment law.

The thesis aims at providing an integrated and comprehensive assessment of the different elements, values and interests that come into play in international investments. Most papers dealing with the issues raised by FDIs tend to focus either on the protection of investors or on the safeguard of human rights, without exploring in detail the interplay between the two perspectives and the economic implications of

different policy choices. This is also due to the fact that, traditionally, investment law and human rights law are perceived as two fields of law having little in common. Similarly, competent institutions in the two fields have generally treated the issues raised by the interaction between FDIs and human rights protection from their standpoint, without taking an integrated approach.

Moreover, the legal debate on FDIs has generally failed to incorporate economic analysis insights in the search for a more effective balance between the interests of investors and those of host states and their population.

This thesis attempts to provide an integrated assessment of the issues raised by FDIs, taking into account the perspectives of both investors and human rights holders. To this end, this work extensively relies on the insights and tools of economic analysis, in order to investigate the economic effects of different policy choices and try to achieve a more efficient and effective balance.

The present work is structured as follows.

Chapter II provides an analysis of: (i) the normative content of certain social, economic and cultural human rights; (ii) the State's corresponding obligations with respect to these rights; and (iii) the human rights responsibilities and standards imposed on multinational corporations, arising from several international soft law instruments. The aim of this analysis is to: (i) clarify "what to be expected, and from whom", when it comes to human right violations; and (ii) set the stage for the following chapters, by showing that human rights standards constitute part of the framework within which host states and multinational corporations should frame their conducts.

Chapter III provides: (i) an overview of the definition and types of foreign direct investment as well as FDI-related trends; (ii) some considerations on the impact that FDIs can have on socio-economic rights; and (iii) the determinants of FDIs (i.e., what moves FDIs), including investment incentives and bilateral investment treaties. This last point is particularly relevant insofar as the determinants of FDIs are, or should be, considered by: (a) host states when framing instruments aimed at attracting FDIs to their markets, including investment BITs; and (b) arbitral tribunals when deciding

whether a host state has breached an investor's protection standard under the relevant BITs.

A particular relevance will be given to the FET standard. Each section will also provide human rights considerations so as to allow "connecting the dots". The aim is to show, among others, that multinational corporations' activities, which are one of the major forms through which FDIs occur, are crucial to the progressive full realization of human rights, and the progressive full realization of human rights is crucial to MNCs' activities.

Chapter IV analyzes the interplay between host states' obligations under human rights treaties and their investment obligations under BITs. To this end, the Chapter will: (i) provide an overview of the main obligations undertaken by host states under BITs and potential limitations thereon, so as to give "legal substance" to the above-mentioned mechanism described by economists as political risk mitigation tool; (ii) analyze in details the host States' obligation to treat investors in a fair and equitable manner ("FET") (with a specific focus on the investor's legitimate expectations standard); and (iii) discuss shortly the Argentine arbitration "saga" generated by the 2001-2001 Argentine crisis.

Chapter V analyzes: (i) the contract theory approach and its applicability to BITs; (ii) certain risks and costs associated with BITs that may, in certain cases, have negative impact on the regulatory powers of host states (and, in turn, on the fulfilment of human rights); and (iii) the provisions that might be used to effectively insert human rights considerations into BITs (also in light of the consideration and case law analyzed in the previous sections). The final aim is to show, among others, that the effective integration of human rights in BITs might render these treaties more efficient and effective in their double aim of attracting and protecting FDIs.

Finally, Chapter VI will provide some concluding remarks.

Where, after all, do universal human rights begin? In small places, close to home – so close and so small that they cannot be seen on any maps of the world. Yet they are the world of the individual person; the neighborhood he lives in; the school or college he attends; the factory, farm or office where he works. Such are the places where every man, woman and child seek equal justice, equal opportunity, equal dignity without discrimination. Unless these rights have meaning there, they have little meaning anywhere. Without concerned citizen action to uphold them close to home, we shall look in vain for progress in the larger world.

- Eleanor Roosevelt -

II. WHICH HUMAN RIGHTS?

1. Overview

Human rights are the "rights that belong to a person for the mere fact of being human; they are rights that all human beings hold equally and that cannot be renounced or compromised because they are universal and inalienable".[1]

The protection of these rights is embodied in numerous instruments, mostly inter-state, at both international and regional levels. The most basic instrument of modern human rights law is the Universal Declaration of Human Rights ("Declaration"), which was adopted by the UN General Assembly on December 10, 1948.[2] The Declaration comprises 30 articles that define the essential content of a wide range of fundamental human rights (covering all aspects of human life).

Before detailing these rights, the Declaration sets out several salient principles, which are reflected in all human rights treaties. *First*, "every individual and every organ of society, shall strive to promote respect for these rights and freedoms and by *progressive measures*, *national and international*, [...] secure their universal and effective recognition and observance".[3] This is a powerful message, emphasizing (already in the late 40s) that all members of the international society (including businesses) should play an active role in the promotion and protection of fundamental

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1 J. DONNELL, *Universal Human Rights in Theory and Practice*, Cornell University Press, 2003, at 10; M. KRIKORIAN, *Derechos Humanos, políticas públicas y rol del FMI. Tensiones, errores no asumidos y replanteos*, Librería Editoria Plantese, 2010, at 35. *See also* UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), available at https://www.refworld.org/docid/3ae6b3712c.html.

2 In the early twentieth century, the protection of human rights became an issue of concern to the international community. Under the League of Nations, established at the end of the First World War, attempts were made to develop an international legal framework, along with international monitoring mechanisms, to protect minorities. The horrors perpetrated during the Second World War motivated the international community to ensure that such atrocities would never be repeated and provided the impetus for the modern movement to establish an international system of binding human rights protection.

3 Universal Declaration, Preamble.

rights.[4] *Second*, the acknowledgment of the *inherent dignity* of the *equal* and *inalienable* rights of all members of the human family is the foundation of freedom, justice and peace in the world.[5] *Third*, all human beings are born free and equal in dignity and rights.[6] *Finally*, "[e]veryone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind".[7]

After these solemn statements, the Declaration enumerates specific groups of rights, including:

(i) The classic civil and political rights (Articles 3 to 21), such as the right: to be "equal before the law",[8] to "an *effective* remedy by the competent national tribunal for acts violating the fundamental rights",[9] not to "be subject to arbitrary arrest, detention or exile",[10] to "a fair and public hearing by an independent and impartial tribunal",[11] and to "own property alone as well as in association with others";[12] and

(ii) The wide range of economic, social and cultural rights (Articles 22 to 25), which are "indispensable for [a person's] dignity and the free development of [his/her] personality", such as the right: to "equal access to public services",[13] to

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4 This principle is further confirmed by Article 29 of the Declaration, according to which "[e]veryone has duties to the community in which alone the free and full development of his personality is possible".

5 *Id.*, Preamble.

6 *Id.*, Article 1.

7 *Id.*, Article 2 (including, discrimination based on "race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty").

8 *Id.*, Article 7.

9 *Id.*, Article 8.

10 *Id.*, Article 9.

11 *Id.*, Article 10.

12 *Id.*, Article 17.

13 *Id.*, Article 21.2.

"work",[14] and to "standard of living adequate for health and well-being […] including food, clothing, housing and medical care".[15]

The sequence of the rights does not explicitly reflect prioritization. This is because, under international human rights law, all human rights are considered to be coequal, interdependent and indivisible.[16] Thus, for instance, the right to adequate standard of living (Article 25) is necessary to secure the right to life (Article 3).[17] By the same token, the right to property (Article 17) might be necessary to secure the right to adequate standard of living (Article 25). In turn, the progressive full realization of these rights is key to a state's economic development, including to its sustainable economic development.

The Declaration is not *per se* legally binding, but its importance should not be underestimated for two main reasons. *First*, the Declaration represents the "first internationally agreed definition of the rights of all people, adopted in the shadow of a period of massive violations" of the same.[18] By signing the Declaration, state parties not only acknowledged these principles, but they also affirmed their commitment to human rights.[19] *Second*, the Declaration "paved the way" for the treaty structure of human rights that emerged in the following decades. The document stands in a foundational position in almost every major human rights instrument adopted after 1948, including those of a binding nature (such as the International Covenant on

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14 *Id.*, Article 23.

15 *Id.*, Article 25.

16 *Id.*, Article 1. Indeed, a truly dignified existence requires the provision of the full catalogue of rights.

17 R. BURKE and J. KIRBY, *The Universal Declaration of Human Rights: Politics and Provisions (1945–1948)*, in G. OBERLEITNER (eds.), *International Human Rights Institutions, Tribunals, and Courts. International Human Rights*, Springer, Singapore, 2018, at 31.

18 Moreover, it is widely accepted that some of the Declaration's provisions are now rules of customary international law, such as the ban on torture and racial discrimination. Through the practice of states, these provisions have come to be seen as legally binding rules, well before their incorporation in specific treaties. Indeed, some commentators argue that the entire Declaration possesses this status.

19 Specifically, states "pledged themselves to achieve, in co-operation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms" (see Declaration, preamble).

Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, the European Convention on Human Rights, and the Inter-American Convention on Human Rights) [20] and non-binding nature (such as the UN Declaration on the Right to Development).[21]

Contrary to the Declaration, international human rights treaties are binding on state signatories and impose on them specific human right obligations, including the obligation to: (i) respect human rights (requiring states to refrain from interfering with and/or curtailing the enjoyment of human rights); (ii) protect human rights (requiring states to protect individuals and group of individuals against human rights abuses, including abuses committed by businesses); and (iii) fulfil human rights (requiring states to take positive action to facilitate and guarantee the enjoyment of basic human rights).

International treaties do not seem to impose direct human rights obligations on corporations (including, on international multinational corporations; "MNCs"), which are the most important private sector institutions for creating wealth, allocating resources on a country-by-country basis, [22] and promoting the realization of economic, social and cultural rights.[23] MNCs serve this role in the global economy.[24] However,

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20 Other relevant treaties include the Refugee Convention (1951), the Declaration on the Granting of Independence to Colonial Countries and Peoples (1960), the International Convention on the Elimination of All Forms of Racial Discrimination (1965), the Convention on the Elimination of All-Forms of Discrimination Against Women (1979), the African Charter on Human and Peoples' Rights (1981), the Convention Against Torture (1984), the Declaration on the Right to Development (1986), and the Convention on the Rights of the Child (1990).

21 UN General Assembly, *Declaration on the Right to Development: resolution adopted by the General Assembly*, 4 December 1986, A/RES/41/128, available at https://www.refworld.org/docid/3b00f22544.htm.

22 S. D. COHEN, *Multinational Corporations and Foreign Direct Investment: Avoiding Simplicity, Embracing Complexity*, in *Multinational Corporations and Foreign Direct Investment*, Oxford University Press, 2007, at 28.

23 *See* UNCESCR, General Comment No. 24, State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities, UN Doc. E/C.12/GC/24, at 1.

24 *Id*.

there exist numerous soft law instruments that provide for specific human right responsibilities and standards on MNC, which would eventually become hard law.

This Chapter provides an analysis of: (i) the normative content of certain economic, social and cultural human rights (Section 2.2); (ii) the state's corresponding obligations with respect to these rights (Section 2.3); and (iii) the MNCs' human rights responsibilities and standard, arising from several international soft law instruments (Section 2.4). The aim of this analysis is to: (i) clarify "what to be expected, and from whom", when it comes to human right violations; and (ii) set the stage for the next chapters by showing that, contrary to the position traditionally taken by several investment arbitral tribunals,[25] human rights are relevant when it comes to international investment projects. Specifically, human rights constitute the framework within which host states and MNCs should frame their respective conducts.[26]

The focus of the chapter will be on certain socio-economic rights that are particularly "touched" – both in a positive and negative way – by the activities of international MNCs (which are the focus of this work). As a matter of fact, most of these rights have been invoked by host States within the context of investment arbitration proceedings (although unsuccessfully).

This Chapter provides also certain considerations on the rights to development and sustainable development, which: (i) find their *raison d'être* in the progressive fulfillment of most socio-economic rights (Section 3); and (ii) are often the *raison d'être*

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25 For instance, in *CMS GAS Transmission*, the arbitral tribunal found that questions affecting fundamental human rights were not relevant when considering the issues in dispute (*see CMS Gas Transmission Company* v. *Republic of Argentina*, ICSID Case No. ARB/01/8, Award dated May 12, 2005, para 121). By the same token in *Siemens*, the arbitral tribunal held that, to the extent it was pleaded, international human rights law was not relevant to the case (*see Siemens A.G.* v. *Republic of Argentina*, ICSID Case No. ARB/02/8, Award dated February 6, 2007, para 79). In *Saur*, the arbitral tribunal held that human rights in general, and the right to water in particular, are one of the various sources that the tribunal should take into account to resolve the dispute; however it highlighted that the right to water and the investors' rights to benefit from the protection offered by BITs operate on different levels (*see SAUR International S.A.* v. *Republic of Argentina*, ICSID Case No. ARB/04/4, Decision on Jurisdiction and Liability dated June 6, 2012, para 330-331).

26 *Urbaser S.A. and Consorcio de Aguas Bilbao Biskaia, Bilbao Biskaia Ur Partzuergoa* v. *the Republic of Argentina*, Award dated December 8, 2016.

underlying the decision of host states to enter into bilateral investment treaties and investment agreements.

Starting this doctoral thesis with a detailed analysis of human rights is aimed to show that human rights lie at the very heart of all economic activities, and, to borrow a quote from Ms. Eleanor Roosevelt, "unless these rights have meaning there, they have little meaning anywhere".[27]

2. The Socio-Economic Rights and Corresponding Obligations

2.1. General Considerations

Despite the proclaimed equality, indivisibility and interdependence of human rights,[28] Socio-Economic Rights have long been considered the "poor cousins" of civil and political human rights.[29] The reasons are several. *First*, traditionally, civil rights were largely seen as immediately applicable and justiciable. By contrast, socio-economic rights were viewed as subject only to progressive realization, normally through *ad hoc* state's tools such as legislative measures.[30] *Second*, civil rights were often viewed as negative freedoms from state intervention, whereas socio-economic rights were thought to involve positive obligations on states, which in turn provided sensitive claims in relation to publicly available resources.[31] *Third*, civil rights encompass the so-called first generation human rights, which were considered to be well known to most national constitutions and legal traditions, while socio-economic rights (often labeled as second generation human rights) were more novel and thus less familiar.[32] Due to these reasons (which do not find support—at least under the

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27 Eleanor Roosevelt, *The Great Question*, remarks delivered at the United Nations in New York on March 27, 1958.

28 *See* Declaration, Article 1.

29 *See* B. SAUL, D. KINLEY and J. MOWBRAY, *The International Covenant on Economic, Social and Cultural Rights. Commentary, Cases and Materials*, Oxford University Press, 2014, at 1.

30 *Id*.

31 *Id*.

32 The developments of the recent decades have demonstrated that this "differentiation" between the two types of rights was overly simplistic and unsupported by facts. For instance, on the one hand, civil and political rights often require (costly) State action along with negative freedom from interference. On the other hand, socio-economic

current status of international human rights law), the socio-economic rights were ultimately codified in an international covenant separate from the one dedicated for civil rights, i.e., the International Covenant on Economic, Social and Cultural Rights ("Socio-Economic Covenant").[33]

The Socio-Economic Covenant was adopted on December 16, 1966. In more than 50 years from its existence, the above-mentioned perception of the corresponding rights have changed.[34] This shift is partially due to the:[35] (i) increased perception by all members of the international community that economic development can be truly achieved solely through actions inspired by, and attentive to, socio-economic rights and needs, i.e., sustainable economic development; and (ii) active role played by the United Nations Committee on Economic, Social and Cultural Rights ("Socio-Economic Committee"),[36] which is the body ultimately responsible for the interpretation and supervision of the Socio-Economic Covenant.

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rights are often immediately applicable and capable of judicial application or supervision. *See*, e.g., M. CRAVEN, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development*, Clarendon Press, Oxford, 1995, at 7-9.

33 International Covenant in Economic, Social and Cultural Rights, Adopted and opened for signature, ratification and accession by General Assembly, Resolution 2200 A (XXI) of December 16, 1966.

34 Specifically, these rights have moved from being the subject of theoretical debates to being increasingly accepted as important international norms with significant practical applications. *See* B. SAUL, D. KINLEY and J. MOWBRAY, *The International Covenant on Economic, Social and Cultural Rights*, at 2, note 28.

35 The adoption in 2008 of the Optional Protocol to the Socio-Economic Covenant (which has entered into force in May 2013) is indicative of this change. One of the main novelties of the Protocol is the possibility to submit complaints to the Socio-Economic Committee for violations of the Covenant.

36 *See* R. BURKE and J. KIRBY, *The Universal Declaration of Human Rights: Politics and Provisions (1945–1948)*, in G. OBERLEITNER (eds.), *International Human Rights Institutions, Tribunals, and Courts. International Human Rights*, Springer, Singapore, 2018, at 143; F. COOMANS, *The International Covenant on Economic, Social and Cultural Rights – From Stepchild to Full Member of the Human Rights Family*, in F. GÓMEZ ISA and K. DE FEYTER (eds.), *International Human Rights Law in A Global Context*, University of Deusto, Bilbao, at 293-317.

The Committee was established in 1987,[37] and, since its inception, it has actively worked to clarify the normative content of the Socio-Economic Rights included in the Covenant as well as the states' corresponding obligations. To this end the Committee has issued 24 authoritative statements in the form of General Comments.[38] Albeit these documents are not legally binding, they are deemed to provide an authentic and authoritative interpretation of the Socio-Economic treaty text, thus contributing to the clarification and development of the *droit vivant*.[39]

2.2. The Socio-Economic Human Rights

2.2.1. The Right to Work

The Socio-Economic Covenant proclaims the right to work in general terms at Article 6, and further develops its individual dimensions (e.g., working conditions and collective dimensions) at Articles 7 and 8, respectively. Although several international instruments address the different dimensions of this right, the Covenant is still considered to be the most comprehensive instrument.[40]

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37 The Socio-Economic Committee came into existence several years after the entry into force of the Socio-Economic Covenant, following a decision by the Economic and Social Council of the UN.

38 The General Comments are all publicly available at the following website: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=9&DocTypeID=11.

39 *See* G. ABLINE, *Les observations générales, une technique d'élargissement des droits de l'homme, Revenue trimestrielle des droits de l'homme*, 2008, at 449-479.

40 At the universal level, the right to work is foreseen by Article 8, paragraph 3(a) of the International Covenant on Civil and Political Civil Rights; Article 5, paragraph (e)(i) of the International Convention on the Elimination of All Forms of Racial Discrimination; Article 11, paragraph 1(a) of the Convention on the Elimination of All Forms of Discrimination against Women; Article 32 of the Convention on the Rights of the Child; and Articles 11, 25, 26, 40, 52 and 54 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

Moreover, several regional instruments recognize the right to work in its general dimension, including Part II, Article 1 of the European Social Charter (1961) and the Revised European Social Charter (1996), Article 15 of the African Charter on Human and Peoples' Rights and Article 6 to the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights. Similarly, the right to work has been proclaimed by the United Nations General Assembly in the Declaration on Social Progress and Development, in its Resolution No. 2542 (XXIV) dated December 11, 1969.

Under Article 6, states parties: (i) recognized the right to work, which includes the right of everyone to the opportunity to gain his/her living by work which he/she freely chooses or accepts; and (ii) undertook to take all appropriate steps necessary to safeguard this right, including laws and regulations to this effect.[41] Article 6 provides for a comprehensive definition of the right to work so as to include also the right to choose whether to work and at what conditions.[42] Moreover, the provision stresses the importance of work for personal development as well as for social and economic inclusion.[43]

The Socio-Economic Committee clarified the scope and normative content of this right in its General Comment No. 18 dated February 6, 2006.[44] According to the Committee, work is essential not only to human survival, but also to life with dignity.[45] Accordingly, the work must be "decent",[46] i.e., it must guarantee: (i) "fair wages and equal remuneration", which are the preconditions necessary for a "decent living"; and (ii) safe and healthy working conditions.[47]

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41 Socio-Economic Covenant, Article 6.

42 *See* UNCESCR, General Comment No. 18, the Right to Work, UN Doc. E/C.12/GC/18 dated February 6, 2006, para 4.

In this sense, the right to work includes the right not to be subject to forced labor (or the new forms of slavery). The International Labor Organization defines forced labor as "all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily" (ILO Convention No. 29 concerning Forced or Compulsory Labor, 1930, Article 2, paragraph 1). *See also* Paragraph 2 of the ILO Convention concerning the Abolition of Forced Labor, 1957.

43 *See* UNCESCR, General Comment No. 18, the Right to Work, UN Doc. E/C.12/GC/18 dated February 6, 2006, para 4. *See also* Declaration, Article 1.

44 *Id*.

45 *Id.*, para 1.

46 *Id.*, para 7.

47 *See* Socio-Economic Covenant, Article 7. *See also* B. SAUL, D. KINLEY and J. MOWBRAY, *The International Covenant on Economic, Social and Cultural Rights*, at 1, note 28.

According to the Committee, the exercise of the right to work (in all its forms and at all levels) requires the existence of the following interdependent and essential elements: availability,[48] accessibility, and quality.[49]

Under international human rights law, states are *primarily* responsible for guaranteeing the promotion and protection of the right to work at these terms and conditions. However, non-state actors, including MNCs (thorough foreign investments), may play a key role in promoting the right to work, in particular by creating jobs and guaranteeing hiring policies compliant with domestic legislations, administrative measures, codes of conduct and other appropriate measures that promote respect for this right.[50]

On the other hand, MNCs can also negatively affect the right to work. For instance, MNCs can implement internal policies and code of conducts that do not guarantee to their employees fair wages or safety and healthy working conditions.[51] As will be seen further below, these elements might become relevant within the context of investment arbitrations.[52]

2.2.2. The Right to Adequate Housing

Under Article 11 of the Covenant, "States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous

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48 For instance, individuals must have specialized services to assist and support individuals in order to enable them to identify and find available employment.

49 Protection of the right to work has several components, notably the right of the worker to just and favorable conditions of work, in particular to safe working conditions, the right to form trade unions and the right freely to choose and accept work.

50 *See* UNCESCR, General Comment No. 24, State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities, UN Doc. E/C.12/GC/24 dated August 10, 2017, at 1.

51 *See* S. B. LEINHARDT, *Some Thoughts on Foreign Investors Responsibilities to Respect Human Rights*, in *Transnational Dispute Management*, 2003, at. 9.

52 *See*, e.g., F. BALCERZAK, *Investor-State Arbitration and Human Rights*, in *International Studies in Human Rights*, 2018, at 71-73; V. S. VADI, *Reconciling Public Health and Investor Rights: the Case of Tobacco*, in P. DUPUY, F. FRANCIONI, and E. PETERSMANN (eds.), *Human Rights in International Investment Law and Arbitration*, Oxford University Press, 2009, at 552-486.

improvement of living conditions".[53] Although several international instruments address the different dimensions of this right,[54] Article 11 of the Covenant is considered to be the most comprehensive and perhaps the most important instrument.[55]

The Socio-Economic Committee clarified the normative content of the right to adequate housing in two General Comments, i.e., General Comments Nos. 4 and 7, dated 13 December 1992,[56] and 16 May 1997,[57] respectively.

General Comment No. 4 sets the tone of the present right by proclaiming its "central importance for the enjoyment of all economic, social and cultural rights" recognized in the Socio-Economic Covenant.[58] Similarly to the right to work, the right to adequate housing is essential not only to human survival, but also to life with dignity.[59]

General Comment No. 4 further clarifies that adequate housing should be interpreted in a wide way so as to include the right "to live somewhere in security, peace and dignity".[60] As the provision itself clarifies, the housing should be "adequate".[61] The concept of adequacy is particularly significant since it serves to

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53 Socio-Economic Covenant, Article 11.

54 *See*, e.g., Article 25(1) of the Universal Declaration of Human Rights, Article 5(e)(iii) of the International Convention on the Elimination of All Forms of Racial Discrimination; Article 14(2) of the Convention on the Elimination of All Forms of Discrimination against Women; Article 27 (3) of the Convention on the Rights of the Child; Article 10 of the Declaration on Social Progress and Development, section III (8) of the Vancouver Declaration on Human Settlements (1976; *Report of Habitat: United Nations Conference on Human Settlements*, United Nations publication, Sales No. E.76.IV.7 and corrigendum, chap. I); Article 8 (1) of the Declaration on the Right to Development and the ILO Recommendation Concerning Workers' Housing, 1961 (No. 115)).

55 *See* Socio-Economic Covenant, Article 11.

56 *See* UNCESCR, General Comment No. 4, The right to adequate housing (Article 11 (1) of the Covenant) dated November 25 – December 13, 1992, UN Doc. E/1992/23.

57 *See* UNCESCR, General Comment No. 7, The right to adequate housing (Article 11 (1) of the Covenant): forced evictions dated May 14, 1997, UN Doc. E/1998/22.

58 *See* UNCESC, General Comment No. 4, para 2.

59 *See* Declaration, Article 1.

60 *See* UNCESCR, General Comment No. 4, para 7.

61 Adequate housing means "adequate privacy, adequate space, adequate security, adequate lighting and ventilation, adequate basic infrastructure and adequate location with regard to work and basic facilities - all at a reasonable cost".

identify the factors that must be taken into account in determining whether particular forms of housing can be considered in line with the Covenant.[62] These factors include legal security of tenure, availability of services, materials, facilities and infrastructure, affordability, habitability, accessibility, location, and cultural adequacy. Although the factors speak essentially for themselves, they reflect several critical aspects of the right.

First, the legal security of tenure underlines the importance of securing one's place of living – whether by legal ownership, rental, leasehold or cooperative arrangement – and the need for redress if eviction is threatened or executed.[63] The relevance of these factors, along with their frequent violations,[64] was central to the Committee's work on General Comment No. 7,[65] according to which "all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats".[66]

Forced eviction is the permanent or temporary removal against the will of individuals, families and/or communities from their homes and/or lands, without the provision of, and access to, appropriate forms of legal or other protection".[67] Generally, instances of forced eviction are associated with heavily populated urban areas, forced population transfers, internal displacement, and forced relocations in the context of internal and international armed conflict, mass exoduses and refugee movements.[68] However, forced eviction often occurs in the name of economic development. For instance, forced evictions may be performed in connection with the

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62 *See* UNCESCR, General Comment No. 4, para 8.

63 *See* B. SAUL, D. KINLEY and J. MOWBRAY, *The International Covenant on Economic, Social and Cultural Rights*, at 931, note 28.

64 The Committee noted that regardless the frequent reaffirmation of importance and necessity of full respect for the right of adequate housing, there remain a disturbing gap between the standard set in Article 11.1 and the situation prevailing in many parts of the world, in particular in developing countries.

65 *See* B. SAUL, D. KINLEY and sJ. MOWBRAY, *The International Covenant on Economic, Social and Cultural Rights*, at 931, note 28.

66 UNCESCR, General Comment No. 7.

67 *Id.*

68 *Id.*, para 5.

development of massive infrastructure and/or oil and gas projects.[69] Within this context, the forced eviction of indigenous people (and the breach of their corresponding property rights) in the name of development has been a recurrent issue in many investment projects (and subsequent investment disputes).[70]

Second, adequate housing requires more than a shelter. To be adequate a house must contain certain facilities essential at least to health and security, including natural and common public facilities (e.g., safe water, energy, and sanitation).[71] MNCs often play a key role in guaranteeing that houses contain these facilities. Indeed, the management and distribution of water, energy and sanitation services is often outsourced by states to MNCs via privatization procedures.[72]

As will be explained further below, the failure of a MNC to provide these facilities at certain standards may entail the international responsibility of the relevant state, under international law.[73] This is because states remain primarily responsible for guaranteeing the fundamental rights provided under the Covenant.

2.2.3. The Right to Health

Under Article 12 of the Socio-Economic Covenant, "State Parties […] recognize the right to everyone to the enjoyment of the highest attainable standard of physical

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69 *Id.*, para 7. F. BALCERZAK, *Investor-State Arbitration and Human Rights*, in *International Studies in Human Rights*, Brill | Nijhoff, 2018, at 62-63.

70 *See* UNCESCR, General Comment No. 7, para 5.

71 *Id.*, para 8.

72 *See* F. MARRELLA, *On the Changing Structure of International Investment Law: the Human Rights to Water and ICSID Arbitration*, in *International Community Review*, 2010, at 343.

73 *See* L. B. LEINHARDT, *Some Thoughts on Foreign Investors Responsibilities to Respect Human Rights*, in *Transnational Dispute Management*, 2003, at. 9.

and mental health".[74] Like the right to adequate housing, several international instruments[75] address the different dimensions of the right to health.[76]

The Socio-Economic Committee clarified the normative content of this right at General Comment No. 14 dated August 11, 2000.[77] According to this document, the right to health is not to be understood as a right to be healthy, which could not be guaranteed. The right contains both freedoms and entitlements.[78] The freedoms include the right to control one's health and body (including sexual and reproductive freedoms, and the freedom not to be subject to non-consensual medical treatment and experimentation).[79] The entitlements include instead the right to enjoyment of a variety of facilities, goods, services and conditions necessary for the realization of the highest attainable standard of health.[80]

The right to health is closely related to, and dependent upon, the realization of other Socio-Economic Rights, including the right to food, housing, work, education, and human dignity.[81] Similarly to the right to work and to adequate housing, the right to health is essential not only to human survival, but also to life with dignity. The right to health indeed embraces a wide range of socio-economic factors that promote conditions in which people can live a healthy life and with dignity. These factors (which

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74 Socio-Economic Covenant, Article 12.

75 UNCESCR, General Comment No. 14, The right to the highest attainable standard of health (Article 12 of the International Covenant on Economic, Social and Cultural Rights), UN Doc. E/C.12/2000/4 dated August 11, 2000.

76 By the time the texts of individual provisions in the Covenant were being considered by the Committee, there already existed a newly created international body dedicated to promoting health across the globe, which was to have a direct and profound effect on the drafting of the right to life in the Covenant, namely the World Health Organization ("WHO"). The WHO which have been established in 1946, was provided with a mandate to effect "the attainment by all peoples of the highest possible level of health". Constitution of the World Health Organization adopted on July 22, 1946.

77 UNCESCR, General Comment No. 14, The right to the highest attainable standard of health (Article 12 of the International Covenant on Economic, Social and Cultural Rights), UN Doc. E/C.12/2000/4 dated August 11, 2000.

78 *Id.*, para 8.

79 *Id*.

80 *Id*.

81 UNCESCR, General Comment No. 14, para 3.

extend to the underlying determinants of health, such as food and nutrition, housing, access to safe and potable water and adequate sanitation, safe and healthy working conditions, and a healthy environment),[82] include availability, accessibility, acceptability, and quality of state institutions and entities able to guarantee this right.[83]

As with respect to the other Socio-Economic Rights analyzed above, states are *primarily* responsible for guaranteeing the promotion and protection of the right to health. However, non-state actors, including MNCs play a key role with respect to this right. Health services are often managed and provided by MNCs within the context of huge privatization processes (e.g., privatization of health services).

2.2.4. The Right to Water

The conceptualization of the right to water is a relatively new endeavor, with its genesis in the modern era of international human rights law.[84] Accordingly, this right is not expressly mentioned in the Socio-Economic Covenant.

The Socio-Economic Committee discusses this right in details in its General Comment No. 15 dated January 20, 2003.[85] This document is considered to be by far the most relevant of all legal recognitions of the right to water.[86] According to General

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82 The Committee itself has interpreted the right to health as defined in Article 12.1, as an inclusive right extending not only to timely and appropriate health care but also to the underlying determinants of health, such as access to safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions, and access to health-related education and information, including on sexual and reproductive health.

83 Socio-Economic Covenant, Article 12.

84 *See* M. CRAVEN, *Some Thoughts on the Emergent Right to Water*, in E. RIEDEL and P. ROTHEN (eds.), *The Human Right to Water*, Berliner Wissenschafts Verlang, Berlin, 2006, Chapter 2.

85 UNCESCR, General Comment No. 15, The Right to Water (Articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights), UN Doc E/C.12/2002/11 dated January 20, 2003, paras 1-4.

86 A wide range of international documents, including treaties, declarations and other standards provide explicit protection of the right to water, including in time of war. For instance, the Geneva Convention III (concerning the Treatment of Prisoners in Time of Wars) and the Geneva Convention IV (concerning to the Protection of Civilian Persons in time of War) provide that prisoners and detainees should be provided with sufficient drinking water as well as shower and bathing facilities (*see*, e.g., Article 46 of the Geneva Convention Relative to the Treatment of Prisoners of War dated August

Comment No. 15, the right to water finds its normative source in two articles of the Covenant, namely Article 11 (right to adequate housing) and Article 12 (right of health).[87] The Committee interpreted the right of everyone to adequate standard of living, "including adequate food, clothing and housing", as covering also the independent right to water for personal and domestic use.[88] Moreover, the right to water is inextricably related to the right to access to the highest attainable standard of health, under Article 12 of the Covenant.

The Committee clarifies that the "right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic use".[89] This right contains both freedoms and entitlements. The freedoms include the right to maintain access to sufficient levels of existing water supplies as well as the right to be free from arbitrary interferences such as disconnections or contamination

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12, 1949). Moreover, Article 54 of the Additional Protocol to the Geneva Conventions dated August 12, 1949, prohibits the destruction of "objects indispensable to the survival of the civilian population such as […] drinking water installations and supplies and irrigations".

Other international and regional provisions recognizing the right to water include: (i) Article 14, paragraph 2, of the Convention on the Elimination of All Forms of Discrimination Against Women, according to which States parties shall ensure to women the right to "enjoy adequate living conditions, particularly in relation to […] water supply"; (ii) Article 24, paragraph 2, of the Convention on the Rights of the Child, which requires State parties to combat disease and malnutrition "through the provision of adequate nutritious foods and clean drinking-water"; (iii) Article 15 of the Protocol to the African Charter on Human and People's Rights and the Rights to Women in Africa.

Furthermore, numerous soft law instruments have called for individual and legally binding water rights, including the *Mar del Plata Declaration* of the 1977 UN Water Conference; the UN General Assembly Declaration on the Principle of Elderly Persons dated December 16, 1991, and the Dublin Statement on Water and Sustainable Development dated January 31, 1992; the United Nations Conference on Environment and Development dated June 14, 1992. *See also, The Human Rights to Water versus Investor Rights: Double-Dilemma or Pseudo-Conflict*, in P. DUPUY et al (eds.), *Human Rights in International Investment Law and Arbitration*, Oxford University Press, 2009, at 491.

87 *See also* African Commission on Human and Peoples' Rights, *Free Legal Assistance Group and others v. Zaire*, Common No. 25/89, 47/90, 56/91, 100/93, 1995, para 47.

88 The Committee found that the right to water fells into the category of those non-explicitly mentioned guarantees, essential for securing an adequate standard of living.

89 UNCESCR, General Comment No. 15, para 2.

of water supplies. The entitlements include the right to a system of water supply and management that provides equality of opportunity for people.[90]

Similarly, to the rights to work, adequate housing and health, the right to water is essential not only to human survival, but also to life with dignity. Specifically, water must be adequate for human dignity, life and health, in accordance with Articles 11 and 12 of the Covenant. The adequacy of water should not be interpreted narrowly, by mere reference to volumetric quantities and technologies. Moreover, the manner of the realization of the right to water must also be sustainable, ensuring that the right can be realized for present and future generations.[91]

While the adequacy of water varies according to different conditions, the following factors apply in all circumstances: availability,[92] quality, and accessibility.[93] As with respect to the other rights analyzed above, states are primarily responsible for guaranteeing the promotion and protection of the right to water at these conditions. However, non-state actors, including MNCs, play a key role with respect to the correct enjoyment of the right to water, as the management and distribution of water services (as most public services) are often outsourced to private providers.

2.3. The Socio-Economic Human Rights Obligations of States

The Socio-Economic Covenant describes in details the human rights obligations of host States. Specifically, under the Socio-Economic Covenant, each state party undertook, among others, to: "[t]*ake steps*, individually and *through international assistance and co-operation*, especially economic and technical, to the maximum of its available resources, with a view to *achieving progressively the full realization* of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures".[94]

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90 *Id.*

91 UNCESCR, General Comment No. 15, para 11.

92 *Id.*, 12.

93 *Id.*

94 *See* Socio-Economic Covenant, Article 2.1.

The obligation imposed on state parties can be broken down into two key sections: (i) the undertaking to take steps to achieve progressively the full realization of the rights; and (ii) the use of maximum available resources. Both elements are extremely relevant to the protection of human rights under investment law, and they should be attentively evaluated by MNCs (when deciding whether to invest in a given country), and by arbitral tribunals when deciding whether by adopting legislation aimed at the progressive full realization of the socio-economic rights, a host state might have breached certain investment obligations under a bilateral investment treaty.

First, States parties are under an obligation to "take steps". Already in 1990, the Socio-Economic Committee clarified through General Comment No. 3 that these steps should: (i) be deliberate, concrete and targeted as clearly as possible toward meeting the obligations recognized by the Covenant;[95] (ii) be taken within a reasonably short time after the Covenant's entry into force;[96] and (iii) take into account that, realistically, the full realization of certain rights might require some considerable time. On the basis of these considerations, the Committee identified two types of state obligations under the Covenant: (i) an obligation of conduct, i.e., the obligation to take (continuously) steps in order to guarantee the *progressive* full realization of the Socio-Economic Rights; and (ii) an obligation of result, i.e., obligation of immediate effects.[97]

As with respect to the first of the above-mentioned obligations, the steps should aim at *achieving progressively the full realization* of the rights. The Covenant does not qualify the concept of *progressive realization*. In the Committee's view, this concept reflects the drafters' (realistic) view that in many countries the full realization of socio-economic rights might require years. Therefore, on the one hand, the concept provides the "necessary flexibility device" which reflects the realities and difficulties of the real world.[98] On the other hand, the concept should be read against the object and main

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95 UNCESCR, General Comment No. 3, The nature of States parties' obligations (Art. 2, para. 1, of the Covenant), UN Doc E/1991/123 dated December 14, 1990, para 2.

96 *Id*.

97 *See* M. DOWELL-JONES, *Contextualizing the International Covenant on Economic, Social and Cultural Rights: Assessing the Economic Deficit*, in *International Studies in Human Rights*, Martinus Nijhoff Publishers, 2004. *See also* E/C.12/COD/CO/4, para. 16.

98 UNCESCR, General Comment No. 3, para. 10.

features of the Socio-Economic Covenant (i.e., its *raison d'être*), which is to establish clear obligations for state parties in respect of the full realization of the socio-economic rights.[99] Progressive realization means a pattern of *continuous* improvement or advancement and entails a state obligation to ensure a broader enjoyment of the rights over time.[100] This also means that all interested parties (including private parties), should expect that when it comes to human rights, states will necessarily enact certain measures at one point in time.

The Committee also clarified that the adoption by states of deliberately retrogressive measures,[101] which might imply a step backwards in the level of enjoyment of certain rights, would require careful consideration and *full justification in light of the object* and purpose of the Covenant.[102] For instance, an armed conflict and/or other emergency situations (such as an economic crisis and financial crisis) would not *per se* be sufficient to justify the intervention.

As with respect to the obligations of immediate effects, according to the Committee two of these are of particular importance. The first one (which is also the subject of a separate general comment) is the "undertaking to guarantee" that all socio-economic rights "will be exercised without discrimination".[103] The second one is the undertaking "to take [immediate] steps".[104]

The means to be used in order to satisfy the obligation to "take steps" are all "appropriate means", including legislative measures and or international

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99 Moreover, any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources.

100 UNCESCR, General Comment No. 3, para. 9. *See also* E/2015/59, Report of the United Nations High Commissioner for Human Rights dated July 21, 2015, para 22.

101 *See* E/2015/59, Report of the United Nations High Commissioner for Human Rights dated July 21, 2015, para 23.

102 *Id*.

103 UNCESCR, General Comment No. 3, para. 1. Every General Comment identifies the relevant undertaking for each socio-economic right.

104 *Id*., para. 2.

instruments.[105] States have ample discretion in deciding on the most "appropriate means" to be used to achieve their obligations under the Covenant. For instance, these means could include legislative measures, judicial remedies,[106] administrative, financial, and/or educational and social right measures.[107] However, as noted by the Committee, "in many instances legislation is highly desirable and in some cases may even be indispensable".[108] This is because, in certain socio-economic fields such as work, health, adequate housing it might be difficult to effectively (and progressively) implement the corresponding rights in the absence of a sound legislative foundation.[109]

In fulfilling their obligations, states may also resort to international means, including *international assistance and co-operation* of an economic and technical nature. As further clarified by the Committee, in the spirit of the UN Charter and the specific provisions of the Covenant, states parties should comply with their commitment to take joint and separate action to achieve the full realization of the Socio-economic rights.[110] Accordingly, when a state's resources are insufficient, as it is often the case with developing countries, the duty to intervene is passed also on

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105 Socio-Economic Covenant, Article 2.

106 *See* UNCESCR General Comment No. 3, the Nature of States Parties' Obligations (Article 2, para 1), UN Doc. E/1991/23 dated December 14, 1990, para. 5. With specific regard to the "judicial remedies", it should be noted that the States that are also States parties to the International Covenant on Civil and Political Rights are already under obligation (under Articles 2, 3, and 16) to ensure to any person whose rights of freedom are violated an "effective remedy".

107 *See* UNCESCR, General Comment No. 3, the Nature of States Parties' obligations (Art. 2, par. 1), UN Doc. E/1991/23 dated December 14, 1990, para. 7.

108 *Id.*, para. 3.

109 By General Comment No. 3, the Committee has clarified that States' obligations under the Covenant neither require nor preclude any particular form of government or economic system being used as the vehicle for the "steps" in question, provided only that it is democratic and all human rights are thereby respected. Thus, in terms of political and economic systems the Covenant is neutral. In this regard, the Committee reaffirms that the rights recognized in the Covenant are susceptible of realization within the context of a wide variety of economic and political systems, provided only "that the interdependence and indivisibility of the two sets of human rights, as affirmed inter alia in the preamble to the Covenant, is recognized and reflected in the system in question".

110 *See* UNCESCR, General Comment No. 3, the Nature of States Parties' obligations (Art. 2, par. 1), UN Doc. E/1991/23, dated December 14, 1990, para. 3.

those States that are in a position to assist.[111] For instance, states parties should, through international agreements (including bilateral agreements) where appropriate, ensure that the right to work as set forth in Articles 6, 7 and 8 of the Covenant is given due attention.[112] Indeed, developing countries often enter into bilateral investment agreements with the aim to attract financial and technical resources to their market (through foreign direct investments), so as to guarantee their economic development and, in turn, the progressive fulfillment of the Socio-Economic Rights of their population.

The second element of the obligation imposed on states under Article 2 of the Covenant, is the use of the maximum available resources.[113] The availability of the resources varies from country to country and it is therefore clearly subjective. As to the financial resources, they fall in this category the economic resources arising from the private sector, including foreign direct investments which are (or at least should be) employed or directed towards socio-economic goals.[114] They equally fall in this category the resources gained through state taxation. In this respect, governmental fiscal policies (that is how a state raises and spends revenues) and the related regulatory framework are matters of critical importance. Tax-related obstacles and problems for states in raising the maximum available resources include, *inter alia*, the extent of regressive taxation, the form and nature of tax incentives (including, tax

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111 The need for international assistance and cooperation is clearly recognized in international human rights instruments. For instance, when becoming members of the United Nations, States signatories pledge "to take joint and separate action" to achieve the goal set forth in the UN charter. *See* C. APODACA, *Child Hunger and Human Rights. International Governance*, Routledge research in Human Rights, 2010, at 81-82.

112 *See* UNCESCR (2006) General Comment No. 18, the Right to Work, UN Doc. E/C.12/GC/186 dated February 6, 2006, para. 29.

113 *See* UNCESCR, General Comment No. 3, the Nature of States Parties' obligations (Article 2, par. 1), UN Doc. E/1991/23, dated December 14, 1990, para. 10. In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources, it must demonstrates that every effort has been made to use all resources that are at its disposal to satisfy, as a matter of priority, those minimum obligations.

114 B. SAUL, D. KINLEY and J. MOWBRAY, *The International Covenant on Economic, Social and Cultural Rights*, at 143, note 28.

incentives to attract foreign direct investments), the weakness of the tax authorities, and the extent of the tax evasion and avoidance schemes.[115]

As to the technical resources, these include not only natural resources, but also other elements such as the quality and efficiency of the state's system of governance, institutions (including the judiciary), as well as infrastructures (including, transportation, public services, sanitation, energy and communication).[116] All of these are elements relevant to foreign investors, including MNCs in deciding whether or not to invest in a country.

Finally, by General Comment No. 3 dated December 14, 1990, the Socio-Economic Committee clarified that every state has at least minimum core human rights obligations. Specifically, states are under the obligation to guarantee "at the very least, minimum essential levels of" each right guaranteed by the Covenant.[117] The notion of minimum threshold encapsulates a "short list of minimalistic well-being rights, such as "food intake, access to health services, income-generating employment and education".[118] A state party in which a significant number of individuals is deprived of essential food, primary health care, or basic shelter and housing, is *prima facie* failing to discharge its obligations under the Socio-Economic Covenant. If the Covenant was to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its *raison d'etre*.[119]

The Committee has identified the minimum core obligations for each right in several of its general comments. For instance, state's minimum core obligations with respect to the right to:

(i) Work (Article 6) include the obligation to *adopt and implement* a national employment strategy and plan of action addressing the concerns of all workers

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115 W. OBENLAND, *Taxes and Human Rights*, Global Policy Forum Europe, 2013.

116 B. SAUL, D. KINLEY and J. MOWBRAY, *The International Covenant on Economic, Social and Cultural Rights*, at 143, note 28.

117 *See* UNCESCR, General Comment No. 3, the Nature of States Parties' Obligations (Article 2, par. 1), UN Doc. E/1991/23 dated December 14, 1990, para. 9.

118 *Id*.

119 *Id.*, para 10.

on the basis of a participatory and transparent process that includes employers' and workers' organizations;[120]

(ii) Health (Article 12) include the obligations to: (i) ensure access to basic shelter, housing and sanitation and equitable distribution of all health facilities, goods and services; and (ii) *adopt* and *implement* a national public health strategy and plan of action;[121] and

(iii) Water (Articles 11 and 12) include the obligations to: (i) ensure access to the minimum essential amount of water, and water facilities and services on a non-discriminatory basis, especially for disadvantaged or marginalized groups; and (ii) *adopt* and *implement* a national water strategy and plan of action.[122]

According to the Committee, the assessment as to whether a State has discharged its core human right obligations must be done against the state's available technical and financial resources.[123] However, a constraint on the available resources cannot be used as a shield against a state's breach of its human rights obligations. In this respect, the Committee has clarified that even where the *available resources* are

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120 *See* UNCESCR, General Comment No. 18, the Right to Work, UN Doc. E/C.12/GC/186 dated February 6, 2006, para. 31.

121 UNCESCR, General Comment No. 14, The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights), UN Doc. E/C.12/2000/4 dated August 11, 2000.

122 UNCESCR, General Comment No. 15, The Right to Water (Articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights), UN Doc E/C.12/2002/11 dated January 20, 2003, paras 1-4. *See also Urbaser v. Argentina*, stating that the "human right to water entails an obligation of compliance on the part of the State […] this obligation, as all others retained in the Covenant referred to above, 'imposes a duty on each State party to take whatever steps are necessary to ensure that everyone enjoys the right to water, as soon as possible. […] The necessary step is therefore that a host State accepting investments in the domain of the provision of water relies on the BIT to have the investor participating to its obligation under international law. It thus complies with the conclusion of the UN Committee on Economic, Social and Cultural Rights that 'States parties should ensure that the right to water is given due attention in international agreements'". *Urbaser S.A. and Consorcio de Aguas Bilbao Biskaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic*, Award dated December 8, 2016, paras. 1208-1209.

123 UNCESCR, General Comment No. 13. In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.

demonstrably inadequate (i.e., such as in cases of economic crisis), the obligation remains for a state to *strive to ensure the widest* possible enjoyment of the relevant rights under the prevailing circumstances, including by monitoring the extent of their realization (or more especially of the non-realization) of the Socio-Economic Rights, and devising strategies and programs for their promotion.[124] This applies also in times of *severe resources constraints*, irrespective of the underlying reasons (including process of adjustment, economic recession, or other factors). What is more, in this context, states' human rights obligations are reinforced insofar in these situations the vulnerable members of society can and indeed must be protected.[125]

2.3.1. The Obligation to Respect, Protect and Fulfil

The above-mentioned states' obligations have been additionally articulated overtime in obligation to respect, obligation to protect and obligation to fulfil human rights. The development of these sub-categories originated in relation to the work of the Sub-Commission on the Prevention and Discrimination and Protection of Minorities on the Rights to Food (dating back to the late 70s).[126] According to leading legal scholars, this articulation provided the final theoretical foundation for the reconciliation of the apparent differences between Socio-Economic and Civil Rights. In other words, all human rights are posited to rest upon the trichotomy of obligations to protect, respect and fulfil human rights.[127]

2.3.1.1. The Obligation to Respect

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124 The Committee has already dealt with these issues in its general comment No. 1.

125 *See* M. D. JONES, *Contextualizing the International Covenant on Economic, Social and Cultural Rights: Assessing the Economic Deficit*, in *International Studies in Human Rights*, Martinus Nijhoff Publishers, 2004.

126 *See*, e.g., H. DHUE, *Rights in Light of Duties* in P. Brown & D. Maclean (eds.), *Human Rights and U.S. Foreign Policy*, Lexington Books, 1979, at 65-82; A. FIDE, *The Rights of Food as Human Rights,* E/CN.4/Sub.2/1987/23; G. VAN HOOF, *The Legal Nature of Economic, Social and Cultural Rights: A Rebuttal of some Traditional Views*, in P. ALSTON and K. TOMASEVSKI (eds.), *The Right to Food, Netherlands,* Martinus Nijhoff, at 331.

127 *See* M. D. JONES, *Contextualizing the International Covenant on Economic, Social and Cultural* Rights, at 29, note 134.

The obligation to respect means that states (and their agents) shall refrain from taking any arbitrary measures (including, legislative and administrative measures) that may obstruct or interfere, either directly or indirectly, with the exercise of the guaranteed socio-economic rights. This obligation has a "negative" dimension, i.e., not to arbitrary deprive individuals of the enjoyment of a particular right.[128] The sole exception to this rule is the one set forth under Article 4 of the Socio-Economic Covenant, according to which states may limit the rights only "by law […] and solely for the purpose of promoting the general welfare in a democratic society".[129]

The exact normative content of this obligation is clarified in several General Comments of the Socio-Economic Committee. For instance, with respect to the right to:

(i) Health (Article 12 of the Socio-Economic Covenant), General Comment No. 14 clarified that the obligation to respect includes, *inter alia*, the obligation to refrain from limiting equal access to health care services as well as from polluting air, water and soil (e.g., through industrial waste from state-owned facilities);[130] and

(ii) Water (Articles 11 and 12 of the Socio-Economic Covenant), General Comment No. 15 clarifies that the obligation to respect includes, *inter alia*, the obligation to refrain from engaging in any practices or activities that may limit or deny equal access to adequate water.[131]

In 2017, the Socio-Economic Committee issued General Comment No. 24,[132] with the aim to clarify the obligations of states in the context of business activities.[133]

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128 *Id.*, at 30.

129 Socio-Economic Covenant, Article 4.

130 UNCESCR, General Comment No. 14, para 34.

131 Para 21.

132 *See* UNCESCR, General Comment No. 24, State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities, UN Doc. E/C.12/GC/24 dated June 23, 2017.

133 *Id.* The General Comment should be read along with the numerous initiatives that have been taken on the topic from the early 70s (and that will be discussed further below).

The comment clarifies that states bear not only the duty to respect socio-economic rights, but also the *duty to ensure that private actors*, including MNCs do not violate these rights.[134] States may violate this obligation also when they *prioritize* certain private interests (including the interest of MNCs) without an *adequate justification* or when they pursue policies that negatively affect these rights.[135] Against this background, General Comment No. 24 clarifies that before entering into investment agreements or contracts, states should:

(i) Identify any potential conflict between their obligations under the Covenant and *under trade or investment treaties* as well as *refrain from entering into* such treaties *where such conflicts are found to exist*;[136]

(ii) Perform human rights impact assessments that take into account both the *positive* and the *negative* human rights impact of trade and investment treaties,

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134 J. H. KNOX, *Horizontal Human Rights*, in *American Journal of International Law*, 2018, at 1.

135 For instance, this may occur when forced evictions are ordered in the context of investment projects (*see* Committee's General Comment No. 21 (2009) on the right of everyone to take part in cultural life, para. 36. *See also* the United Nations Declaration on the Rights of Indigenous Peoples. In this context, the indigenous people's cultural value and rights associated with their ancestral lands are particularly at risk. Accordingly, state parties (and businesses) should respect the principle of free, prior and informed consent of indigenous people in relation to all matters that could affect their rights, including the lands, territories and resources that they have traditionally owned, occupied or otherwise used or acquired (*see* the United Nations Declaration on the Rights of Indigenous Peoples, arts. 10, 19, 28, 29 and 32). *See* A/HRC/19/59/Add.5. *See also* Recommendation CM/Rec (2016) 3 of the Committee of Ministers of the Council of Europe, appendix, para. 23; and Vienna Convention on the Law of Treaties, arts. 26 and 30 (4) (b).

See UNCESCR, General Comment No. 24, State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities, UN Doc. E/C.12/GC/24, para 12. *See also* UNCESCR (2006) General Comment No. 7 (1997) on forced evictions, paras. 7 and 18, respectively; OHCHR and UN-Habitat, Forced Evictions, Fact Sheet No. 25/Rev.1, at 28-29; and A/HRC/25/54/Add.1, paras. 55 and 59-63. *See also Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26, Award dated December 8, 2016, para. 1209.

136 *See* UNCESCR, General Comment No. 24, State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities, UN Doc. E/C.12/GC/24, para 13.

including the *contribution of such treaties to the realization of the right to development*;[137]

(iii) *Regularly assess* the impact on human rights of the implementation of these agreements so as to allow for the adoption of any corrective measures that may be required from time to time;[138] and

(iv) Make sure that by entering into such treaties they do *not derogate from the obligations* under the Covenant.[139]

With specific reference to this last point, the Socio-Economic Committee encourages state to insert (in future treaties) provisions explicitly referring to the state's human rights obligations as well as to ensure that the mechanisms for the settlement of investor-State disputes take human rights into account in the interpretation of investment treaties or of investment chapters in trade agreements.[140]

2.3.1.2. The Obligation to Protect

The obligation to protect requires states to protect individuals against human rights abuses. To "protect" means for the state to "impose respect" and to "*effectively*" prevent infringements of socio-economic rights by all members of the international society, including MNCs. In practice, this implies for states to adopt and enforce "legislative, administrative, educational and other measures", including mechanism able to provide victims of human rights abuses with access to *effective* remedies.[141]

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137 *Id*.

138 *Id*.

139 *Id.*

140 *Id. See*, e.g., *Inter-American Court of Human Rights*, *Sawhoyamaxa Indigenous Community v. Paraguay*, Judgment dated March 29, 2006, Series C No. 146), para. 140; and *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26, Award dated December 8, 2016, para. 1209.

141 This is because by "ratifying the Covenant, a State party commit itself under Article 2 to take all necessary steps […] to put an end to any violations. A Government could not simply state that it did not consider itself guilty of violations; it had to go further and give the assurance that it would actively undertake to put an end to all violations brought to its attention". E/C.12/1998/SR.7, para. 58.

Similarly, to the obligation to respect (see 2.3.1.1, above), the Socio-Economic Committee clarified in several General Comments the normative content of the obligation at issue. For instance, with respect to the right to:

(i) Health (Article 12), the obligation to protect requires, *inter alia*, the obligation to: (a) adopt legislation or to take all appropriate measures necessary to ensure equal access to health-related services provided by third parties; and (b) ensure that the privatization of the health sector does not constitute a threat to the availability, accessibility, and quality of health facilities, goods and services;[142] and

(ii) Water (Articles 11 and 12 of the Socio-Economic Covenant), the obligation to protect requires, *inter alia*, the obligation to: (a) adopt effective legislative and other measures to restrain third parties from denying equal access to adequate water;[143] and (b) prevent third parties operating water supply and management services from compromising equal, affordable, and physical access to water.[144]

The Socio-Economic Committee further clarified that states' obligation to protect includes, *inter alia*, the duty to:

(i) Adopt a legal framework requiring business entities to exercise human rights due diligence in order to identify,[145] prevent and mitigate the risks of violations of Covenant rights, to avoid such rights being abused, and to account for the negative impacts caused or contributed to by their commercial decisions and operations;[146]

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142 UNCESCR, General Comment No. 24, para. 35.

143 *Id*.

144 *Id.*, para. 24.

145 Specifically, "[i]n exercising human rights due diligence, businesses should consult and cooperate in good faith with the indigenous peoples concerned through indigenous peoples' own representative institutions in order to obtain their free, prior and informed consent before the commencement of activities".

146 UNCESCR (2017), General Comment No. 24, para 13. *See also* Guiding Principles on Business and Human Rights, A/HRC/17/31, endorsed by the Human Rights Council in its resolution 17/4, principles 15 and 17.

(ii) Consider imposing criminal or administrative sanctions and penalties, as appropriate, where business activities result in abuses of the Socio-Economic Covenant or where a *failure to act with due diligence* to mitigate risks allows such infringements to occur;[147]

(iii) *Revoke business licenses and subsidies*, if and to the extent necessary, from offenders as well as *revise relevant tax codes*, *public procurement contracts*, export credits and other forms of state support, privileges and advantages in case of human rights violations, *thus aligning business incentives with human rights responsibilities*;[148]and

(iv) "[R]*egularly review* the adequacy of laws and identify and address compliance and information gaps, as well as emerging problems".[149]

State parties enjoy full discretion in deciding the most appropriate means to fulfil these obligations. However, as already mentioned above, the obligation to protect often necessitates direct legislative or regulatory measures, including measures that might impose restrictions on certain businesses in order to protect, e.g., the right to health,[150] the right to adequate housing,[151] right to work,[152] and the right to water.

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147 *See* UNCESCR, General Comment No. 24, para 12.

148 *Id*. See the conclusions attached to the resolution concerning decent work in global supply chains, adopted by the General Conference of the International Labor Organization at its 105th session, para. 16 (c).

149 UNCESCR, General Comment No. 24, para 15. Guiding Principles on Business and Human Rights, principle 17 (c). See also A/HRC/32/19.Add.1, para. 5, and Human Rights Council resolution 32/10.

150 Including measures restricting marketing and advertising of certain goods and services such as tobacco products (in line with the Framework Convention on Tobacco Control), and breast-milk substitutes (in accordance with the 1981 International Code of Marketing of Breast-milk Substitutes and subsequent resolutions of the World Health Assembly).

151 Including measures exercising rent control in the private housing market as required for the protection of everyone's right to adequate housing.

152 Including measures establishing a minimum wage consistent with a living wage and a fair remuneration and/or aimed at gradually eliminating informal or "non-standard" (i.e. precarious) forms of employment, which often result in denying the workers concerned the protection of labor laws and social security.

State parties fail to discharge their obligations and are, therefore, liable under international human rights law whenever e.g., they fail to *prevent* or to *counter* MNCs' conducts that lead (or have the *foreseeable* effect to lead) to such rights being abused (for instance by lowering the criteria for approving new medicines or by not requiring certain control measures to be implemented in relation to potentially damaging products, such as tobacco control measures[153]).

Other examples in which a state might be held liable for a breach of its human rights obligations include situations in which the state: (i) exempts certain investment projects or certain geographical areas from the application of laws that protect socio-economic rights; (ii) fails to regulate the real estate market;[154] (iii) grants exploration and exploitation permits for natural resources without giving due considerations to the potential adverse impacts that such activities may have on the population's socio-economic rights, and (iv) allows corruptive practices in public procurement procedures.[155] As with respect to this last element, it should be noted that corruption constitutes one of the major obstacles to the effective promotion and protection of socio-economic rights.[156] One of the reasons is that these practices undermine states' abilities to (effectively) mobilize resources for the delivery of services essential to the realization of socio-economic rights.[157]

As it will be discussed further below, this obligation is particularly relevant within the context of privatization.

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153 With specific regard to this last measure, the human rights dimension of tobacco control initiatives has been the subject of several interesting cases before arbitral tribunals (see *Philip Morris Brand Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay) v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award dated July 8, 2016, paras 418-419) and human rights courts (see *Wockel v. Germany*, APP No. 32165/96, ECoomHR 1998; and *Novoselov v. Russia*, App. No 66460/01 dated June 2 2005, para. 39).

154 *See* UNCESCR, General Comment No. 24, para. 18. *See also* A/63/263 and A/HRC/11/12.

155 *Id.*

156 *See* Human Rights Council resolution 23/9 and General Assembly resolution A/RES/69/199.

157 *See* UNCESCR, General Comment No. 24, para 20.

2.3.1.3. The Obligation to Fulfill

The obligation to fulfil means that states must take positive actions to facilitate the enjoyment of basic human rights by taking appropriate measures (including, legislative, administrative, budgetary and judicial measures) aimed at ensuring the full realization of these rights. The Socio-Economic Committee has additionally articulated this obligation in three additional sub-categories: the obligation to facilitate, the obligation to promote and the obligation to provide.[158]

Similarly, to the obligation to respect and protect (see paragraphs 2.3.1.1-2.3.1.2, above), the Socio-Economic Committee clarified the normative content of this obligation in several General Comments. For instance, with respect to the right to:

(i) Health (Article 12), the obligation to fulfil include, *inter alia*, the obligation to give sufficient recognition to the right to health in national political and legal systems, preferably by way of *legislative* implementation, and to adopt a national health policy with a detailed plan for realizing the right to health; and

(ii) Water (Articles 11 and 12 of the Socio-Economic Covenant), the obligation to fulfil requires, *inter alia*, the obligation to adopt legislative measures necessary to guarantee the accessibility and availability of water services.

In addition, the Committee clarified that the fulfilment of this obligation may require, among other things, the following activities: (i) the mobilization of resources by the state, including the enforcing of progressive taxation schemes; (ii) seeking business cooperation and support to implement the Covenant rights and comply with other human rights standards; and (iii) directing the efforts of business entities towards the fulfillment of Covenant rights.[159]

2.3.2. State Responsibility for MNCs

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158 *See* UNCESCR, General Comment No. 15, Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights, UN Doc. E/C.12/2002/11, para 25.

159 *See* UNCESCR, General Comment No. 24, paras 23 - 24.

As mentioned above, states not only bear the obligation to respect and fulfil the human rights of their population, but they also have a duty to ensure that private actors (including FDIs) do not violate these rights.[160] Traditionally these human rights obligations are addressed to states and have been primarily intended to regulate the relations between individuals and the state. As will be further discussed below, international law does not impose on non-state actors (including private corporations) direct human rights obligations. Human rights thus have, strictly speaking, no direct horizontal effect, in the sense of being applicable, as a matter of international law in relations between individuals and/or corporations.[161] The essential public/private divide of human rights has also been dealt with by the UN Human Rights Committee in its General Comment No. 31, in which the committee explicitly emphasized that the primary obligations remain with the State.[162]

However, human rights violations committed by non-state actors may entail the state's international responsibility. Specifically, under international law, a state may be liable for the activities of MNCs: (i) empowered by that same state to carry out certain sovereign functions (within the context of privatization procedures); and (ii) under the state's control.

Relevant to this topic is Article 5 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts ("Draft Articles"), which deals with the attribution to states of the conduct of entities which are authorized to exercise governmental authority. Under this provision, the conduct of entities "empowered by the law of that

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160 See C. TUMUSCHAT, *Human Rights: Between Idealism and Realism*, Oxford University Press, 2003, at 309.

161 DE BRABANDERE, *Human Rights and International Investment Law*, in M. KRAJEWSKI (ed.), *Research Handbook on Foreign Direct Investment*, Chentelham, 2019, at 621.

162 Human Rights Committee, General Comment No. 3, Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN Doc. CCPR/C/21/Re.1/Add.13, 2016 ("the article 2, paragraph 1, obligations are binding on States [Parties] and do not, as such, have direct horizontal effect as a matter of international law. The Covenant cannot be viewed as a substitute for domestic criminal or civil law. However the positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amendable to application between private persons or entities").

State to exercise elements of governmental authority shall be considered an act of that State under international law, provided the person or entity is acting in that capacity in the particular instance".[163]

The term entity may include "private companies" empowered by a state to exercise functions of a public character normally exercised by state organs. The meaning of the term "governmental authority" varies depending on the particular society, its history and traditions. As the commentary to the Draft Articles clarifies, of particular importance will be not just the content of the powers, but also the way in which they are conferred on an entity as well as the purposes for which they are to be exercised and the extent to which the entity is accountable to government for their exercise.[164] For instance, a private entity involved in health care will be an entity exercising elements of "governmental authority" if health care is to be considered "governmental" by the state's society, history and tradition, and there is a degree of empowerment of the single entity by internal law.

Article 5 of the Draft Articles addresses the phenomenon of parastatal entities which exercise elements of governmental authority in place of state organs as well as the phenomenon of privatized entities.[165] Privatization is an ongoing process which takes place in economic sectors traditionally managed by states.[166] The purpose of privatization is to bring market *efficiency* and new economic and technical resources to underfunded and poorly managed public enterprises (generally in developing

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163 International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1, Article 5, available at: https://www.refworld.org/docid/3ddb8f804.htm.

164 For instance, whether a corporation that is involved in the health care comes within the scope of Article 5 will depend on the specific circumstances of the case. The answer will depend first on the 'history and traditions' of a particular society. For instance, where health care has been considered "governmental", and there is a degree of empowerment by internal law, then denial of the right to health could be considered an act directly attributable to the state under the law of state responsibility. The same applies to entities involved in the management and distribution of water services.

165 The commentary gives the example of private security services: "For example, in some countries private security firms may be contracted to act as prison guards and in that capacity may exercise public powers such as powers of detention and discipline pursuant to a judicial sentence or to prison regulations".

166 *See* F. BALCERZAK, *Investor-State Arbitration and Human Rights*, at 67, at 51.

countries).[167] Following privatization, states cease to provide certain socio-economic services themselves and outsource them to private entities, which in turn retain public or regulatory functions.

In privatization there is the risk that an entity empowered by a state to provide essential services results uncapable or unwilling to do so.[168] This may in turn constitute an obstacle to the enjoyment of state's population human rights and may entail the international responsibility of the state.[169] Indeed, notwithstanding the outsourcing operation, in privatization the state may be responsible under international law for the entities' failure to correctly distribute and manage essential services, if the requirement under article 5 of the Draft Articles are met (i.e., unlawful act by an entity exercising element of governmental authority).[170]

States should be extremely attentive when choosing to whom and at what conditions they outsource public services and should guarantee that privatization does not become a threat to the availability, accessibility, and quality of that same services. As stated by leading scholars "when entering into privatization agreements [states] are under an obligation to make sure that they are able to honor their human rights obligations. To this end, States might consider subjecting private providers to strict

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167 *See* F. MARRELLA, *On the Changing Structure of International Investment Law: The Human Rights to Water and ICSID Arbitration*, 2010, International Community Law Review, at 343.

168 This situation may occur when the privatization is done improperly (e.g., the concession was obtained through bribery and corruptive practices) and/or the private entity does not provide the services in an appropriate manner. As it will be discussed in the next sections, the case of Argentina and the consequences related to the privatization process of its water and energy services provide a clear example of this. *See* Chapter IV, Section 5.

169 U. KRIEBAUM, *Privatizing Human Rights. The Interface between International Investment Protection and Human Rights*, in (eds.) August Reinisch, Ursula Kriebaum, *The Law of International Relations* – Liber Amicorum Hanspeter Neuhold (Eleven International Publishing, 2007), at 177.

170 F. BALCERZAK, *Investor-State Arbitration and Human Rights*, at 68, note 51. For instance, if a private entity involved in health care fails to provide health services within certain agreed standards, then denial of the right to health may be considered an act directly attributable to the state under the law of state responsibility if health care has been considered "governmental", and there is a degree of empowerment by internal law.

regulations that impose on them so-called 'public service obligations'".[171] For instance, in the privatization of water or electricity services, it might be advisable to impose specific performance requirements on the part of the MNCs in relation to the coverage and continuity of services.[172]

2.3.3. Limitations to the Socio-Economic Rights

Under Article 4 of the Socio Economic Covenant, states parties "may subject" the socio-economic rights "only to such limitations [that] are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society".[173]

Limitations to the socio-economic rights are, therefore, possible to the extent that they are: (a) determined by law, (b) aimed at promoting the general welfare, (c) in a democratic society, and are (d) compatible with the nature of these rights.

First, the limitations must be "determined by law".[174] The focus is not only on the formal existence of the "law", but also on its quality. The law should not be retrospective, arbitrary or discriminatory, and should be accessible and foreseeable, and subject to effective remedies. Such interpretation is confirmed by the case law of the European Court of Human Rights (ECtHR) on similar requirements under the corresponding Convention.[175] The law can be of various forms, including constitutional, administrative, common law, or even international or regional, as long it is accessible and precise.[176]

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171 *Id.*, at 2. *See also Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa* v. *The Argentine Republic*, ICSID Case No. ARB/07/26, Award dated December 8, 2016, para 1290.

172 *See* UNCESCR, General Comment No. 24, para. 22. Similarly, private health-care providers should be prohibited from denying access to affordable and *adequate* services, treatments or information.

173 Socio Economic Covenant, Article 4.

174 *Id*.

175 Sunday *Times* v *UK* (App. 6538/74) dated April 26, 1979, 1980 2 EHRR 245, para 49 *Add additional case law*.

176 *Id.*, paras 248-249.

Second, the limitation must aim at "promoting the general welfare".[177] The concept of general welfare is not further clarified. According to an ordinary interpretation, matters of national security, public order, public health or public morals would seem to follow within said concept.[178] For instance, public infrastructures and development projects can be used as grounds for limiting socio-economic rights. Access to surplus water (that is not essential to survival and thus not covered by the minimum core obligation requirement), might be restricted in time of scarcity or economic crisis. In all these circumstances the question to be discussed will be of whether these measures are "necessary and proportionate" in a democratic society, which brings to the third requirement.

Third, the restrictive measure must be for the purpose of general welfare "in a democratic society". The notion of democratic society is not commonly defined. On this point, the Limburg Principles suggest that "[w]hile there is no single model of a democratic society, a society which recognizes and respect the human rights set forth in the United Nations Charter and the Universal Declaration of Human Rights may be viewed as meeting this definition".[179] This definition seems to impose an additional burden upon states, i.e., to demonstrate that the limitation do not impair the functioning of a democratic society.

The above-mentioned views appear to be supported by the interpretation of similar references to what is necessary in a democratic society under the principle of proportionality of the ECtHR. This principle is used to construe the limit between lawful

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177 Socio Economic Covenant, Article 4.

178 UNGA, Annotations of the text of the draft International Covenants on Human Rights, A/2929 dated July 1, 1955.

179 Limburg Principles on the Implementation of the ICESCR, E/CN.4/1987/17 dated January 8, 1987, para 55. The aim of the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights is to clarify the nature and scope of state parties' obligations under the Socio-Economic Covenant.

and unlawful governmental action,[180] and it is generally considered to be composed of three requirements: suitability, necessity and proportionality.[181]

Suitability requires that a measure is appropriate or helpful to achieve its objective, which should be just. The requirement of necessity corresponds to a "pressing social need", whereas the requirement of proportionality considers whether the restrictive measures undertaken by the state are proportionate to the legitimate aim pursued.[182] Moreover, it verifies whether the effects of the state's measures are not disproportionate or excessive compared to the public purpose. The proportionality test[183] also asks if the restrictions are "relevant" to the legitimate aim and "sufficient" (requiring considerations of the nature, severity, effects and expected harms).[184] Arbitral tribunals are increasingly importing the proportionality test within the context of investment disputes.[185]

With respect to the ECtHR proportionality test, the following consideration should be advanced. Under the ECHR, national authorities are accorded a "margin of appreciation" in the assessment of whether a restriction is justified in a democratic society. By contrast, it would appear that the Socio-Economic Committee and the Human Rights Council (i.e., the body in charge with interpreting the Civil Covenant; "HRC") follow a stricter approach. For instance, the HRC have expressly stated that, under the Civil Covenant, restrictions to the corresponding rights are not to be

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180 The test is used not only by the ECtHR but also by the ECJ, the US Supreme Court (with regard to interstate commerce clauses) and the WTO Appellate body.

181 B. SAUL, D. KINLEY and J. MOWBRAY, *The International Covenant on Economic, Social and Cultural Rights*, at 256, note 28.

182 *See*, e.g., *Silver et al* v *UK* (Apps 5947/72, 6205/73, 7052/75), March 25, 1983, 5 EHRR, 357.

183 *See* J. KROMMNDIJK and J. MORJIN, *'Proportional' by What Measure(s)? Balancing Investor Interests and Human Rights by Way of Applying the Proportionality Principle in Investor-State Arbitration*, in P. DUPUY, F. FRANCIONI, and E. PETERSMANN (eds.), *Human Rights in International Investment Law and Arbitration*, Oxford University Press, 2009, at 438.

184 *See*, e.g., *Dudgeon v. UK* (App. 7525/76) dated October 22, 1981 4 EHHR 149, para. 54.

185 *See* Chapter IV below.

assessed by reference to the margin of appreciation, but a stricter standard of scrutiny would rather apply.[186]

Fourth, state's measures should be "compatible with the nature of these rights".[187] This has been interpreted so as to mean that this element "requires that a limitation shall not be interpreted or applied so as to jeopardize the essence of the rights concerned".[188] In other words, this element introduces an additional limitation, which rules out certain extreme restrictions. To put it differently, minimum core rights can never be limited i.e., the host state's obligation to guarantee minimum essential levels of each socio-economic right (survival rights) should always be discharged.[189] This is because the minimum core level of such rights is already pegged at the low level of what it is necessary to ensure survival or subsistence. The proper application of the proportionality principle would likely achieve the same result. No matter how significant is the public interest, the destruction of core human rights cannot easily be viewed as proportionate, and certainly not if core individual human dignity is accorded sufficient weight.[190]

Survival rights are clearly of a different order of importance than certain civil and political rights, the restriction of which does not necessarily endanger a person's very survival. The same is true for the property rights of businesses, which might be "touched" by measures undertaken by states when fulfilling their socio-economic human rights obligations.

On a final note, contrary to the Civil Covenant, the Socio-Economic Covenant does not contain an express derogation clause (similar to the non-precluded measures), addressing specifically whether derogation from Socio-Economic Rights is permitted in the event of public emergency. The absence of a derogation clause can

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186 *See* B. SAUL, D. KINLEY and J. MOWBRAY, *The International Covenant on Economic, Social and Cultural Rights*, at 256, note 28. *See* also Chapter IV below.

187 Socio Economic Covenant, Article 4.

188 Limburg Principles on the Implementation of the ICESCR, E/CN.4/1987/17, dated January 8, 1987, para. 56.

189 *See* B. SAUL, D. KINLEY, and J. MOWBRAY, *The International Covenant on Economic, Social and Cultural Rights*, at 256, note 28.

190 *Id*.

be only understood to mean that the suspension of socio-economic rights is never permitted.[191]

2.4. The Socio-Economic Obligations of Business Entities and the Question of the Corporate Social Responsibility

Traditionally multinational corporations do not have binding human rights obligations. This is because under international law, states are the only entities unequivocally and "fully-fledged" with international personality and as such subjects of international law.[192] Individual and corporations instead do not possess legal personality (i.e., they are not subject of international law) and, therefore, cannot be the addressee of obligations, including human rights obligations.

Notwithstanding the foregoing, there exists under international law no actual legal impediment to the recognition of a legal personality to MNCs. Indeed, the status of a subject under international law result from the rights and duties conferred to the same and not vice versa.[193] For instance, international organizations have partial subject status under international law. This status arises from the right and duties expressly conferred to them by states by way of interstate agreements. Alike

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191 *Id.*, at 258.

192 International organizations do in certain circumstances satisfy some of the conditions. When they are endowed with international legal personality, international organizations are usually described as "ancillary" subjects of international law, as they remain instruments in the hand of states. They have often limited competence and field of action; they clearly have rights and duties, and also play a significant role in the making of international relations and law, particularly in the field of human rights and environmental law.

193 With this respect, the ICJ defines a subject of international law as an entity capable of possessing international rights and duties and having the capacity to maintain its rights by bringing international claims. Specifically, according to the ICJ: "[i]t is clear that 'international personality' is not an absolute concept. It is relative in the sense that different types of international legal person may have different types or layers of international personality. Generally (and not exhaustively), international personality entails the ability to bring claims before international tribunals exercising an international legal jurisdiction, to enjoy rights and be subject to international legal obligations, to participate in international law creation, to enjoy the immunities attaching to international persons within national legal systems, to participate in international organizations and to conclude treaties". M. DIXON and R. MCCORQUODALE, *Cases and Materials on International Law*, Oxford, 2003, at 132.

international organization, MNCs may acquire partial subject status under international law via international treaties.[194]

Although, there exists no legal obstacle to the formation of direct human rights obligations on corporations, these obligations still do not exist in practice. With certain few exceptions, treaty-based human rights law, as embodied in the six main international conventions (including the Socio-Economic Covenant) and the three major regional treaties, does not create direct obligations on and between non-state actors, including MNCs. The wording of the treaties is unequivocal. State parties "respect", "ensure", "take steps toward achieving", and undertake "human rights" obligations. The treaty obligations themselves are only owed by states.[195]

That is not to say that human rights treaties and instruments do not affect the relations in the human rights sphere. They clearly do so.

First and foremost, most of the human rights instruments analyzed above recognize the key role played by MNCs in the promotion, protection and progressive fulfilment of socio-economic rights (generating at least an obligation of a moral or ethical nature).[196] For instance, the preamble of the Declaration expressly recognizes that "every individual and every organ of society" (including, therefore, MNCS) plays a role in the promotion of human rights. Articles 29 and 30 of the Declaration seems to provide for the obligation of MNCs not to be complicit in human rights abuses committed by states.[197] Similarly, Articles 5, paragraph 1 of the Socio-Economic

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194 *See Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26, Award dated December 8, 2016, para 1290.

195 *See* J. RUGGIE, *Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate* Acts, 2007, para 20. See also Human Rights Committee, General Comment No. 31, Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.13, 2004.

196 Vienna Convention on the Law of Treaties, Article 31. *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa* v. *The Argentine Republic*, ICSID Case No. ARB/07/26, Award dated December 8, 2016, para 1290.

197 Specifically, pursuant to the preamble "every individual and every organ of society [including therefore MNCS] shall strive to promote respect for those rights and freedoms". Article 29 of the Declaration further clarifies that "everyone" (including, therefore, MNCs) has "duties to the community in which alone the free and full development of his personality is possible". Finally, Article 30 expressly extends the

Covenant denies to any "group or person" the right to " engage in any activity or to perform any act aimed at the destruction of any of the rights or freedoms recognized herein."[198]

The central role played by MNCs in the promotion, protection and progressive fulfilment of Socio-Economic Rights has also been recognized and clarified by the Committee in several of its general comments. For instance, in General Comment No. 11, the Committee clarified that, while only states are parties to the Covenant and are thus ultimately accountable for compliance with the treaty, "all members of society […] have responsibilities in the realization of the rights", including "the private business sector".[199] General Comment No. 18 instead emphasized the central role played by MNCs in the promotion of the right to work and, in particular, in the creation of jobs that comply with certain standards and policies.[200]

Due their key relevance for the promotion and protection of human rights, several attempts have been made to impose direct human rights obligations on

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categories of possible violators of human rights beyond states so as to include MNCs. *See* S. F. PUVIMANASINGHE, *Foreign Human Rights and the Environment*, *A Perspective from South Asia on the Role of Public International Law for Development*, Martinus Nijhoff Publishers, 2007, at 126. At a minimum, these provisions set forth the obligations of non-state actors not to be complicit in human rights obligations committed by states.

198 Socio-Economic Covenant, Article 5.

199 See also General Comment No. 24. Businesses play an important role in the realization of economic, social and cultural rights, inter alia by contributing to the creation of employment opportunities and — through private investment — to development. However, the Committee on Economic, Social and Cultural Rights has been regularly presented with situations in which, as a result of States' failure to ensure compliance, under their jurisdiction, with internationally recognized human rights norms and standards, corporate activities have negatively affected economic, social and cultural rights.

200 Specifically, the relevant paragraph of the General Comment reads as follows: "[p]rivate enterprises - national and multinational - while not bound by the Covenant, have a particular role to play in job creation, hiring policies and non-discriminatory access to work. *They should conduct their activities on the basis of legislation*, administrative measures, codes of conduct and other appropriate measures promoting respect for the right to work, agreed between the government and civil society. Such measures should recognize the labour standards elaborated by the ILO and aim at increasing the awareness and responsibility of enterprises in the realization of the right to work". *See* UNCESCR, General Comment No. 18, para 52.

MNCs.[201] Some of the attempts date back to the 70s. Although these attempts have been so far unsuccessful, they have generated an ample body of soft law instruments, which provide human rights standards to be followed by MNCs in their day-to-day operations. It is presumed that at one point this standard will become hard law.

Some of these initiatives will be analyzed succinctly in the paragraphs to follow.

2.4.1. Early UN Initiatives on Business and Human Rights

In the mid-70s, the United Nations Economic and Social Council requested the UN Secretary General to create a commission group with the mandate to study the impact of MNCs on development processes and international relations.[202] The Commission was created in 1973, with the aim, among others, to formulate a "set of recommendations [to MNCs] which, taken together, would represent the basis for a code of conduct dealing with transnational corporations".[203] Due to disagreements between developed and developing countries on several issues, the Commission was unable to agree on the content of a code of conduct,[204] and was ultimately dissolved in 1994. Notwithstanding this failure, the UN continued to pursue the project of a code of conduct that would impose on MNCs specific human rights obligations.[205]

2.4.2. UN Global Compact

In 1999, the former UN Secretary General Kofi Annan presented at the World Economic Forum in Davos the so-called UN Global Compact ("Compact").[206] The

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201 CESCR, Concluding Observations: India, E/C.12/IND/CO/5 dated August 5, 2008.

202 The Commission was created on December 1974 under Resolution 1913 (LVII) and was composed of 48 states members, elected by the Economic and Social Council on "a broad and fair geographical basis". *See* <https://digitallibrary.un.org/record/215243/files/E_RES_1913%28LVII%29-EN.pdf>.

203 *Id.*, para 3(d).

204 *See* P. MUCHLINSKI, *Multinational Enterprises and The Law*, Blackwell Publishers, 1995, at 593-96.

205 *See*, e.g., *Social Responsibility of Transnational Corporations, U.N. Conference on Trade and Development*, at 8 (1999), available at: <http://www.unctad.org/en/docs//poiteiitm2l.en.pdf>; and Social Responsibility, U.N. Conference on Trade and Development, U.N. Doc. UNCTAD _ITEI/22 (2001), available at: <http://www.unctad.org/en/docs//pstieiitd22.en.pdf>.

206 *See*, *e.g.*, L. B DE CHAZOURNES and E. MAZUYER, *Le Pacte mondial des Nations Unies 10 ans après*, Bruxelles, Bruylant, 2011; E. DECAUX, *La responsabilité des sociétés*

Compact is a non-binding pact aimed at encouraging businesses worldwide to adopt sustainable and socially responsible policies in their day-to-day business and to report on their implementation. Since its inception, the Compact operates as a sort of public-private partnership ("PPP"),[207] involving multinational companies[208] from over 160 countries as well as UN agencies, government, labor and civil society groups.[209]

The purpose of the initiative is twofold. *First*, to encourage MNCs worldwide to perform their activities in accordance with certain universally accepted human rights standards and principles set forth in the Compact itself.[210] *Second*, to contribute to the realization of the Millennium Development Goals and the 2030 Agenda. Specifically, members of the Compact committed to join the UN in partnership projects to the benefits of developing countries.

By subscribing the Compact, MNCs agree to align their operations and strategies to the ten principles contained within the document, and more specifically to:

(i) "[S]upport and respect the protection of internationally proclaimed human rights" as well as to "make sure that they are not complicit in human rights abuses" (Articles 1 and 2);

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transnationales en matière de droits de l'homme, RSC, 2005, at 789; C. MALECKI, *Responsabilité sociale des entreprises. Perspectives de la gouvernance d'entreprise durable*, Paris, LGDJ, 2014, No. 47; R. DE QUENAUDON, *Droit de la responsabilité sociétale des organisations. Introduction*, Bruxelles, Larcier, 2014, at 234-242.

207 The Compact also represents a form of public-private partnership ("PPP") or co-regulation which usually involves a combination of government, multilateral, civil society and business interests. It can also be characterized as a multi-stakeholder initiative, which in this case involves a multilateral organization. *See* UNRISD, *Corporate Social Responsibility and Business Regulation*, Research and Policy Brief I, UNRISD/P/B/04/1 IF 19 March 2004, at 1-2.

208 Currently, around 1400 MCS are involved in the project from over 160 countries, including Argentina. See United Nations Global Compact, *See who's involved* available at: <https://www.unglobalcompact.org/what-is-gc/participants>.

209 *Id*.

210 *Id*. According to this document, a human rights-based approach to business would contribute to the emergence of more stable global markets (based on the principle of equality) and to more open and prosperous societies.

(ii) Uphold "the elimination of all forms of forced and compulsory labor", "the effective abolition of child labor", and "the elimination of discrimination in respect of employment and occupation" (Articles 3-6);

(iii) Support "a precautionary approach to environmental challenges" and "undertake initiatives to promote greater environmental responsibility" (Articles 7-9); and

(iv) "Work against corruption in all its forms, including extortion and bribery" (Article 10).[211]

Moreover, under the Compact the MNCs are required to: (i) communicate in an annual report and/or other major public reports, steps and progresses made in implementing the ten principles; and (ii) take initiatives to actively promote the Compact and underlying principles also by resorting to press releases, and public statements.[212]

The Compact has been the subject of several criticisms, which include the lack of attention to the criteria and procedures for choosing the corporate partners, and the tendency to ignore basic inconsistencies between the policy interests of developing countries and the economic interests of corporations.[213] A second major criticism is the lack of compliance and enforcements mechanisms which renders the initiative

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211 S. F. PUVIMANASINGHE, *Foreign Human Rights and the Environment*, *A Perspective from South Asia on the Role of Public International Law for Development*, Martinus Nijhoff Publishers, 2007, at 129.

212 *Id*.

213 *See*, e.g., A. ZAMMIT, *Development at Risk: Re-thinking UN-Business Partnerships, UNRISD/South Centre*, Geneva, 2003. Specifically, it has been argued that more could be achieved if the Compact was to divert its energies and resources to boosting developing country efforts to improve labor, human rights and environmental standards in ways that contributed to more socially inclusive patterns of development.

inefficient.[214] The Compact has also come under criticism for being seen as a new form of marketing.[215]

2.4.3. The UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights

On August 2003, the Sub-Commission on the Promotion and Protection of Human Rights approved the draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights.[216] These norms essentially sought to impose on MNCs the same range of human rights obligations that States have accepted for themselves under the relevant treaties.[217] The only distinctions was that States would have had the "primary" duty, whereas corporations would have kept "secondary" duties, and solely within their "spheres of influence".[218] This proposal triggered a deeply divisive debate within the business community[219] and human rights advocacy groups while evoking little support from

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214 Originally no compliance mechanism was foreseen. In 2003, the Global Compact Office introduced a new provision on Report on the Progress, requiring participating companies to inform their stakeholders (consumers, employees, union, shareholders, media, public authorities, etc.), every year, on the progress made in integrating the principles laid down, using their annual report, sustainability report or other public reports, their website or any other means of communication.

215 H. GHERARI, *Le profil juridique et politique du Pacte mondial*, in L. BOISSON DE CHAZOURNES, *Le Pacte mondial des Nations Unies 10 ans après*, Bruylant, Bruxelles, 2011, at 7.

216 UN sub-commission on the Promotion and Protection of Human Rights, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights*, UN Doc E/CN.4/Sub.2/2003/12/Rev.2.

217 A/HRC/17/31, para. 2.

218 https://www.business-humanrights.org/sites/default/files/reports-and-materials/Ruggie-protect-respect-remedy-framework.pdf.

For an in depth review of the norms, *see* S. DEVA, *UN's Human Rights Norms for Transnational Corporations and other Business Enterprises: an Imperfect Step in the Right Direction?*, in ILSA *Journal Of International & Comparative Law*, 2004, at 493-524, 497.

219 Considerable opposition to the norms was voiced from different quarters, including some states, enterprises as well as industry bodies like the International Chamber of Commerce (ICC), the International Organization of Employers, and the US Council for International Business. The main argument was that national governments and (not corporations) are responsible for the enforcement of human rights obligations, and should do that through developing and enforcing domestic standards.

Governments.[220] Due to these reasons, the Commission on Human Rights declined to adopt the document. Although, the norms were not approved, this development clearly reflected the necessity as well as urgency on part of the UN to draft specific rules in a new world order in which States no longer enjoy the monopoly of "human rights violators".[221]

2.4.4. The UN Protect, Respect and Remedy Framework

In 2005, then UN Secretary-General Kofi Annan appointed Harvard Professor John Ruggie with the goal of moving beyond the stalemate and clarify the roles and responsibilities of States and MNCs in the business and human rights sphere. The work of the Special Representative took place in three phases. The first phase was defined by the Special Representative's original mandate, which was set forth for a period of two years and it was mainly intended at identifying and analyzing the existing standards and practices on the issue of business and human rights.[222] In 2007, the UN Human Rights Council extended the mandate of the Special Representative by one

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220 *Id*.

221 Indeed, the initiative came at the end of the 90s, a period where the liability of businesses in relation to human rights "inflamed" due to the activities (mainly US companies) performed by oil, gas, and mining companies in developing countries. *See* B. STEPHENS, *The Amorality of Profit: Transnational Corporations and Human Rights*, in Berkeley Journal of International Law, 45, 2001, at 51-53; A. X. FELLMETH, *Wiwa v. Royal Dutch Petroleum Co.: A New Standard for the Enforcement of international Law in the U.S. Courts?*, in *Yale Human Rights and Development Law Journal*, 2002, 241, at 244-45; A. K. SACHAROFF, *Multinationals in Host Countries: Can They be Held Liable Under the Alien Tort Claims Act for Human Rights Violations?*, in *Brooklyn Journal of International Law*, 1998, at 927, 958-64; J. C. ANDERSON, *Respecting Human Rights: Multinational Corporations Strike Out*, in *University of Pennsylvania Journal of Labor and Employment*, 2000, at 463; L. AYOUB, *Nike Just Does It and Why the United States Shouldn't: The United States' International Obligation to Hold MNCs Accountable for Their Labor Rights Violations Abroad*, in *DePaul Business and Commercial Law Journal*, 1999; A. RAMASASTRY, *Corporate Complicity: From Nuremberg to Rangoon. An Examination of Forced Labor Cases and Their Impact on the Liability of Multinational Corporations*, in *Berkeley Journal of International Law*, 2002, at 91; M. MONSHIPOURI et al., *Multinational Corporations and the Ethics of Global Responsibility: Problems and Possibilities*, Human Rights Quarterly, 2003, at 965.

222 To this end, the Special Representative launched an extensive research program that continued until the beginning of 2011. Several thousand pages of documentation have been published on hiip://www.businesshumanrights.org/SpecialRepPortal/Home. The Special Representative submitted also an interim report. *See* E/CN.4/2006/97 dated February 21, 2006.

year and invited him to submit recommendations on the topic. This extension marked the second phase of the Special Representative's mandate.

At the outset of the second phase of its mandate, the Special Representative observed as follows:

> "There were many initiatives, public and private, which touched on business and human rights. But none had *reached sufficient scale to truly move markets*; they existed as separate fragments that did not add up to a coherent or complementary system. One major reason has been the *lack of an authoritative focal point* around which the expectations and actions of relevant stakeholders could converge."[223]

Therefore, in June 2008, after three years of extensive research and consultations with governments, MNCs and civil societies, the Special Representative made only one recommendation: that the Council endorsed the "Protect, Respect and Remedy" Framework ("Framework") he had developed. The Council did so, unanimously "welcoming" the Framework in its Resolution No. 8/7 and providing, thereby, the *authoritative* focal point that was missing.[224]

The Framework rests on the following three pillars. *First*, States have the *primary* duty to protect all human rights from abuses by, or involving, MNCs through appropriate policies, regulations, and adjudication. *Second*, the Framework affirmed the corporate responsibility of all MNCs to respect all human rights and corresponding applicable law (legality requirement). Far from imposing a direct responsibility under international law, the Framework requires MNCs to act with *due diligence* to avoid infringing on the rights of others and to address the adverse impact of their businesses on time. *Third*, the Framework urges for the need to create *effective remedies*,

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223 UN 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' UN Doc A/HRC/17/31.

224 *Id.*, para. 5; and A/HRC/RES/8/7.

including through appropriate judicial or non-judicial mechanisms.[225] As the Report further provides "[e]ach pillar is an essential component in an inter-related and dynamic system of preventative and remedial measures: the State duty to protect because it lies at the very core of the international human rights regime; the corporate responsibility to respect because it *is the basic expectation society has of business in relation to human rights*; and access to remedy because even the most concerted efforts cannot prevent all abuses."[226]

By Resolution No. 8/7 (welcoming the Framework), the Council also extended the Special Representative's mandate for an additional period of three years (until 2011) in order to "operationalize" the Framework by, among others: (i) providing views and concrete and practical recommendations on ways to strengthen the fulfilment of State's duty to protect all human rights from abuses by or involving transnational corporations and other business enterprises, including through international cooperation; (ii) elaborating further on the scope and content of the corporate responsibility to respect all human rights and to provide concrete guidance to business and other stakeholders; and (iii) exploring options and making recommendations, at the national, regional and international level, for enhancing access to *effective remedies* available to those whose human rights are impacted by MNCs' activities.[227]

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225 *Id.*, para. 1.

226 *Id.*, para 6.

227 *Id*. The Resolution further requested the Special Representative to: (i) integrate a gender perspective throughout his work and to give special attention to persons belonging to vulnerable groups, in particular children; (ii) identify, exchange and promote best practices and lessons learned on the issue of transnational corporations and other business enterprises, in coordination with the efforts of the human rights working group of the Global Compact; (iii) work in close coordination with United Nations and other relevant international bodies, offices, departments and specialized agencies, and in particular with other special procedures of the Council; (iv) promote the framework and to continue to consult on the issues covered by the mandate on an ongoing basis with all stakeholders (including states, national human rights institutions, international and regional organizations, transnational corporations and other business enterprises, and civil society, including academics, employers' organizations, workers' organizations, indigenous and other affected communities and non-governmental organizations, including through joint meetings); and (v) report annually to the Council and the General Assembly.

This represented the third phase of the Special Representative's mandate.[228] During the interactive dialogue at the Council's June 2010 session, delegations agreed that the recommendations should take the form of "Guiding Principles".[229]

On March 24, 2011, the Special Representative presented its final report to the Human Rights Council. The Report sets forth the UN Guiding Principles on Business and Human Rights ("UNGP"), which were endorsed by the Human Rights Council in its Resolutions 17/4 of June 16, 2011.[230] The UNGP are articulated in three general (also called foundational) principles that reflect the three main pillars, and operational principles that provide clarification on how to render operative the foundational principles.

The UNGP[231] are not legally binding, and they have a soft law nature. As clarified by the same the Special Representative himself:

> "The Guiding Principles' normative contribution lies not in the creation of new international law obligations but in *elaborating the implications of existing standards and practices for States and businesses*; integrating them within a single, logically coherent and comprehensive template; and *identifying where the current regime falls short and how it should be improved*."[232]

The document therefore is a non-binding instrument that is not premised on the idea of a direct human rights responsibility of corporations under international law.

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228 F. MARRELLA, *On the Changing Structure of International Investment Law: The Human Rights to Water and ICSID Arbitration*, 2010, International Community Law Review, at 75.

229 A/HRC/RES/8/7, para. 9.

230 As the Special Representative clarified, the "Council endorsement of the Guiding Principles, by itself, will not bring business and human rights challenges to an end. But it will mark the end of the beginning by establishing a common global platform for action, on which cumulative progress can be built, step-by-step, without foreclosing any other promising longer-term developments".

231 Each Principle is accompanied by a commentary further clarifying its meaning and implications.

232 UN Doc. A/HRC/17/31, para. 14.

However, it states in a clear and concise way what should be the conduct of a MNCs that operates in respect of human rights.

Specifically, the UNGP provides that all MNCs should conduct their activities respecting all internationally recognized human rights. This responsibility refers to all internationally recognized human rights, insofar as the activity of MNCs can have an impact on "virtually the entire spectrum of human rights".[233] The benchmarks against which MNCs should assess the human rights impact of their activities are generally set forth in the International Bill of Human Rights (consisting of the Universal Declaration of Human Rights and the two international Covenant), as well as in the principles concerning fundamental rights in the eight ILO core conventions as set out in the Declaration on Fundamental Principles and Rights at Work).[234] However, depending on the specific circumstances of the case, MNCs may need to consider additional standards. For instance, certain projects may require a special attention in relation to the specific rights of indigenous people in which all the instruments that have been elaborated on the rights of indigenous people should be taken into consideration.[235]

The responsibility to respect requires MNCs to: (i) avoid causing or contributing to causing human rights violations through their own activities or as a result of their business relationships with third parties; and (ii) seek preventing or mitigating human rights violations that are directly linked to their operations and services, even if they have not directly contributed to it. The responsibility therefore extends also to any adverse activity arising from business relationships with business partners, including state-owned companies.[236] This brings the question of complicity with human rights violations perpetrated by the host state. Complicity may arise not only when a MNC contributes (or is seen as contributing) to human rights violations caused by third parties or the host state, but also when it benefits from these abusive conducts.[237] In

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233 UNGP, para. 12.

234 UNGP, at 9.

235 UNGP, at 14.

236 UNGP, at 23.

237 As a legal matter, most national jurisdictions prohibit complicity in the commission of a crime, and a number allow for criminal liability of business enterprises in such cases. Under international criminal case law, the relevant standard for aiding and abetting is

cases of complicity, the factors that will enter into determination to for the purpose of evaluating the MNCs' accountability are several and include the enterprise's leverage over the entity concerned, how crucial is the relationship between the MNC as this entity, the severity of the abuse, and whether the MNC's termination of the relationship with the entity would have had adverse human rights consequences.[238]

The responsibility extends to all MNCs irrespective of the geographical area of operation (i.e., developed or developing countries). Where specific domestic context renders it impossible to fully meet this responsibility, MNCs are expected to respect the principles of internationally recognized human rights to the greatest extent possible. This is especially true in some operating environment characterized by high political risk (including conflict areas).[239] Operating in these environments may increase the risk of the enterprise being complicit of human rights abuses committed by other actors. Moreover, corporate directors, officers and employees may be subject to individual liability for acts that amount to gross human rights abuses.[240] These abusive conducts can generate serious costs on the MNCs, including reputational damages.

First, MNCs should express their commitments to meet their human rights responsibilities though a statement of policy (or whenever means an enterprise employs to set out publicly its responsibilities and commitments), which should be approved and issued by the MNC's management.[241] The statement should be made publicly available and should be communicated actively to all entities with which the MNC has contractual relationships, including state entities, and investors.[242]

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knowingly providing practical assistance or encouragement that has a substantial effect on the commission of a crime.

238 UNGP, at 9.

239 UNGP, Article 7.

240 UNGP, Article 23.

241 UNGP, Articles 16-17.

242 UNGP, Article 24.

Second, MNCs should perform a human rights due diligence aimed at identifying,[243] preventing (also with the assistance of human rights expertize), mitigating[244] and accounting for how they address adverse human rights impacts. Since human rights situations are dynamic, human rights impact assessments should be undertaken though the whole cycle of the MNC's activity and/or project and at regular intervals. In any event, human rights due diligence should be initiated as early as possible in the development of a new activity or relationship, insofar as human rights risk can be evaluated and mitigated already at the early stage of an investment project. The human rights due diligence can be included in broader enterprise risk management systems (such as risk as environmental risk assessments).[245]

Third, MNCs should enable the remediation of any adverse human rights impact they cause or to which they contribute to. Where a MNC identifies such a situation (either through its human rights due diligence process or otherwise), its responsibility to respect requires an active engagement in the remediation activity.[246]

On a final note, it should be emphasized that these obligations exist: (i) independently from the state's abilities and/or willingness to fulfil its own human rights obligations, and (ii) *over and above* compliance with national regulations protecting human rights.[247] Accordingly, if a state passes legislation that is in clear breach of human rights standard, the MNC should avoid investing in this country.

2.4.5. The Drafts Convention on Business and Human Rights

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243 The initial step of the human rights due diligence is to identify and assess the nature as well as the actual and potential negative impact a given business can produce on human rights. Typically this would include assessing the human rights framework prior to a proposed business activity, including by identifying the relevant applicable standards and obligations as well as the specific human rights that might be affected. In this process, particular relevance should be given to the vulnerable and marginalized groups, including indigenous population, women and children.

244 With this regard, Article 19 of the UNGP provides that "in order to prevent and mitigate the adverse human rights impacts, business enterprises should integrate the findings from their impact assessments, across relevant international functions and processes, and take appropriate action".

245 UNGP, Article 18.

246 UNGP, Article 24.

247 UNGP, Article 13.

On July 2014, the HRC established an open-ended intergovernmental working group with the aim to elaborate a legally binding instrument to regulate the activity of MNCs (as well as domestic enterprises).[248] On July 16, 2018, the working group published the Zero Draft ("Zero Draft").[249]

The purpose of the Zero Draft was to "strengthen the respect, promotion, protection and fulfilment of human rights" and to "ensure effective access to justice and remedy to victims of human rights violations" in the context of MNCs.[250] The document placed considerable relevance on the obligations of MNCs to perform human rights due diligences before starting activities.[251]

The Zero Draft was heavily criticized by the business community, according to which the document did not provide a sound basis for a possible future standard on business and human rights.[252] It was said that the Zero Draft would greatly undermine countries' development opportunities and would create a lopsided global governance system that would result in significant gaps in human rights protection.[253]

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248 *See* Human Rights Council, *26/9 Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights*, UN Doc. A/HRC/RES/26/9 dated July 14, 2014, available at: <http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/26/9>.

249 *See* Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and other Business Enterprises dated July 16, 2018, Zero Draft, available at: <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/DraftLBI.pdf>.

250 Zero Draft, Article 2.

251 Zero Draft, Article 9.

252 *See* Business response to the Zero Draft Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises and the Draft Optional Protocol to the Legally Binding Instrument ("Draft Optional Protocol") Annex, available at: <https://cdn.iccwbo.org/content/uploads/sites/3/2018/10/icc-joint-business-response-zero-draft-2018.pdf>.

253 Taken as a whole, the legal regime that the Zero Draft Treaty and Draft Optional Protocol would create is legally imprecise; divergent with established standards and laws; incompatible with the aim of promoting inclusive economic growth and investment; at risk of enabling politically-motivated prosecutions; and - crucially - not capable of serving all victims of human rights abuses.

On July 16, 2019, a revised draft was released ("Revised Draft"). The Revised Draft includes some major novelties, including: (i) the proposal for the creation of a "comprehensive" system of legal liability for human rights abuses committed by MNCs or with their participation; and (ii) a standard of legal responsibility of one company in relation to the harm caused by another company, no matter where the latter is located, when the former company controls or supervises the activities that caused the harm.[254]

What however strikes about this draft treaty is that is still does not impose direct human rights obligations on MNCs, emphasizing once again that states are the one having primary responsibility when it comes to human rights standards.

2.4.6. Other Human Rights Initiatives

Several other international organizations have developed instruments aimed at setting forth human rights standards for MNCs, including the Intentional Labor Organization ("ILO"), and the OECD.

a) The International Labor Organization Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy

The Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy ("TDP")[255] was first adopted by ILO in 1977, and subsequently amended several times; most recently in March 2017 to reflect the guidelines provided by the UNGP.[256] The TDP offers guidelines in the fields of employment, training, conditions

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254 *See* <https://www.business-humanrights.org/en/legal-liability-for-business-human-rights-abuses-under-the-revised-treaty-on-business-and-human-rights>.

255 Adopted by the Governing Body of the ILO, Geneva, 1977, and amended in 2000, Official Bulletin, LXXXIII, 2000, Series A, No. 3.

256 The Governing Body of the International Labor Office approved the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy at its 204th Session (November 1977) and subsequently amended it several times.

of work and life, and industrial relations which governments and MNCs are recommended to observe[257] on a voluntary basis.[258]

Before introducing the general and specific guidelines, the TDP recognizes that the "continued prominent role of multinational enterprises in the process of *social and economic globalization* renders the application of the principles of the MNE Declaration *important* and *necessary* in the context of foreign direct investment and trade, and the use of global supply chains".[259]

Furthermore, the TDP provides, *inter alia*, that MNCs should:

(i) Operate in a way that is "consistent with national law and in harmony with the development priorities and social aims and structure of the country in which they operate";[260]

(ii) Endeavor to increase employment opportunities and standards (especially when operating in developing countries), taking into account the employment policies and objectives of the host state's government;[261]

(iii) Consult with the competent national authorities before starting operation, in order to keep their employment plans in line with national social development policies;[262]

(iv) respect the minimum age for admission to employment or work in order to secure the effective abolition of child labor in their operations";[263] and

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257 *Aim and Scope*. The declaration reflects the understanding that the different actors have a specified role to play with respect to human rights.

258 Each state will further choose the most appropriate law, measures and actions to implement such guidelines.

259 Introduction.

260 TDP, para. 11. The provision further clarifies that "[t]o this effect, consultations should be held between multinational enterprises, the government and, wherever appropriate, the national employers' and workers' organizations concerned."

261 TDP, para. 16.

262 TDP, para. 17. The provision further clarifies that "such consultation, as in the case of national enterprises, should continue between the multinational enterprises and all parties concerned, including the workers' organizations".

263 TDP, para. 27.

(v) maintain the highest standards of safety and health, *in conformity with national requirements*.[264]

The TDP is not legally binding on states or MNCs.

b) The OECD Guidelines on Multinational Corporations

The OECD Guidelines on Multinational Corporations ("OECD Guidelines") were first adopted in 1976, and subsequently amended several times; most recently in May 2011.[265] The OECD Guidelines are the only multilaterally agreed and comprehensive code of responsible business conduct that governments have committed to promote. The OECD Guidelines (i) are recommendations addressed by governments to MNCs operating in OECD countries; (ii) provide for non-binding principles and standards for responsible business conduct in a global context consistent with applicable laws and internationally recognized standards; and (iii) aim at promoting positive contributions by MNCs to the economic, environmental and social progress worldwide.[266]

The updated guidelines are an improvement of their predecessors and among the novelties they include: (i) a new human rights chapter, which is consistent with the UNGP; (ii) a new and comprehensive approach to due diligence and responsible supply chain management (representing significant progress relative to earlier approaches); and (iii) a pro-active implementation agenda to assist enterprises in meeting their responsibilities as new challenges arise.[267]

Under the updated guidelines, MNCs should, *inter alia*: (i) contribute to the economic, environmental and social progress of the state with a view to achieving sustainable development; (ii) respect the internationally recognized human rights of those affected by their activities; (iii) encourage human capital formation; (iv) refrain from seeking or accepting exemptions not contemplated in the statutory or regulatory framework in relation to environmental, health, safety, labor matters and human rights

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264 TDP, para. 44.

265 OECD, Guidelines for Multinational Enterprises, 2011, OECD Publishing available at: <http://dx.doi.org/10.1787/9789264115415-en>.

266 *Id*.

267 *Id.*, Introduction.

matters; (v) avoid causing (or contributing to cause) adverse impact on matters covered by the OECD Guidelines; and (vi) carry out risk-based due diligence (by, e.g., incorporating them into their enterprise risk management systems) in order to identify, prevent and mitigate actual and potential adverse human rights impact.[268]

3. The UN Declaration on the Rights to Development and the Corresponding Rights and Obligations

The UN Declaration on the Right to Development ("DRTD") was adopted on December 4, 1986. Article 1 of the DRTD provides that "the right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development".[269] Under Article 2, the central focus of the development process are human beings, who should be the active participant and beneficiary of the right to development.[270] Article 3 of the DRTD upholds the key human rights principles of equality, no discrimination, participation, accountability, transparency, and international cooperation. Moreover, the declaration places a special focus on the "responsibility" of "all human beings […] for development".[271] This provision is key as it recalls the principle that every member of society is responsible for the fulfilment of the right to development, including MNCs.[272]

Under the declaration, states have the *primary responsibility* for the creation of national and international conditions favorable to the realization of the right to development. Specifically, states have the duty, *inter alia*, to:

(i) *formulate appropriate national development policies* aimed at the constant improvement of the well-being of the entire population;[273]

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268 *Id*.

269 DRTD, Article 1.

270 DRTD, Article 2.

271 DRTD, Article 3.

272 *See* Chapter II above.

273 DRTD, Article 2.3.

(ii) Co-operate with each other in ensuring development and eliminating obstacles to the same;[274]

(iii) Take *steps*, "*individually and collectively*", to formulate international development policies with a view to facilitating the full realization of the right to development;[275]

(iv) Give "equal attention and urgent consideration […] to the implementation, promotion and protection of civil, political, economic, social and cultural rights" insofar as "all "human rights and fundamental freedoms are indivisible and interdependent";[276]

(v) Take all necessary steps to eliminate the obstacles to development "resulting from failure to observe civil and political rights, as well as economic social and cultural rights";[277]

(vi) Undertake, at the national level, all necessary measures for the realization of the right to development and […] ensure, *inter alia*, equality of opportunity for all in their access to *basic resources, education, health services, food, housing, employment and the fair distribution of income*";[278] and

(vii) "Ensure the full exercise and progressive enhancement of the right to development, including the formulation, adoption and implementation of policy, legislative and other measures at the national and international levels".[279]

While a discussion on the legal status of the DRDT would require a specific work on the subject (and this is not the aim of this work), it is sufficient to note that (as the Universal Declaration), the DRDT is not *per se* legally binding. However, this declaration can and does give rise to rights and obligations in certain instances.[280]

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274 DRTD, Article 3.3.

275 DRTD, Article 2.2.

276 DRTD, Article 6.2.

277 DRTD, Article 6.3.

278 DRTD, Article 8.1.

279 DRTD, Article 10.

280 *See* N. SCHRIJVER, *The Role of the United Nations in the Development of International Law*, in HARROD, J., N. SCHRIJVER, N. (eds.), *The UN Under Attack, Gower*, Aldershot,

Indeed, the DRDT builds, among others, on the International Covenants, and other international and agreements as well as the resolutions, recommendations and other instruments of the of the United Nations and its specialized agencies concerning the integral development of the human beings, economic and social progress and development of all peoples.

The right to development and related States' obligations are further reaffirmed in other international instruments including the Rio Declaration on Environment and Development ("Rio Declaration"), the Vienna Declaration and Program of Action ("VDPA"), and the outcome document of the World Conference on Human Rights in 1993. Of these documents, of particular relevance is the Rio Declaration, which raises the concept of sustainable development.

3.1. Sustainable Development

The concept of sustainable development emerged from international environmental law, and it gradually evolved so as to encapsulate economic and human rights-related concerns. The core element of the concept is the balancing (of the often conflicting) interests of economic, human rights and environmental nature.[281] A difficult balancing exercise that often appears at the litigation stage when adjudicatory bodies are called to solve conflicts between States' human rights and investment obligations.[282]

The most popular definition of the term "sustainable development" was articulated by the Brundtland Commission in "our common future" (and reflected in the subsequent Report).[283] According to this definition, sustainable development "is development which meet[s] the needs of the present generation without compromising

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1998, at 35-36. Moreover, the DRDT contains several obligations that are binding by virtue of their integration in binding treaties and customary international law.

281 *See* S. SCHACHERER and R. T. HOFFMANN, *International Investment Law and Sustainable Development*, in *Research Handbook on Foreign Direct Investment*, 2019, at 564-565. See also R. PISILLO MAZZESCHI and P. DE SENA, *Global Justice, Human Rights and the Modernization of International Law*, Springer, 2018, at 136-137.

282 *See* Chapter IV below.

283 M. CORDONIER SEGGER and A. KHALFAN, *Sustainable Development Law: Principles, Practices, and Prospects*, 2004, p. 20.

the needs of future generations to meet their own needs".[284] This is a rather broad and general definition, characterized by its core element, the *balancing* of the conflict of interests. The notion of sustainable development was explicitly embodied in the non-binding Rio Declaration.[285]

Ever since, the concept of sustainable development has been included in several subsequent instruments (both binding and non-binding),[286] including the "United Nations Millennium Declaration"[287] ("Millennium Declaration") and the "the 2030 Agenda for Sustainable Development"[288] ("Agenda").

The Millennium Declaration identifies six fundamental values essential to international relations, including freedom, equality, solidarity, tolerance, respect for nature, and shared responsibility.[289] Under this declaration, states undertook to: (i) "spare no effort to promote democracy and strengthen the rule of law, as well as respect for all internationally recognized human rights and fundamental freedoms, including the right to development"; and (ii) "strive for the full protection and promotion in all countries of civil, political, economic, social and cultural rights for all".[290]

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284 WCED, *Our Common Future*, OUP, New York, 1987, endorsed by UNGA Res. 42/186, or the Tokyo Declaration.

285 The Brundtland Report led the UN to convene a second global conference held in 1992 in Rio de Janeiro, which culminated in the Rio Declaration. The Rio Declaration provided for twenty-seven principles urging for the integration of environment and development so that both may be sustained, over the long term. M. CORDONIER SEGGER and A. KHALFAN, *Sustainable Development Law: Principles, Practices, and Prospects*, 2004, p. 20.

286 For instance, a binding instrument is the Convention to Combat Desertification of 1994, whereas a non-binding instrument is the Hague Declaration on the Environment (28 I.L.M. 1989, p. 1308) on global warming and climate change.

287 *See* S. SCHACHERER – R. T. HOFFMANN, *International Investment Law and Sustainable Development*, in Research Handbook on Foreign Direct Investment, 2019, at 564-565.

288 *Id*.

289 D. BARSTOW MAGRAW and L. D. HAWK, *Sustainable Development*, in D. BODANSKY et al. (eds), The Oxord Handbook of International Environmental Law, 2008, at 617-618.

290 *See Millennium Development Goals Report* (New York: United Nations, 2005) 30, Goal 7: Ensure Environmental Sustainability.

The Agenda sets out 17 Sustainable Development Goals that should "guide the decisions we take over in the next 15 years", including the goal to adopt policies that are inspired to respect, protect and fulfil human rights.[291]

On July 2018, the Principles of Effective Governance for Sustainable Development, (agreed at CEPA 17) were endorsed by the UN Economic and Social Council. These principles are intended to help interested countries to build, voluntary basis, effective, accountable and inclusive institutions at all levels, in the context of the 2030 Agenda for Sustainable Development.[292]

3.2. Sustainable Development and Customary International Law

The status of sustainable development as customary international law has long been the subject of debate in the international community.[293] Some scholars have denied that sustainable development has reached the stage of customary international law (or that it is all capable at all of reaching this status).[294] According to this theory the concept of sustainable development is excessively abstract and vague. These characteristics renders sustainable development inherently incapable of having the status of a binding rule of law addressed to states and purporting to constrain their conduct.[295]

However, according to a second (and prevailing) stream of commentary, there is growing evidence that sustainable development is rising to the level of customary international law. First, since its rise, the concept has increasingly been referred not

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291 *Id*.

292 See on the topic <*https://sdg.iisd.org/news/cepa-18-discusses-implementing-governance-principles-for-sdgs/*>.

293 *See* J. VERSCHUUREN, *The Growing Significance of the Principle of Sustainable Development as a Legal Norm*, in D. FISHER (ed.), *Research Handbook on Fundamental Concepts of Environmental* Law, 2016, at 276.

294 *See* LOWE, *Sustainable Development and Unsustainable Arguments*, in A. BOYLE and D. FREESTONE (eds.), *International Law and Sustainable Development: Past Achievements and Future Challenges*, 1999, at 24.

295 *Id*.

only in soft law instruments but also in binding international treaties.[296] Second, states constantly adopt national sustainable development strategies and design development projects that take into account environmental considerations and sustainable development goals. Third, there are increasing examples of regulatory bodies established by states with the mandate to implement sustainable development goals. Fourth, in an increasing number of cases, international and national tribunals have been confronted with the status of sustainable development as a legal norm.[297]

All this evidence would lead to affirm that, despite clear judicial confirmation to this end, sustainable development, as an objective, already constitutes a principle of customary law, resulting from a general and consistent practice of states that they follow from a sense of legal obligation.[298]

4. Concluding Remarks on Chapter II

The content of this chapter can be summarized in a nutshell as follows.

First, under international human rights law, states have clear human rights obligations, which include the obligation to respect, protect and fulfil socio-economic human rights. To fulfil these obligations, states are, *inter alia*, under the duty: (i) to take immediate steps to guarantee the progressive full realization of these rights; and (ii) ensure, at the very least, minimum essential levels of these same rights (survival rights). This last obligation should always be discharged irrespective of the specific socio-economic conditions prevailing in the relevant state (i.e., emergency situations and/or economic crisis). States have ample discretion in deciding which are the most appropriate mean to discharge their human rights obligations. However, in most cases, legislative measures would appear to be the most appropriate means.

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296 J. VERSCHUUREN, *The Growing Significance of the Principle of Sustainable Development as a Legal Norm*, in D. FISHER (ed.), *Research Handbook on Fundamental Concepts of Environmental* Law, 2016, at 277-287.

297 *Id.*, at 287-296.

298 *See* V. BARRAL, *Sustainable Development in International Law: Nature and Operation of an Evolutive Legal Norm*, in *European Journal of International Law*, 2012, at 385-388.

Among the mentioned states' obligations, of particular relevance are the specific obligations to prevent and/or counter unlawful conduct by MNCs and generally to prevent and/or anticipate negative impact of economic activities on human rights. The normative context of these specific obligations (as well as of all states' human rights obligations) has been the subject of numerous human rights instruments both of a binding and non-binding nature and have been considered to include, *inter alia*, the obligation: (i) to take all necessary steps to limit or prevent the unlawful conducts of MNCs, including legislation that might limit and/or have a negative impact on the MNCs' activity; and (ii) not to derogate from their human rights obligations in trade and investments agreement whenever that derogation can result in serious human rights violations.

Breach of these obligations may entail the international responsibility of the state both under the Covenant and the Draft Rules.

Second, MNCs are essential for the progressive full realization of socio-economic rights, and in turn, the economic and sustainable development of states. Notwithstanding their central role, MNCs do not have direct human rights obligations under international law. However, several soft law instruments address the human rights standards that MNCs should follow in their day-to-day activities, including the obligation to respect human rights as well as the obligation to prevent and address human rights abuses. Of particular importance within this context are MNCs' human rights due diligence obligations, which require MNCs to perform human rights impact assessments of their activity prior to starting a given business. The due diligence should include, *inter alia*, an analysis of the state's human rights obligations under international law against which MNCs should frame their expectations.

The content of this chapter will be relevant to Chapter IV, when it will be analyzed how the obligations that host states have under human rights law "connect" with their investment obligations under international investment law. It will also be relevant to Chapter V, when it will be analyzed how to effectively incorporate human rights standards in international investment treaties.

The golden rules of the good investor.

- It takes 20 years to build a reputation and five minutes to ruin it. If you think about that, you'll do things differently
- If you're in the luckiest 1% of humanity, you owe it to the rest of humanity to think about the other 99%"
- Risk comes from not knowing what you are doing
- Focus on your customers and lead your people as though their lives depend on your success
- If a business does well, the stock eventually follows
- If you aren't thinking about owning a stock for 10 years, don't even think about owning it for 10 minutes

- Warren Buffett -

III. HUMAN RIGHTS AND FOREIGN DIRECT INVESTMENTS: CONNECTING THE DOTS

This chapter provides: (i) an overview of the definition and types of foreign direct investment ("FDIs") as well as FDIs-related trends; (ii) some considerations on the impact that FDIs can have on socio-economic rights; and (iii) the determinants of FDIs (i.e., what moves FDIs), including investment incentives and bilateral investment treaties. This last point is particularly relevant insofar as the determinants of FDIs are/or should be considered by: (a) host states when framing instruments aimed at attracting FDIs to their markets, including investment incentives and bilateral investment treaties ("BITs"); and (b) arbitral tribunals when deciding whether a host state has breached an investor's legitimate expectation when exercising its regulatory powers.

Each section will also provide human rights considerations so as to allow "connecting the dots". The aim is to show, among others, that MNCs' activities, which are one of the major forms through which FDIs occur, are crucial to the progressive full realization of human rights; and the progressive full realization of human rights is crucial to MNCs' activities. Accordingly, to borrow a quote from Mr. Warren Buffet's golden investment rules, MNCs should focus on their customers and lead their people as though their lives depend on the MNCs' success.

1. FDI: General Considerations, Definition, Types and Trends

The OECD defines FDIs as an "investment that reflects the objective of establishing a lasting interest by a resident enterprise in one economy ('direct investor') in an enterprise ('direct investment enterprise') that is resident in an economy other than that of the direct investor.[299] The lasting interest implies the existence of a long-term relationship between the direct investor and the direct investment enterprise and a significant degree of influence on the management of the enterprise".[300] Evidence of such relationship is "the direct or indirect ownership of 10% or more of the voting power of an enterprise resident in one economy by an investor resident in another

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299 OECD, Benchmark Definition of Foreign Direct Investment, 2008, para. 117.

300 *Id.*

economy".[301] Unlike cross-border portfolio investments, which may be easily pulled out and reinvested elsewhere, FDIs have long term horizons and are generally not done for speculative purposes, but rather to serve domestic markets, exploit natural resources, provide platforms to serve world markets through export,[302] and provide public services within the context of privatization proceedings.

FDIs vary on the basis of direction flows, nature, strategic motives, economic categories, forms, time periods, launching times, components and modes of entry and ownership.[303]

FDI direction flows denote the amount of FDIs flowing to a given country in a given period of time.[304] On the basis of direction flows, FDIs are divided into FDI outward and FDI inward flows.[305] By investing in a foreign market, an investor makes an investment which in relation to the national economy is called "outflow". That same investment in the country receiving the investment (host country) is considered to be an "inflow" FDI.[306] Another important differentiation related to the nature of FDIs is between mergers and acquisitions ("M&A") and greenfield investments. While the notion of M&A is self-explanatory, greenfield investments refer to these investments that include the establishment of new production facilities such as offices, buildings, and factories.[307] Finally, while FDIs can occur in various forms, MNCs are the major

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301 *Id*.

302 *Id*. *See also* A. KERNER, *Why Should I Believe You? The Costs and Consequences of Bilateral Investment Treaties*, in *International Studies Quarterly*, 2009, at 73-102.

303 K. E. MEYER and S. ESTRIN, *Investment Strategies in Emerging Markets: An Introduction to the Research Project*, in *Investment Strategies in Emerging Markets*, 2004, at 1.

304 J. P. SASSE, *An Economic Analysis of Bilateral Investment Treaties*, at 2.

305 For an in-depth analysis of the types of FDI *see, e.g.*, *Foreign Direct Investment, International Financial Flows and Geography*, in *Foreign Direct Investment*, 2000, at 7.

306 Another major distinction is between FDI flows and FDI stocks. FDI stocks indicate the value of FDIs in a given country at a given point of time. J. P. SASSE, *An Economic Analysis of Bilateral Investment Treaties*, at. 2.

307 *See also* JOHN-REN CHEN, *Foreign Direct Investment, International Financial Flows and Geography*, in *Foreign Direct Investment*, 2000, at 7.

player, making FDIs essentially "the cross-border expansion of production undertaken by large corporations".[308]

In the last decades, three main trends have been observed in relation to FDIs.

First, as figure 1 below shows, the global FDIs inflows in the past years have been reaching the lowest picks.[309] The decline was concentrated in developed countries, where in 2018 FDIs inflows fell by as much as 40% to an estimated $451 billion,[310] mainly due to the large repatriations of accumulated foreign earnings by the US multinational enterprises, following certain tax reforms.[311] In contrast, FDI inflows to developing economies has remained resilient. Specifically, in 2018, the share of developing economies in global FDI reached 58%.[312]

The latter figure is in line with the fact that over the last few decades FDIs have been considered the largest source of external finance to emerging and developing markets,[313] as well as a key driver of their economies and development.[314] Even those

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308 *See*, e.g., L. ZARSKY, *International Investment for Sustainable Development. Balancing Rights and Rewards*, at 15-16; D. S. BETTWY, *The Human Rights and Wrongs of Foreign Direct Investment: Addressing the Need for an Analytical Framework*, in *Richmond Journal of Global Law & Business*, 2012, at 242.

309 UNCTAD, *Global Investment Trends and Prospects*, 2019, at 13.

310 *Id*.

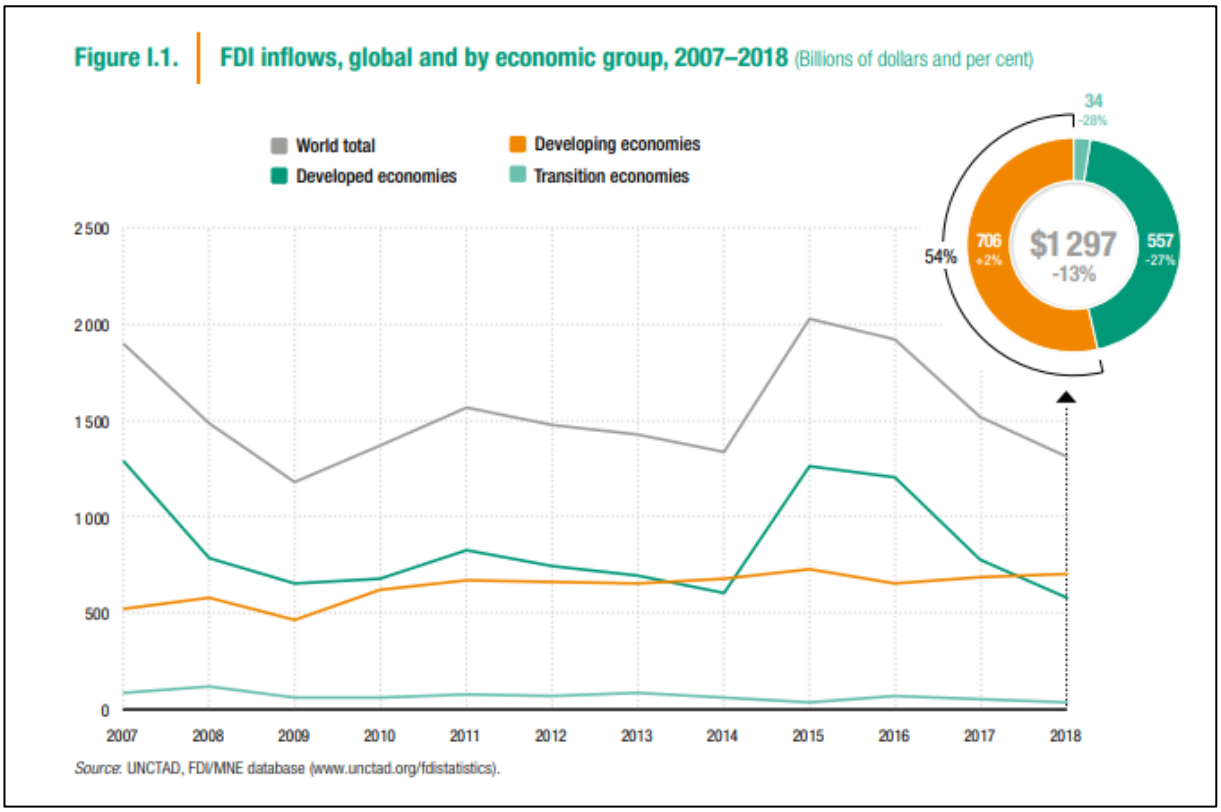
311 This caused an unprecedented 73% decline in flows to Europe, a value last seen in the 1990s. Prior to 2018, the United States FDI outflows were almost entirely accounted for by reinvested earnings. The US MNCs refrained from bringing home overseas earnings to avoid tax liabilities. The reforms that came into force in January 2018 reduced those liabilities and the US multinational corporations duly began repatriating accumulated overseas profit. UNCTAD, *Global Foreign Investment Flows Dip to Lowest Levels in a Decade*, Report dated January 21, 2019, available at: <https://unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=1980>.

312 UNCTAD, *Global Investment Trends and Prospects*, 2019, at 16.

313 FDI flows have "become the most important vehicle to bring goods and services to foreign markets and to integrate national production facilities". *See* K. SAUVANT, *The Rise of International Investment, Investment Agreement, and Investment Disputes. Appeals Mechanism in International Investment Disputes*, Oxford University Press, 2008. *See also* OECD, *Foreign Direct Investment for Development. Maximizing Benefits, Minimizing Costs*, 2002, at 5.

314 FDIs are also considered to be more resilient to economic and financial crisis. L. ALFARO – M. CHEN, *Surviving the Global Financial Crisis: Foreign Direct Investment and Establishment Performance*, June 2010.

who question the extent to which particular MNCs may contribute to a host state's economy do not deny that incoming FDI inflows remain the principal vehicle for generating economic growth (and, therefore, for the progressive full realization of



socio-economic rights in developing countries[315]), or that the activities of the MNCs[316] that control assets and capital abroad are crucial to the extraction of natural resources, the construction of infrastructures, and the production and distribution of public goods and services that are necessary to guarantee adequate standard of living conditions.

Figure 1[317]

315 *See* Chapter I, above.

316 K. P. SAUVANT, *The Rise of International Investment, Investment Agreements and Investment Disputes in K. P. Sauvant (ed.), Appeals Mechanism in International Investment Disputes*, New York, Oxford University Press, 2008, at 3-4.

317 Chart taken from the 2019 UNCTAD 2019 Report, available at: <https://unctad.org/en/PublicationsLibrary/wir2019_en.pdf>.

The reasons of the success of FDIs as crucial engine of economic globalization are not only quantitative but also qualitative.[318] It is not just the amount of capital crossing borders that matters, but also what the invested capital does when it arrives in a host State. Compared to the import of one foreign produced good, the permanent presence of a foreign controlled enterprise produces far more sociological, economic and cultural consequences for both home and host states. FDIs positively and negatively affect people and their communities far more directly than trade.[319]

Second, notwithstanding the perceived nature as key driver of the economic development of developing countries, certain negative trends have been registered with respect to the same, especially on the regulation side. Due to certain FDIs' negative effects, an increased number of countries have taken a more critical stance towards FDIs, and have introduced new investment restrictions reflecting economic, national, security,[320] and socio-economic human rights concerns.[321] The *economic* concerns relate, *inter alia*, to the fear that foreign enterprises will employ fewer nationals or ship jobs overseas, create unfair competition to local companies or monopolize certain sectors, buy up valuable assets, real estates and local enterprises

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318 J. E. ALVAREZ, *The Public International Law Regime Governing International Investment*, in Ha*gue Academy of International Law*, 2011, at 16.

319 *Id*., at 19.

320 For instance, in 2017, Italy extended the Government's so called "golden powers" to block takeovers in high-tech industries by non-EU companies that may pose a serious threat to essential national interest or present a risk to public order or national security. Likewise, the Russian Federation introduced certain prohibitions for inward investment by offshore companies, and required the government's authorization for foreign investment in certain transactions involving assets of strategic importance for national defense and state security. Venezuela published the new Constitutional Law on Foreign Productive Investment, according to which foreign investors may not participate directly and indirectly in national political debates. *See* UNCTAD, *World Investment Report. Investment and New Industrial Policies*, 2018, at 83.

321 For instance, in 2017, Australia introduced: (i) an annual charge on foreign owners of underutilized residential property and increased fees that foreign investors must pay when seeking approval to purchase residential real estate; and (ii) a quantitative restriction on the acquisition of certain real estate assets by foreigners. New Zealand tightened screening procedures for foreign acquisitions of sensitive land, and South Africa introduced a new mining charter, which raises the minimum threshold for black ownership of mining companies. The United Republic of Tanzania adopted new mining laws, requiring, *inter alia*, that the government obtains at least a 16 per cent stake in mining and energy projects.

(including, malfunctioning state-owned enterprises) at low prices, import more foreign produced inputs or shift valued national technology to their overseas affiliates.[322] The *national security* concerns instead include fear that FDIs will control and compromise access to the technology needed for national defense or that foreign enterprises, especially when owned or controlled by foreign governments or sovereign wealth funds, will act as a Trojan horse, pursuing the goals of their home states instead of merely following the dictates of the market. Economic and national security concerns are mainly related to developed countries.[323]

Finally, *political and human rights* concerns include, among others, the fear that foreign enterprises may: (i) unduly influence politicians (also through corruption) and/or acquire a key role in national affairs; and (ii) operate their activities unlawfully in breach of domestic and international laws, including human rights and environmental law standards.[324] As discussed in the previous chapter, this scenario often appears in the context of huge investment projects or privatization procedures of public services that are done improperly (*e.g.*, through bribery and corruptive practices).

The above-mentioned concerns are increasingly being perceived as threats to states' sovereign powers and, in particular, to their power to decide whether to welcome foreign enterprises and how to treat such "guests" after they have established their presence in their jurisdiction. Even citizens of developed countries and their political representatives consider that this is a matter that each sovereign state has to decide on its own. Especially when the "guests" breach domestic and international laws, including human rights law.[325]

The host state's prerogatives should not change merely because MNCs offer prospect of capital necessary to secure development. Indeed, even in host States with a tradition of strong support for liberal capital flows – such as the United States – the

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322 *See* Chapter I, above.

323 *Id*.

324 *Id*.

325 J. E. ALVAREZ, *The Public International Law Regime Governing International Investment*, in *Hague Academy of International Law*, 2011.

extent of foreign controlled enterprises within one's borders, or particular "sensitive sectors", has been questioned on cyclic terms,[326] paving the way for protectionist legislations.[327]

Third, the protectionist wave has "hit" also international investment agreements, including bilateral and multilateral agreements. These agreements, among others: (i) guarantee "special" rights (unaccompanied by any obligations) and legal protection to FDIs, including the right to start investment arbitration proceedings against the host State; and (ii) impose on host States obligations (unaccompanied by rights) which are often conflicting with their human rights obligations under international human rights law.[328]

These features of international investment agreements have generated a legitimacy crises of the investment arbitration system, which has been exasperated by the high number of disputes decided in favor of foreign investors.[329] This may be one of the reasons why investment treaty making has reached its lowest point in 2017, where 18 investment agreements were concluded (i.e., the lowest number since 1983).[330]

2. FDI and Socio-Economic Rights

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326 *See*, e.g., K. P. SAUVANT, *Driving and Countervailing Forces: A Rebalancing of National FDI Policies*, in K. P. Sauvant (ed.), *Yearbook of International Investment Law & Policy*, Oxford University Press, 2009, at 259-260. *See also* Organization for International Investment, *Summary of Bills Affecting Foreign Investment in the United States*, 1993; M. TOLCHIN and S. J. TOLCHIN, *Selling Our Security: The Erosion of America's Assets*, Knopf, 1992; P. CHOATE, *Agents of Influence*, Knopf, 1990; N. J. GLICKMAN and D. P. WOODWARD, *The New Competitors*, Basic Books, 1989.

327 On some of the protectionist legislation adopted by the Trump administration see, e.g., G. SACERDOTI, *Multilateralismo in crisi? L'organizzazione mondiale del commercio di fronte alla sfida di Trump*, in *Diritto Commerciale Internazionale*, 2018, at 385-395.

328 *See* Chapter IV below.

329 In 2017, at least 65 new treaty-based ICSID case were commenced. By the end of 2017, investors had won about 60 percent of all cases that were decided on the merits. See, e.g., S. D. FRANCK, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, in *Fordham Law Review*, Vol. 73, at 1521, 2005.

330 For the first time, the number of effective treaty termination outplaced the number of new investment agreements. Another reason explaining the reduced number of treaty-making is the high numbers of BITs already existing.

As already mentioned under chapter I, FDIs can have both positive and negative effects on the safeguard of socio-economic rights.

These effects are discussed in greater details below.

2.1. The Positive Impact of FDIs on Socio-Economic Human Rights

FDIs play an important role in the realization of socio-economic rights.[331] Through FDIs host states mobilize the "economic" and "technical" resources necessary to fulfil their human rights obligations, including the obligation to take immediate steps to guarantee the progressive full realization of socio-economic rights and, at the very least, the minimum essential levels of these rights (the survival rights).[332]

Economists and legal scholars have identified at least four ways in which FDIs can contribute to human rights development: (i) direct creation of the conditions for

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331 The positive effects are recognized by all major soft law instruments. For instance, according to the ILO's Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, "multinational enterprises play an important part in the economies of most countries and in international economic relations. This is of increasing interest to governments as well as to employers and workers and their respective organizations. Through international direct investment, trade and other means, such enterprises can bring substantial benefits to home and host countries by contributing to the more efficient utilization of capital, technology and labor. Within the framework of sustainable development policies established by governments, they can also make an important contribution to the promotion of economic and social welfare; to the improvement of living standards and the satisfaction of basic needs; to the creation of employment opportunities, both directly and indirectly; and to the enjoyment of human rights, including freedom of association, throughout the world". By the same token, according to the OECD Guidelines for Multinational Enterprises, "[t]he activities of multinational enterprises, through international trade and investment, have strengthened and deepened the ties that join the countries and regions of the world. These activities bring substantial benefits to home and host countries. These benefits accrue when multinational enterprises supply the products and services that consumers want to buy at competitive prices and when they provide fair returns to suppliers of capital. Their trade and investment activities contribute to the efficient use of capital, technology and human and natural resources. They facilitate the transfer of technology among the regions of the world and the development of technologies that reflect local conditions. Through both formal training and on-the-job learning enterprises also promote the development of human capital and creating employment opportunities in host countries."

332 FDIs are therefore also crucial for achieving the host states' economic and sustainable development in accordance with the SDGs goals set forth in the 2030 Agenda. *See* E. V. DÉCAUX, *Les formes contemporaines de l'esclavage*, in *Recueil des cours*, 2008, at 9-197. See also Chapter II above.

the enjoyment of these rights; (ii) long-term spillovers; (iii) privatization; and (iv) human rights promotion activities.

First, FDIs may create the conditions and "infrastructures" necessary for the correct enjoyment of human rights. For instance, FDIs may create jobs that guarantee decent working conditions, including fair wages, equal remuneration for the same type of jobs, and safe and healthy working conditions.[333] Decent work is essential not only to human survival, but also to life with dignity under the Socio-Economic Covenant and to the fulfilment of other socio-economic rights,[334] including the right to health and adequate standard of living conditions, which also depend on the enjoyment of the right work.

Second, FDIs generate long-term spillovers,[335] including wage, technology, human capital and market access spillovers, which have a global positive impact on job markets and on the host state's development as a whole.[336] Spillover is any unwanted FDI advantage for the host state. *Wage spillovers* occur because MNCs tend to pay higher wages and offer better job opportunities than domestic firms in developing countries.[337] The higher wages paid by foreign MNCs produce in turn an increase in the wages paid by domestic firms, which compete for human resources and, thus, are forced to offer similar or better working conditions.[338] Wages spillovers may also contribute to generate human capital spillovers. *Human capital spillovers*

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333 OECD Policy Brief, *The Social Impact of Foreign Direct Investment*, July 2008, available at: <https://www.oecd.org/els/emp/The-Social-Impact-of-foreign-direct-investment.pdf>. See Chapter II, Section 2.2.1, above.

334 *See* Chapter II, above.

335 See, e.g., B. CHOUDHURY, *Business Law Forum: Balancing Investor Protections, the Environment, and Human Rights. International Investment Law as a Global Public Good*, in *Lewis & Clark L. Rev.*, 2013, at 513.

336 Spillovers include any benefits to the host state that are not appropriate by the foreign investor.

337 R. E. LIPSEY, *Home and Host Country Effects of FDI*, NBER Working Paper No. 9293, 2002; D. W. TE VELDE and O. MORRISSEY, *Do Workers in Africa Get a Wage Premium if Employed in Firms Owned By Foreigners*?, in *Journal of African Economies*, 2003, at 41–73; and E. GIULIANI and C. MACCHI, *Multinational Corporations' Economic and Human Rights Impacts on Developing Countries: a Review and Research Agenda*, in *Cambridge Journal of Economics*, 2013, at 482.

338 *Id*.

arise from the presence in the host state of more knowledgeable and skilled MNCs that improve the quality of the local human capital, often through training of local employees. Several studies have shown that the increase in the quality of human capital ultimately reduces income inequality and expands the middle class.[339] Human capital spillovers in turn, contribute to the success of technology and productivity spillovers.[340] *Technological and productivity spillovers* are considered important sources of economic advantage for host states' long-term development trajectories.[341] Based on the assumption that MNCs possess superior technological capabilities compared with domestic firms in developing countries, scholars traditionally have analyzed them in relation to their being technology-transfer channels. The accumulation of new technological capabilities by domestic firms via MNCs, in turn, contributes to their increased productivity. Qualitative researches show that *productivity* spillovers take various forms. Domestic firms can become more efficient and, thus, more competitive as a result of competitive pressure exercised by MNCs, also through imitation.[342] In addition, FDIs flows may produce *market spillovers*. When MNCs establish a presence in a host economy, a "market access spillover" may benefit local firms that establish a relationship with foreign firms. As MNCs operate in multiple countries, they are normally able to exploit a cross-border network.[343]

Third, FDIs may contribute to the progressive full realization of socio-economic rights through privatization processes. In the area of public goods, host states may mobilize the economic and technical resources necessary to fulfil their human rights

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339 *Id*.

340 *See* M. FU and T. LI, *Human Capital as a Determinant of FDI Technological Spillovers and its Threshold Effect in China: An Analysis Based on Multiple Productivity Estimates*, 2009, available at: https://open.unido.org/api/documents/4812013>. *See also* H. GÖRG and D. GREENWAY, *Much Ado About Nothing? Do Domestic Firms Really Benefit from Foreign Direct Investment?* 2003.

341 *See* R. NARULA and N. DRIFFIELD, *Does FDI Cause Development? The Ambiguity of the Evidence and Why it Matters*, in *European Journal of Development Research*, 2012, at 1–7.

342 E. GIULIANI AND C. MACCHI, *Multinational Corporations' Economic and Human Rights Impacts on Developing Countries: A Review and Research Agenda*, in *Cambridge Journal of Economics*, 2014, at 483.

343 D. S. BETTWY, *The Human Rights and Wrongs of Foreign Direct Investment: Addressing the Need for An Analytical Framework*, 2002, at 249.

obligations also through privatization. The latter typically aims at bringing market efficiency and new economic and technical resources to underfunded and poorly managed public enterprises.[344] During the privatization process, host states cease to provide socio-economic services themselves and outsource them to MNCs, which are better equipped to ensure better standards and higher service levels.[345]

Fourth, MNCs carrying out FDIs can actively engage in human rights promotion activities. There has been for a long time a shared view that, in market economies, it would be "ingenuous" to believe that MNCs would voluntarily divert resources and/or sacrifice profits or their duties vis-à-vis investors and shareholders to promote and protect human rights.[346] After all FDI is all about profit. However, there is a growing awareness among MNCs' executives that respect for human rights is a fundamental and necessary part of the practice of good management,[347] which should be guaranteed: (i) also by sacrificing profit, at least short term profit, if necessary; and (ii) irrespective of the host state's abilities and/or willingness to fulfil its own human rights obligations, and even *over and above* compliance with national regulations protecting human rights.[348]

As to point (i) above, it has been acknowledged that philanthropic initiatives and social investments may allow MNCs to play a significant role in promoting different kinds of unfulfilled socio-economic and social rights.[349] Although a company's social investment or philanthropy budget might be a tiny fraction of the resources it mobilizes through its core business activities, these budgets are not insubstantial. A 1998 study

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344 F. MARRELLA, *On the Changing Structure of International Investment Law: The Human Rights to Water and ICSID Arbitration*, in *International Community Law Review*, 2010, at 343.

345 *See* Chapter 2.3.1.2, above.

346 CESCR, Concluding Observations: India, E/C.12/IND/CO/5 dated August 5, 2008.

347 Over 500 institutional investors have also signed up to the United Nations-backed Principles for Responsible Investment and together account for more than US$ 20 trillion worth of assets under management in 36 countries.

348 UNGP, United Nations Human Rights Council, *Guiding Principles on Business and Human Rights*, at 13. *See* also Chapter II, above, Section 2.4.4

349 *See* P. RIVOLI and S. WADDOCK, *'First They Ignore You …' The Time-Context Dynamic and Social Responsibility*, in *California Management Review*, 2001, at 87-104.

of 50 multinational companies calculated that the social investment/philanthropy figure for these 50 companies alone was almost equivalent to the annual operating budget of the United Nations Development Program.

As to point (ii) above, human-rights oriented managements are increasingly implementing codes of conduct to be applied both in the relationship with their employees and in those with third parties, including contractors and subcontractors. For instance, in Italy, it is settled case law that the obligations provided by the code of conduct/ethics (including the obligation to act transparently and lawfully) of a publicly owned company apply to all its business partners, including its contractors and subcontractors, and are therefore automatically incorporated in the contractual relationships entertained with its business partners. Failure to discharge these obligations entails the contractor's right to terminate the contractual relationship.[350]

This increasing awareness is dictated not only by moral concerns (raised under the wave of several soft laws initiatives undertaken in that field), but also by purely economic and commercial concerns. Human rights violations can impose high costs on MNCs, including litigation, reputation and audience costs.[351] The latter are of particular concern to managers, who do not want their companies being associated with human rights violations or corruption. Moreover, respect for human rights can grant long-term advantages over competitors that overlook this area in terms of reputation, loyalty and quality of employed human resources as well as innovation.[352]

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350 *See*, e.g., Judgment of the Court of Rome No. 19384 dated October 18, 2016.

351 *See* Chapter IV, below.

352 In today's competitive job market, having a 'job for life' is becoming a thing of the past. According to a 2017 Investec survey, in Britain more than half of the surveyed respondents were planning to change careers within the next 5 years. By the same token, according to LinkedIn, young workers in the U.S. typically change jobs 4 times in their first 10 years after graduation. Moreover, workers are increasingly looking for something more than a pay check and a 9-to-5 experience. "This is particularly true for Millennials [which] represent an increasing share of the workforce, across a range of sectors and organizational levels. Yet, in general, they express little loyalty to their employers. The challenge of attracting and retaining valuable employees can be addressed in a number of ways, including improving the social and human rights record of a company". *See* DR. B. BAĞLAYAN, I. LANDAU, M. MCVEY and K. WODAJO, *Good Business: The Economic Case for Protecting Human Rights*, December 2018, at 24, available at: <http://corporatejustice.org/2018_good-business-report.pdf>.

For instance, recruitment surveys show that corporate ethics is an increasingly important area; many applicants now ask hiring managers how the company's values (including those relating to the protection of human rights) are translated into day-to-day activities.[353] Securing and maintaining a social license to operate is another incentive. Support for human rights can also be a source of innovation for the introduction of new products.[354] To state it differently, respect for human rights can be profitable on a long term.

2.2. The Negative Impact of FDIs on Socio-Economic Human Rights

MNCs may also produce negative impacts on the host state's population. Injury to individuals and/or property rights and damage to the environment are factual settings often involved in these scenarios. In turn, these scenarios have a strong impact on the development of the host state, including its economic and sustainable development.

Economists and legal scholars have identified different ways through which FDIs may negatively affect the rights to work, adequate living conditions, water and health.

First, MNCs may undermine the enjoyment of their employees' socio-economic rights, for instance, by failing to offer safety working conditions,[355] or by exploiting

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353 A global survey by New York-based consulting firm DBM found that 82 per cent of human resources and career experts cite corporate leadership ethics to be important to job seekers today. "Globally, corporations are being held to the highest standards by current and future employees" *See* <http://findarticles.com/p/articles/mi_m3495/is_11_47/ai_94161915/?tag=content>. *See also* J. F. SHERMAN and A. LEHR, *Human Rights Due Diligence: Is It Too Risky?*, A Working Paper of the Corporate Social Responsibility Institute, No. 55, Cambridge, Harvard University, February 2010, available at: <www.hks.harvard.edu/m-rcbg/CSRI/pub_main.html>. *See also* United Nations Human Rights, The Global Compact. A Guide for Business. How to Develop a Human Rights Policy, 2011, at 6, available at: <https://www.ohchr.org/Documents/Publications/DevelopHumanRightsPolicy_en.pd>.

354 *Id*.

355 S. B. LEINHARDT, *Some Thoughts on Foreign Investors Responsibilities to Respect Human Rights*, in *Transnational Dispute Management*, 2013, at 9.

In the context of FDIs, violations of labor rights can also occur in relation to large construction projects. The alleged abuses of migrant workers' rights in Qatar, related to the preparation for the 2022 Work Cup, serves as an example. Many immigrants are employed under the visa known as "kafala". This document binds workers to their

child labor.[356] Kraft, the Belgian giant of the agribusiness, was accused by Oxfam of using cocoa collected by slave children in many of the chocolates it produces (just like 99.5% of Belgian chocolate sold in supermarkets).[357]

Second, FDIs are often associated with the breach of the rights to adequate housing and property, including property rights of indigenous people.[358] The most striking example relates to the exploitation of the natural resources sector,[359] and includes situations where investment projects collide with the rights of indigenous

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employers and prohibits them from leaving the country where the construction site is located until the contract expires.

356 *See* S. SCHADENDORF, *Human Rights Arguments in* Amicus Curiae *Submissions: Analysis of ICSID and NAFTA Investor-State Arbitrations*, in *Transnational Dispute Management*, 2013, at 2. For instance, the situation of the KPR Mill, operating in India, can serve as an example of child labor used by business actors. It is reported that the company hires approximately 5,000 girls aged between 15 and 23.

357 *See* <http://www.rtl.be/info/belgique/societe/306816/99-5-du-chocolat-belgefabrique-par-des-enfants-esclaves>.

358 *See*, e.g., *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, Award dated June 8, 2009.

359 *See*, e.g., G. K. FOSTER, *Foreign Investment and Indigenous People: Options for Promoting Equilibrium Between Economic Development and Indigenous Rights*, in *Michigan Journal of International Law*, 2012, at 627-691; V. S. VADI, *When Cultures Collide: Foreign Direct Investment, Natural Resources and Indigenous Heritage in International Investment Law*, in *Columbia Human Rights Law Review*, 2010, at 797-890; S. WIESSNE, *The Cultural Rights of Indigenous Peoples: Achievements and Continuing Challenges*, in *European Journal of International Law*, 2011, at 121–140; G. K. FOSTER, *Investors, States, And Stakeholders: Power Asymmetries in International Investment and the Stabilizing Potential of Investment Treaties*, in *Lewis Clark Law Review*, at 361-422; J. CARINO, *Indigenous Peoples' Right To Free, Prior, Informed Consent: Reflections on Concepts and Practice*, in *Arizona Journal of International and Comparative Law*, 2005, at 19-40.

people living in the investment area.[360] Latin America countries offer several examples of this pattern.[361]

Third, FDIs may also negatively impact on the right to water and other essential goods (such as energy), which are necessary to guarantee adequate living conditions. In developing countries most public services are privatized. As discussed above, the privatization of public goods may also significantly impact socio-economic rights in a negative way. This may happen when the privatization process is done improperly

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360 Resources seeking FDIs on indigenous lands generally do not remain longer than the time necessary to complete a specific investment project. However, even a brief intrusion on the land of the indigenous population can have devastating long-term consequences. Indigenous people can suffer harm such as: chemical contamination of drinking water and fisheries, erosion of their cultural tradition and identity, destruction of the lands upon which they depend for hunting, and displacement from their ancestral lands. *See*, e.g., G. K. FOSTER, *Foreign Investment and Indigenous People: Options for Promoting Equilibrium between Economic Development and Indigenous Rights*, in *Michigan Journal of International Law*, 2012, at 603.

361 Much of the oil and gas FDIs in the country has been concentrated in a strip along the Peru-Ecuador border in the Amazon rainforest that is home to several native populations, including the Achuar. In 1971, the Peruvian government granted the first oil and gas concession on the Achuar's territory to the U.S.-based Occidental Petroleum Corporation. Occidental produced oil in its assigned "blocks" for several decades until it transferred its rights to a foreign company in the early 2000s. During its years of operation, Occidental's activity had devastating effects on the Achuar's population and their property rights. *See*, e.g., G. K. FOSTER, *Foreign Investment and Indigenous People: Options for Promoting Equilibrium between Economic Development and Indigenous Rights*, in *Michigan Journal of International Law*, 2012, at 638; M. O. MARTINEZ et al., *Impacts of Petroleum Activities for the Achuar People of the Peruvian Amazon: Summary of Existing Evidence and Research Gaps*, in *Envtl. Res. Letters*, 2007, at 1.

The activities of other companies have also been recognized as having a negative impact on indigenous people. For instance, the exploration activities of petroleum companies are endangering the Matsés people (an uncontacted community of indigenous people living in voluntary isolation in Peru). *See*, e.g., Survival, *Matsés denuncian amenaza de prospección petrolera en tierras de indígenas no contactados*, January 31, 2017, available at: <https://www.survival.es/noticias/11571>. *See also* Business and Human Rights Resource Centre, *Perú: Se empeora la situación de indígenas amazónicos por nuevo derrame petrolero de Frontera Energy*, February 28, 2018, available at: <https://www.business-humanrights.org/es/per%C3%BA-se-empeora-la-situaci%C3%B3n-de-ind%C3%ADgenas-amaz%C3%B3nicos-por-nuevo-derrame-petrolero-de-frontera-energy>.

(through corruption and bribery), and the private provider fails to provide the relevant public service (or to guarantee minimum essential levels).[362]

Fourth, MNCs can also considerably undermine the enjoyment of the rights to health and healthy environment. The breach of these rights can result from the non-compliance by the MNCs with environmental standards (either domestic or international). For instance, the activities carried out by Shell in Nigeria have resulted in the contamination of the Niger Delta and the pollution of numerous water sources.[363]

3. The FDI's Decision and its Determinants: Where do Human Rights Stand?

3.1. General Considerations

As shown by the following graphic, MNCs have to answer several basic questions when evaluating whether to invest in a given country, including whether, when, where, how to invest, and how to finance.[364]

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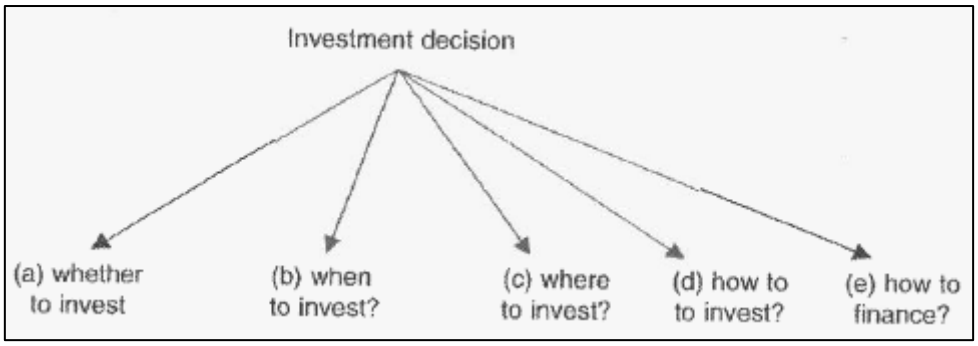
362 *See* Chapter II, above, Section 2.3.1.2. As discussed in more details in Chapter 2 above, although these violations are factually committed by MNCs, under international human rights law, they may be legally attributable to the host state.

363 As a consequence, Nigeria's Delta is considered to be amongst the world's most severely petroleum-impacted ecosystems. With respect to these activities, the African Commission on Human and People's Rights found that Shell committed serious human rights violations to the detriment of the local population, including violations of the right to health (Article 16 of the African Charter), the right to a clean environment (Article 24 of the African Charter), and the right to food (derived from Articles 4, 16 and 22 of the African Charter). The Commission further found that the violations were committed by Shell in complicity with the host state's military government and the local state-owned company. *See the Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria, African Commission on Human and People's Rights Communication* No. 155/96 (2001), Decision dated October 13, 2001, para. 2.

Similar problems were reported with reference to other investors in the Niger Delta, including Eni. Amnesty International, *Nigeria: Negligence in the Niger Delta: decoding Shell and Eni's poor record on oil spills*, March 16, 2018.

364 J. REN CHEN, *Foreign Direct Investment, International Financial Flows and Geography*, in *Foreign Direct Investment*, New York: St. Martin's Press, 2000, at 8.



To answer the above-mentioned questions, a diligent investor will perform a cost-benefit analysis and will most likely invest in the country that guarantees him the highest expected profit (taking into account possible risks). Thus, profitability should at least be a theoretical possibility when a MNC decides whether to operate abroad. In a country whose currency in a given year is in free fall, like Argentina for the past several decades,[365] it may generally be non-sensical for a MNC that is not yet active in the Argentinian market to make a large dollar-denominated investment to start operations.[366] Similarly, a MNC already operating in a crisis ridden country (like

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365 The case of Argentina will be analyzed in depth in the next chapter. It is however worth noting here that, at the time of the drafting of this work, Argentina is facing yet another financial crisis. On the aftermath of the primary presidential elections that took place on August 11, 2019, which were won by the center-left opposition leader (Mr. Alberto Fernández), the value of the peso dramatically felt. *See*, e.g., The Guardian, *Argentinian Peso Plunges As Centre-Left Win Election Primary*, August 12, 2019; Reuters, *Argentina Central Bank Faces Peso Test Ahead Of October Election*, August 16, 2019; New York Times, *Argentine Peso Collapses as Macri's Re-election Chances Drop*, August 12, 2019; The Economist, *Stunning Reversal For Argentina's President Mauricio Macri*, August 12, 2019. As a result, Argentina defaulted on some of its payments leading the government to impose currency controls in a move meant to tackle the economic crisis. For instance, MNCs will need permission from Argentina's central bank to buy dollars with pesos while individuals are limited to purchases of $10,000 per month. *See* Financial Times, *Debt, Default and Disorder: Macri Nears End with Familiar Crisis*, August 29, 2019; and *Forbes*, *Argentina Introduces Currency Controls Amid Deepening Debt Crisis,* September 2, 2019. The crisis is a consequence of Argentina's economy slow-down, which slumped by 2.5% in 2018, and shrank by a further 5.8% in the early 2019. Argentina has one of the world's highest inflation rates, clocking in a 22% during the first half of 2019. According to the BBC, 3 million people in Argentina have fallen below the poverty line since 2018.

366 P. VANHAM, *When a Country is Facing Political and Human Rights Issues, Should Businesses Leave or Stay?* December 2018, available at: <https://hbr.org/2018/12/when-a-country-is-facing-political-and-human-rights-issues-should-businesses-leave-or-stay>.

Venezuela) may decide that it is no longer profitable to operate there, and therefore may take the decision to disinvest.[367]

The MNC's decision to invest or disinvest in a given country may differ considerably per industry and type of MNC. For instance, the cost-benefit analysis of a manufacturer or consumer good MNC will differ significantly from that of a service provider MNC. The former normally has long term assets (such as factories or buildings) and therefore may have stronger incentives to stay in troubled economies (also due to the high costs related to the disinvestment). Conversely, a service provider MNC usually has fewer fixed assets to look after, and its clients are often fellow multinationals.[368]

Regardless of the type of MNCs, over the last few decades, several MNCs have entered and left "frontier markets" like Venezuela, Cuba, Iran, Vietnam, Myanmar, Argentina, and others, despite the high risks related to investment in these countries, including economic and political risks. The cost-benefit analysis of these investors has most likely been based on a short-term profit prospect.[369]

The following paragraphs will explain in details all these concepts by: (i) describing one of the main models of cost-benefit analysis used by MNCs when deciding where to invest (namely, the so-called OLI Paradigm); (ii) analyzing the main risks involved with an investment project (i.e., economic, financial, cultural and political risks); and (iii) discussing the short-term focus that certain MNCs adopt when deciding whether to invest in a given country.

Each sub-section will also attempt to answer the following human-rights related questions: are human rights a determinant of the FDI decision? Are human rights violations perceived as a risk by MNCs when investing in a given country? How do short-term profit-seekers FDIs impact on human rights?

3.2. The OLI Paradigm

367 *Id.*

368 *Id.*

369 *Id.*

In the past few decades several theoretical and empirical studies have attempted to answer the above-mentioned questions and identify the main factors underlying the decision to carry out a FDI.[370] Among these, the most prominent study

[370] One of the earliest theories explains FDIs in terms of market imperfections. Specifically, Kindleberger argued that for companies to gain advantage by investing abroad, market has to be imperfect. If we assume that markets are perfect there is nothing foreign companies can exploit to make enough profit that will offset costs and risks associated with investing abroad (*see* C.P. KINDLEBERGER, *The Theory of Direct Investment*, in: Kindleberger, C. Ed., American Business Abroad, Yale University Press, New Haven, 1969).

Later, the concept of firm-specific advantages was introduced to explain how market imperfections lead to foreign investment. These advantages include superior technology and marketing (*see* R. E. CAVES, *International Corporations: The Industrial Economics of Foreign Investments*, in *Economia,* 1971, at 1-27), cheap labor (*see* H.G. GRUBEL, *Internationally Diversified Portfolios: Welfare Gains and Capital* Flows in *The American Economic Review*, 1968, at 1299-1314), management skills, and exclusive access to natural resources (*see* S. LALL and P. STREETEN, *Foreign Investment, Transnationals and Developing Countries*, Macmillan, 1977). According to certain economic theories, only when a foreign company possesses these firm-specific advantages it can successfully invest and become a major player in a foreign market and compensate for the disadvantages of being foreign in the country of its operation (*see* S. HYMER, *The International Operations of National Firms: A Study of Foreign Direct Investment. MIT Press*, 1976, Cambridge, MA.).

is the so-called OLI paradigm ("OLI") by Dunning,[371] pursuant to which a MNC decision to invest is based upon the following three factors.[372]

First, whether the MNC possesses an ownership-specific advantages ("O") over its competitors in the host state, deriving from knowledge-based firm-specific assets that amount to competitive advantages and lead to market power. This would include patents, trade secrets, well-known trademarks (brands), human capital and

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371 *See* J. H. DUNNING, *Explaining International Production*, Unwin Hyman Ltd, 1988. Dunning's theory was first introduced in 1977, and subsequently amended on several occasions to account for developments in the global economy and the activities of multinational enterprises. As acknowledged by Dunning himself, the OLI paradigm is not a theory in the strict sense, but rather a framework that brings together different strands of the economic and business literature to answer the following three basic questions. What enables foreign MNCs to outcompete domestic ones in the host country?; Why do MNCs choose specific locations for their activities?; Why would a MNC choose to engage in equity investment across borders rather than to exploit its ownership advantages through licensing, exports or some cooperative entry mode, such as joint ventures and contractual alliances?

See J. H. DUNNING, *Trade, Location of Economic Activity and the MNE: A Search for an Eclectic Approach*, B. OHLIN et al. (ed.), *In the International Allocation of Economic Activity: Proceedings of a Nobel Symposium Held at Stockholm*, Macmillan, 1977; J. H. DUNNING*, Explaining Changing Patterns of International Production: In Defense of the Eclectic Theory. Oxford Bulletin of Economics & Statistics*, 1979, at 269-95; J. H. DUNNING, *The eclectic paradigm of international production: A restatement and some possible extensions*, in *Journal of International Business Studies*, 1988, at 1-31; J. H. DUNNING, *Reappraising the Eclectic Paradigm in the Age of Alliance Capitalism*, in *Journal of International Business Studies*, 1995, at 461-491; J. H. DUNNING, *Location and the Multinational Enterprise: A Neglected factor?*, in *Journal of International Business Studies*, 1996, at 45–66; J. H. DUNNING, *The Eclectic Paradigm of International Production: A Personal Perspective. In the Nature of the Transnational Firm*, Routledge, 2000; J. H. DUNNING, *The Eclectic (OLI) Paradigm of International Production: Past, Present and Future*, in *International Journal of the Economics of Business*, 2001, at 173–190; J. H. DUNNING, *The Contribution of Edith Penrose to International Business Scholarship* in *Management International Review*, 2003, at 3-19. J. H. DUNNING, *An Evolving Paradigm of the Economic Determinants of International Business Activity*, in *Managing Multinationals in a Knowledge Economy: Economics, Culture, and Human Resources*, 2004; J. H. DUNNING and S.M. LUNDAN, *Institutions and the OLI paradigm of the multinational* enterprise, in *Asia Pacific Journal of Management*, 2008, at 573-593; J.H. DUNNING and S.M. LUNDAN, *Multinational Enterprises and the Global Economy*, Edward Elgar, 2008; DUNNING and S.M. LUNDAN, *The Institutional Origins of Dynamic Capabilities in Multinational Enterprises, Industrial and Corporate Change* 19, 2008, 1225–1246; J.H. DUNNING and C. PITELIS, *Stephen Hymer's Contribution to International Business Scholarship: An Assessment and Extension*, in *Journal of International Business Studies*, 2008, 167-176.

372 R. SENDLHOFER and H. WINNER, *Marginal Effective Tax Rates on Foreign Direct Investment*, in *Foreign Direct Investment*, 2000, at 43.

management expertise, and high quality products.[373] *Second*, the MNC will consider whether it has a locational advantage of going abroad ("L"), including less costly labor and transport, access to natural resources, proximity to a large market (which leads to more efficient logistics), and/or the need to get around trade barriers.[374] *Finally*, the MNC will invest if it finds it advantageous to internationalize ("I") across different markets (i.e., to maintain possession of this advantage), and realize the source of its competitive advantage within its firm (rather than simply selling or licensing it to foreign companies).[375]

In an extension of the OLI paradigm, Dunning further identified three main forms of FDIs, i.e., natural resource-seeking, market-seeking, and efficiency-seeking FDIs. A *resource-seeking* FDI is attracted by the presence of raw materials or natural resources within a given country, and its goal is to profit from the sale of these resources in world markets. The locational choice of these FDIs is therefore generally related to the presence of certain materials.[376] These types of FDIs—exemplified by the investments carried out by oil and gas companies—constituted the majority of the early FDIs, particularly within developing countries.

Market-seeking FDIs move abroad to protect or expand access to a foreign market. Indeed, a MNC will commonly move the entire production process within the host state and will sell the products and service within the local market. Primary location consideration with respect to these types of FDIs are the size and potential growth of the host market as well as domestic labor pool with the skills required for the productive process. These types of FDIs better describe manufacturing firms in sectors with low value-added and high transportation costs (namely, firms that

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373 *Id.*

374 *Id*.

375 S. L. BLANTON and R. G. BLANTON, *What Attracts Foreign Investors? An Examination of Human Rights and Foreign Direct Investment*, in *Journal of Politics*, 2007, at 144.

376 *Id*.

produce heavy or "bulky" goods such as tires or fabricated metals) as well as service industries.[377]

In *efficiency-seeking* FDIs, a MNC moves a part of its production process abroad with the goal of reducing overall costs and, thus, increasing competitiveness in the global market. In this context, efficiency can be improved in two basic ways: (i) by lowering factor costs in one part of the production chain (i.e., accessing markets with low labor costs in assembling a finished product); or (ii) attaining economies of scale in the production process.[378] Along these lines, the location decision can be driven by the presence of very skilled and/or very cheap labor forces, depending upon the demands of the production chain. Export processing zones fit into this category due to their emphasis on labor costs, as well as manufacturing sectors with high value-added and relatively low transportation costs.

The premise of the OLI paradigm is that investment decisions with regard to a particular country are framed as a cost-benefit analysis. In the interest of *profit*, investment decisions are determined in part by the presence of natural resources and/or specific advantages, and the costs associated with investing in a potential host country. Within the framework of a cost-benefit analysis, the distribution of FDIs across countries is in part a function of location-specific advantages.[379] But where do human rights stand in the equation?

3.2.1. Are Socio-Economic Rights FDIs Determinant?

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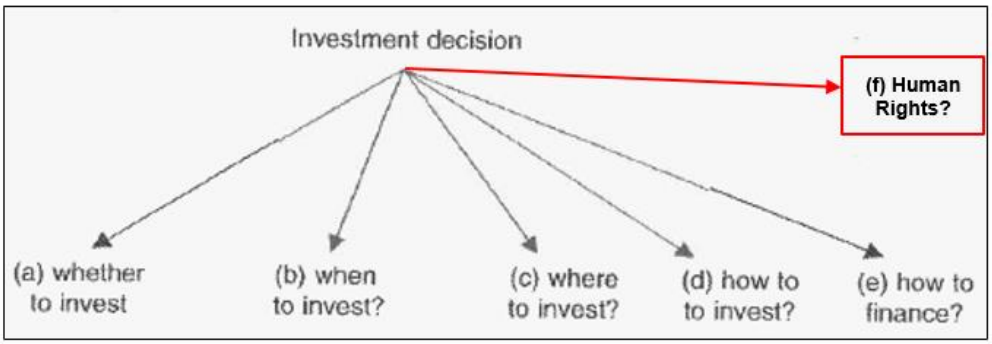
377 R. CAVES, *Multinational Enterprise and Economic* Analysis, Cambridge University Press, 2007.

378 S. COHEN, *Multinational Corporations and Foreign Direct Investment: Avoiding Simplicity, Embracing Complexity*, Oxford University Press, 2007.

379 S. L. BLANTON and R. G. BLANTON, *What Attracts Foreign Investors? An Examination of Human Rights and Foreign Direct Investment*, in *Journal of Politics*, 2007, at 144.



There are two prevailing views on the role of human rights in the FDIs' decision making process.

According to the traditional view, human rights violations attract FDIs. As the profitability of the home market stagnates, MNCs are forced abroad. Striving to maximize profit and maintain their own rates of growth, MNCs target countries where local population can be exploited and controlled (e.g., host states that do not guarantee even the minimum essential levels of socio-economic rights). According to this view, FDIs are traditionally attracted by and support government that abuse human rights, including socio-economic rights. In turn, repressive regimes actively solicit the technical and economic resources associated with FDIs.[380] Domestic elites reap a disproportionate benefit from these investments and are often willing to compromise the good of the whole in order to attract and keep foreign investment,[381] by providing a "favorable balance of class forces",[382] with low wages, tight control, and a minimum of class-based economic disputes.[383] In support of this theory, legal

380 D. SPAR, *Foreign Investment and Human Rights*, Challenge, 1999, at 58.

381 S. MAXFILELD, *Understanding the Political Implications of Financial Internationalization in Emerging Market Countries*, World Development 26, 7, 1201-19; F. CARDOSO and E. FALETTO, *Dependency and Development in Latina America*, Berkeley, University of California Press.

382 R. DANI, *Labor Standard in International Trade: Do they Matter and What Do We Do About Them?*, in *Emerging Agenda for Global Trade*, Overseas Development Council, 1996, at 57.

383 B. LONDON and ROBERT J. S. ROSS, *The Political Sociology of Foreign Direct Investment*, in *International Journal of Comparative Sociology*, 1995, at 25.

scholars cite to the case of United Fruit Company in Guatemala, IT&T in Chile and Chase Manhattan Bank in Mexico.[384]

According to an alternative view, which is gradually prevailing, the political, economic and social stability of the host state as well its ability to discharge its human rights obligations are increasingly becoming a key element in the decision-making process of investors. The reasons are several and can be summarized as follows.

First, originally FDIs targeted primarily industries such as mining and oil extraction (i.e., resource-seeking FDIs). These FDIs are inherently limited to countries that possess such resources and are historically characterized by governments that abuse human rights. Within this context, the pursuit of corporate interest often led investors to invest and hence establish relationships with countries that abuse human rights.[385] However, in recent years, FDIs are increasingly involving consumer products, manufacturing, service industries, and hi-tech industries and investors are increasingly targeting countries where the quality of human capital is high.[386] Accordingly, although low labor costs are still a determinant of the production costs, MNCs tend to give greater preference to the need to access and maintain a well-trained and skilled labor pool.[387]

Second, respect for human rights is the right thing to do, but it is also a business decision. As mentioned above, human rights violations pose a number of risks and costs for all business. These risks/costs include putting the company's social license to operate at risk, reputational damages, consumer boycotts, exposure to legal liability, adverse action by investors and business partners, reduced productivity and moral of

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384 R. FALK, *Interpreting the Interaction of Global Markets and Hunan Rights*, in *Globalization and Human Rights*, University of California Press, at 61-76.

385 *See* S. L. BLANTON and R. G. BLANTON, *What Attracts Foreign Investors? An Examination of Human Rights and Foreign Direct Investment*, in *Journal of Politics*, 2007, at 144. *See also* R. G. BLANTON and S. L. BLANTON, *Rights, Institutions, and Foreign Direct Investment: An Empirical Assessment*, in *Foreign Policy Analysis*, 2012, at 431-451.

386 *See* Chapter III, above.

387 Offshoring and relocation towards destinations offering cheaper domestic labor become less relevant in a world of increasingly automated manufacturing. At the same time, improving living conditions requires creating jobs, which in turn still relies heavily on manufacturing.

employees, and adverse government action.[388] These costs/risks are particularly high in developing countries where MNCs run the political risk of becoming potential targets of acts of political violence, including the kidnapping,[389] the killing[390] and the unlawful imprisonment[391] of the MNCs' management and staff as well as the unlawful expropriation of the MNCs' assets.[392] Furthermore, MNCs that are perceived as complicit in human rights abuses might be sanctioned by the market in terms of damage to the reputation, audience, image and even stock value.[393]

Third, as explained in details under Chapter II above, there have been in the last decades numerous initiatives aimed at holding MNCs accountable for human rights violations (i.e., the so called corporate social responsibility).

In sum, human rights matter in the investment decision. Countries that uphold human rights tend to receive more FDIs than countries that do not.[394] Certain empirical studies have found that countries with higher levels of respect for human rights have a better record of successfully completing the World Bank funded projects to build infrastructures,[395] thus suggesting a possible link between respect for human rights and economic performance. By the same token, studies have shown that respect for human rights can "directly reduce risk to FDI by enhancing political stability and predictability", creating indirectly "an environment conductive to the development

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388 *See* United Nations Global Compact, *The Ten Principles of the UN Global Compact, Principle One: Human Rights*, available at: <https://www.unglobalcompact.org/what-is-gc/mission/principles/principle-1>.

389 Shell experienced kidnapping and repeated sabotage in Nigeria.

390 Chevron was forced to abandon two oil fields in Sudan after several of its employees were killed.

391 *See* D. SPAR, *Attracting High Technology Investment: Intel's Costa Rica Plant*, PLAS Occasional Paper, Washington, DC, Foreign Investment Advisory Service, 1998, at 9.

392 These factual elements often lie at the heart of most human rights claims raised by investors within investment arbitration proceedings.

393 *Id.*

394 OECD, *More Open Economies Receive more FDI*, December 19, 2011, available at: <https://www.oecd.org/investment/investmentfordevelopment/1959815.pdf>.

395 *See* S. L. BLANTON and R. G. BLANTON, *A Sectoral Analysis of Human Rights and FDI: Does Industry Type Matter?*, in *International Studies Quarterly*, 2009, at 469-493.

of human capital", and encouraging "a more open, well-trained, and economically efficient society".[396]

3.3. The Different Types of Investment Risk

The investor's cost-benefits analysis will also include an evaluation of all risks related to investing in a given country. The standard definition of "risk" is fairly intuitive and easy to grasp.[397] Risk is typically defined as "the probability that an event will happen, where the event will have adverse consequences (costs) for the relevant party".[398]

Apart from the regular business risk, investors are particularly concerned with the *country* and/or environment risk. All host states create an environment of both opportunities and risks for MNCs.[399] The country risk is the *unanticipated* "downside" variability in a key performance indicator, or significant strategic target, which results from engaging in international business transactions with an inevitable exposure to the performance and policies of a sovereign country other than the home country.[400] It is worth emphasizing that only a *significant* and *unexpected* change can be a source of relevant risk.[401]

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396 *Id.*

397 *See* J. W. YACKEE, *Political Risk and International Investment Law*, in *Duke Journal of Comparative & International Law*, 2014, at 477.

398 *See* R. A. POSNER, *Behavioral Finance Before Kahneman*, in Loyola Law Journal, 2003, at 1341, 1345-1346; J. W. YACKEE, *Political Risk and International Investment Law*, in *Duke Journal of Comparative & International Law*, 2014, at 477. Risk has also been defined as an "uncertainty in regard to cost, loss or damage". *See also* J. CAMILO HOYOS, *The Role of Bilateral Investment Treaties in Mitigating Project Finance's Risks: The Case of Colombia*, at 288.

399 This reflects the continuing importance of states as chief political units in the world and the role of government as a purposeful actor developing a strategy to achieve the objectives which give to the same its legitimacy. *See* C. WHITE and MIAO FAN, *Risk and Foreign Direct Investment*, 2006, at 147.

400 *Id*.

401 While expected changes can never be a source of risk, such a change, although contextual can increase the vulnerability to particular kinds of risk, while not itself constituting a risk-generating event. *See* C. WHITE and MIAO FAN, *Risk and Foreign Direct Investment*, 2006, at 158-161.

Country risk is generally divided into four components: economic, financial, political and cultural risk.[402]

3.3.1. The Economic Risk

Economic risk arises from *unexpected* changes in the economic context of an investment project, including long-run slowdown of economic growth, a sustained deterioration in the level of GDP per capita, deficit in current account of the balance of payments, persistent depreciation of the exchange rate, high inflation rates, significant increase in the interest rates, currency fluctuations, diminished ability to borrow abroad, infrastructure deficiencies and bureaucratic delays.[403]

3.3.2. The Financial Risk

Financial risk compromises *unpredicted* changes in creditworthiness, including sovereign risk, both the danger and unexpected increase in the size of the loss given default. Creditworthiness is of indirect relevance in that it may indicate a starting point for a risk premium for a particular country. An unexpected fall in creditworthiness may be associated with two outcomes in particular: restriction/difficulties in access to credit and the capital market, and vulnerability in credit rating.[404]

3.3.3. The Cultural Risk

The cultural risk includes misunderstanding the influence of specific cultures on the patterns of business behavior, including selling, consuming and negotiation. The two main sub-components are transaction cost uncertainties, which arise because of nepotism, corruption or excessive bureaucratization, and negotiation uncertainties, which arise from ignorance of how to interpret what has been offered.[405]

3.3.4. The Political Risk

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402 *Id. See also* M. BUSSE and J. L. GROIZARD, *Foreign Direct Investment, Regulations and Growth*, in *The World Economy,* 2007; J. P. SASSE, *An Economic Analysis of Bilateral Investment Treaties*, at 17.

403 *See* C. WHITE and MIAO FAN, *Risk and Foreign Direct Investment*, 2006, at 158-161.

404 *Id*.

405 *Id*.

There is no general agreement on what constitutes political risk.[406] According to Stephen Kobrin, political risk arise from *unexpected* "actions of national governments which interfere with or prevent business transactions, or change the terms of agreements or cause the confiscation of wholly or partially owned business property".[407] In other words, political risk compromise the *unpredicted* risk of governmental intervention in the development or operation of a given FDI. An impairment of the investor's property rights is normally the effect of such government's actions (direct and/or indirect expropriation of the assets).

Political risk includes elements of political instability, government policy, uncertainties compromising everything from expropriation to tax changes, and social instability.[408] Political risk is also strictly related to the materialization of the above-mentioned economic, social and cultural risks. Political risk is therefore driven by the uncertainty over the reasons underlying the actions of the government and related agencies. As a matter of fact, governments can intervene in an investment for a uncountable reasons: driven by a purely economic or political self-interest (negative political risk); to react to unforeseen circumstances (including wars, actions taken by minority, separatist and terrorist groups, economic crisis, and health emergency situations);[409] to respond to the reaction of its citizens to an investment (also in light

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406 *See* D. BAAS, *Approaches and Challenges to Political Risk Assessment: The View from Export Development Canada*, in *Risk Management*, at 137, 2010; E. CLARK and B. MAROIS, *Managing Risk in International Business: Techniques and Applications*, 1996, at 34.

407 Political risk has also been defined as "exposure to a change in value of an investment or cash position resultant upon government action" (*see* A. BUCKLEY, *An International Capital Budgeting*, 1996, in Practice Hall, Hemel Hempstead, at 321) or the "negative impact on a key performance indicator or a strategic target relevant to an investment, of an unanticipated change in the political environment of the host country, whatever its nature - a regime, a policy change or an increase in political turbulence" (*see* C. WHITE and MIAO FAN, *Risk and Foreign Direct Investment*, 2006, at 147).

Political risk is particularly high in host countries characterized by unstable political and financial environment, where the rule of law is only weakly established and domestic courts can often not be relied upon to enforce whatever contract the foreign investor might have with the host State. *See* S. KOBRIN, *Political Risk: A Review and Reconsideration*, in *Journal of International Business Studies*, 1979, at 67.

408 See C. WHITE and MIAO FAN, *Risk and Foreign Direct Investment*, 2006, at 148.

409 *See* Chapter IV, below, Section V.

of re-election); in furtherance of a non-investment international obligation under international law, including a human right obligation;[410] and in order to maximize the social welfare of its citizens.[411]

On these grounds, it is possible to group the sub-components of political risk into three different sources of relevant changes. Political risk arising from: (i) changes of government (including democratic changes and changes through *coup d'etats*, and revolutions);[412] (ii) external factors and insecurities (including wars, invasion and foreign inspired disorders); (iii) internal factors and insecurity, (e.g., job insecurity, high level of unemployment, high level of criminal activity and social conflicts);[413] and (iv) deliberate changes of policy by government in areas relevant to the business enterprise, usually as a result of pressure from key interest groups.[414]

It is undeniable that political risk is particularly high in developing countries, which are often characterized by unstable governments and economies. It is equally undeniable that to a large extent in these countries the political risk is *foreseeable*. If we apply the definition and description of risk operated above, a foreseeable political risk could not be potentially seen as a source of relevant risk.

3.3.5. The Human Rights Obligation Risk

Human rights risk could be considered as a particular type of political risk. This is the risk that the host state will intervene in the investment while discharging its human right obligations under international human rights law, including the obligation to take immediate steps to guarantee: (i) the progressive full realization of the socio-

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410 *Id*.

411 Multilateral Investment Guarantee Agency, World Bank Group, World Investment and Political Risk 21, 2011.

412 Radical shifts in political leadership create political risk for investors insofar as a new government may adopt unanticipated policies different from those adopted by its predecessor, including the unilateral announcing of measures that restrict the future profitability of foreign operations. For instance, in order to reduce expenditures and increase revenues, a government may not service the country's debts or even expropriate foreign assets. *See* C. WHITE and MIAO FAN, *Risk and Foreign Direct Investment*, 2006, at 156.

413 *Id*., at 156-157.

414 *Id*.

economic rights recognized under the Socio-Economic Covenant; and (ii) at the very least, the minimum essential levels of these rights (the survival rights). The probability that this risk will materialize may depend on the economic, financial, political and cultural situation existing in the host state.[415]

Taking the example of a country characterized by chronic economic and political instability the result of which is that a significant number of individuals are deprived of work (and or adequate working conditions), essential primary health, essential living conditions, including access to water and other public services.[416] Under the Socio-Economic Covenant, the country is under the specific obligation, among others, to adopt the most appropriate measures necessary to guarantee at the very least the minimum essential levels of these rights. In furtherance of its obligations, the host state may adopt the measures it considers most appropriate to: (i) "address the concern of all workers";[417] (ii) guarantee access to basic shelter, housing and sanitation; (iii) adopt and implement national public health strategies; and (iv) ensure access to minimum essential amount of water to its population.[418] The host state will discharge these obligations to the maximum of its financial and technical available resources. The host state might also amend its tax legislation (i.e., the way host States raise revenues) in order to raise the necessary financial resources.

The overall measures taken by the host state to guarantee at the very least the minimum essential levels of socio-economic rights may represent for certain FDIs operating in that host state a risk (i.e., the human rights obligation risks), namely, the risk that the measures will have a negative impact on the investment by e.g., reducing its profitability or, in the worst case scenario, nullifying the investment.

Maintaining the example of the economically troubled host states. To face the crisis, the host state may resort to FDIs to gather the financial and technical resources necessary to guarantee at the very least the survival socio-economic rights. For

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415 *See* Chapter II, above, Section 2.3.1.

416 As Argentina has been for most of the last two centuries.

417 General Comment No. 18, para. 31.

418 *See* Chapter II, above.

instance, to guarantee the minimum essential levels of water and adequate housing, host states may outsource their distribution and management to a MNC normally through a concession agreement. However, if the private provider fails to guarantee the minimum essential levels of these rights, there is the risk that the host state will intervene by either revoking the concession and/or changing the terms of the original agreement.

Apart from the duty to guarantee the minimum essential levels of socio-economic rights, the host state is under the obligation to take immediate steps to guarantee the progressive full realization of these rights and, in turn, the economic development of the host state. Progressive realization means a pattern of *continuous* improvement or advancement, which entails a state's obligation to ensure a broader enjoyment of the rights over time.[419] Moreover, as explained under chapter II above, the adoption by host states of deliberately retrogressive measures,[420] which might imply a step backwards in the level of enjoyment of the socio-economic rights would require careful consideration and *full justification in light of object* and purpose of the Socio-Economic Covenant.[421] Thus, for instance, an armed conflict and/or other emergency situations (such as an economic crisis) would not *per se* be sufficient to justify this intervention.

All the above-mentioned scenarios the relevant host State will be acting under its human rights obligations.[422] Accordingly, the risk that it would pass legislation in furtherance of these obligations is relative foreseeable. If we apply the definition and description of risk operated above, a foreseeable human rights obligation risk could not potentially be seen as a source of relevant risk.

3.4. FDI's Short-Term Profit Focus

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419 UNCESCR, General Comment No. 3, para. 9. *See also* E/2015/59, Report of the United Nations High Commissioner for Human Rights dated July 21, 2015, para. 22.

420 *See* E/2015/59, Report of the United Nations High Commissioner for Human Rights dated July 21, 2015, para. 23.

421 *Id*.

422 *See* Chapter II.

Often investors who decide to enter a troubled economy are short-term profit seekers. These are inventors who know and/or foresee that one of the above-mentioned risks may materialize, but intentionally decide to invest because they estimate that the profit up to the materialization of the risk would be high enough to make the FDI profitable.[423]

The Argentine example, which will be discussed further below,[424] is a good one. In the early 1990s, Argentina underwent a severe economic crisis generated in part by a long-run slowdown in the economic growth, a sustained deterioration in the level of GDP per capita, and an extremely high inflation rate. The crisis had a tremendous impact on the socio-economic rights of the Argentinian population, bringing high levels of unemployment, and leaving a high percentage of the Argentine population without adequate living and health conditions, including access to water and energy. To overcome the crisis, and guarantee its population, at the very least, the minimum essential levels of socio-economic rights, Argentina (which has ratified the Socio-Economic Covenant on August 8, 1986), took steps, individually and through international assistance and cooperation, and to the maximum of its available resources (as required by the Socio-Economic Covenant).[425]

Specifically, Argentina passed several reforms aimed at attracting FDIs to its market, including: (i) a convertibility regime, which to counter the high inflation rates present in Argentina imposed the fiction one pesos one dollar; (ii) several privatization laws of energy and water services aimed at bringing market efficiency to these underfunded and poorly managed public services; and (iii) several investment treaties with developed countries, which also in light of their human rights obligation under the Socio-Economic Covenant intervened to provide cooperation and technical assistance to Argentina.

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423 *See* P. VANHAM, *When a Country is Facing Political and Human Rights Issues, Should Businesses Leave or Stay?*, December 2018 available at: <https://hbr.org/2018/12/when-a-country-is-facing-political-and-human-rights-issues-should-businesses-leave-or-stay>.

424 *See* Chapter IV, below, Section 5.

425 *See* Chapter IV, below, Section 5.

On the one hand, most of these reforms, although made with the aim to guarantee the progressive development of Argentina, did not incorporate human rights concerns. Quite to the contrary, most of the measures were deliberately retrogressive, implying a step backwards in the level of enjoyment of most socio-economic rights.[426] Notwithstanding the foregoing, the efforts of the Argentine government were applauded by the whole international community and certain financial institutions, including the MFI.[427]

In 2001-2002, Argentina was stroke by yet another severe crisis rooted partially in the previous crisis, partially in the above-mentioned measures adopted by Argentina. The crisis was so severe that almost led the country to the verge of its collapse. To face the crisis, and once again in furtherance of its human rights obligations, Argentina implemented certain emergency measures, including the termination of the convertibility regime and the reform of the privatization laws. These measures generated a wave of investment arbitrations against the country commenced by investors who had invested in Argentina in the period 1992-2001, allegedly attracted by the favorable investment regime.[428]

The defense raised by Argentina will be analyzed under Chapter IV, below. What it is interesting to note for purposes of this section is that, as the figure 2 below shows, although most of the reforms were passed by Argentina in the early 1990s, the highest pick in FDIs inflow to the country was registered in the late 1999, when the signs of the crisis were already there.[429]

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426 *See also* M. KRIKORIAN, *Derechos Humanos, políticas públicas y rol del FMI. Tensiones, errores no asumidos y replanteos*, Librería Editoria Plantese, 2010, at 99-131.

427 *See* Chapter IV, Paragraph 5.

428 *See* Chapter IV, below, Section 5.

429 *Id.*

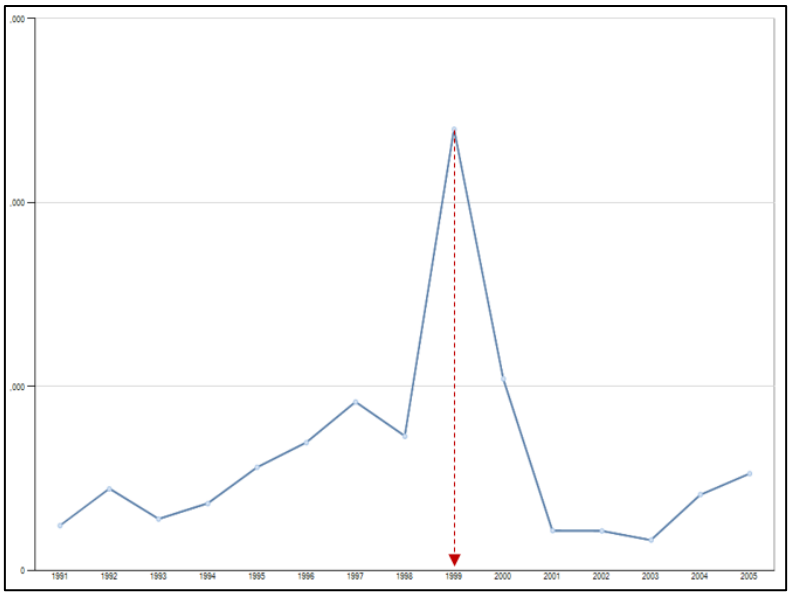

Figure 2[430]

It is also worth noting that at the time of the drafting of this work, Argentina is facing yet another financial crisis. On the aftermath of the primary presidential elections that took place on August 11, 2019 and which saw the defeat of the current president Mauricio Macri by centre-left opposition leader (Alberto Fernández), the value of the pesos felt dramatically,[431] and Argentina declared once again default.

Argentina's latest crisis started to show its first signs in the first quarter of 2018. By this time Argentina's economy had slumped down by 2.5%, and 3 million people were already living below the poverty line.[432] As before, the highest pick in FDIs inflows to Argentina was registered exactly at the beginning of 2018, when the signs of the crisis were already there.

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430 The chart has been generated by using the data available on the OECD website <https://data.oecd.org/fdi/fdi-flows.htm>.

431 *See*, e.g., The Guardian, *Argentinian Peso Plunges As Centre-Left Win Election Primary*, August 12, 2019; Reuters, *Argentina Central Bank Faces Peso Test Ahead Of October Election*, August 16, 2019; New York Times, *Argentine Peso Collapses as Macri's Re-election Chances Drop*, August 12, 2019; The Economist, *Stunning Reversal For Argentina's President Mauricio Macri*, August 12, 2019.

432 *Id*.

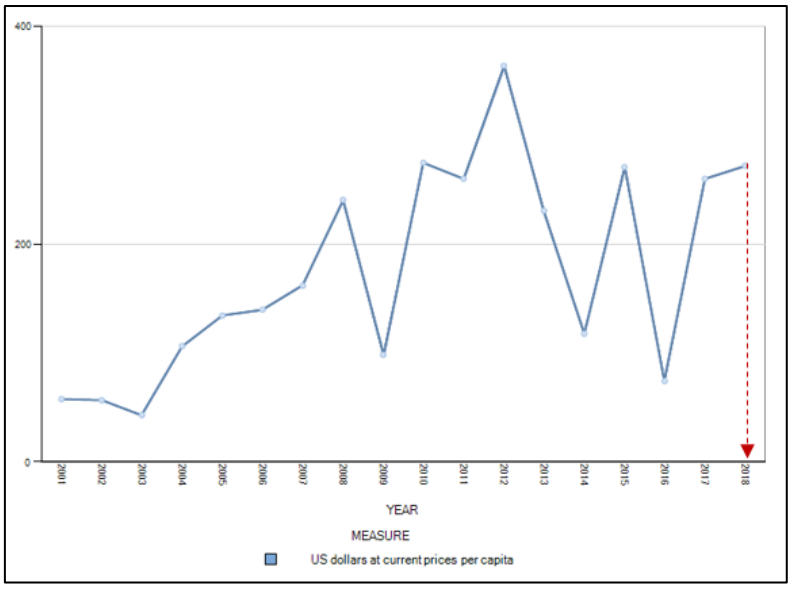

Figure 3[433]

4. The Role of Host State in Influencing the Investment Decision

As mentioned above, FDIs guarantee the technical and financial resource through which developing countries discharge their human rights obligations, and promote the development of their economies. Due to their relevance for developing countries, host states devote significant efforts in framing tools and policies able at attracting FDIs, including: (i) through general or specific policies promoting the attractiveness of the location so as to influence the investment decision; and (ii) by entering into investment agreements and international investment treaties.[434] In other words, host states can impact on the investor's cost-benefit analysis by rendering the location more attractive.[435]

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433 The chart has been generated by using the data available on the OECD website <https://data.oecd.org/fdi/fdi-flows.htm>.

434 Specifically, by these treaties, host states commit themselves in a legally binding way to grant foreign investors various rights that reduce uncertainty with respect to entry and exit conditions, post entry operations as well as dispute settlement mechanism. *See*, e.g., M. BUSSE, J. KÖNIGER and P. NUNNENKAMP, *FDI Promotion through Bilateral Investment Treaties: More than a BIT?*, in *Rev. World and Economics*, 2010, at 146-177.

435 *See* Chapter III, Section 3.2.

The task of elaborating these policies is usually subdivided among different state agencies with competences in trade, foreign, industrial, tax, and social policies.[436] Since these tools are ultimately aimed at promoting and guaranteeing the Socio-Economic Rights and the development of the host State, one would assume that they dedicate a particular attention to such rights. The assumption is wrong, although things are gradually changing.

This section will provide an overview of the main instruments used by States to influence the investment decision, including: (i) national investment incentives; (ii) investment contacts; and (iii) international investment agreements. Each sub-section will also attempt to verify where do human rights stands in these instruments?

4.1. National Investment Incentives as Determinants of FDI. Where do Human Rights Stand?

To make the location more attractive to FDIs, host states enact investment incentives.[437] The OECD defines investment incentives as "measures designed to influence the seize, location or industry of a foreign direct investment project by affecting its relative costs or by altering the risks attached to it through inducements that are not available to comparable domestic investors".[438] The UNCTAD, instead, defines investment incentives as "measurable advantages provided by government to particular companies or group of companies with a goal to force them to behave some way".[439] Based on the above-mentioned definitions, the investment incentives should have the following characteristics.

First, they should be directed to a foreign FDI rather than to a national investor, because of the particular advantages that FDI can bring in terms of capital, technology and others to the host state.[440] *Second*, the incentive must be tailored to a specific

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436 See C. SMEKAL and R. SAUSGRUBER, *Determinants of FDI in Europe*, in *Foreign Direct Investment*, 2000, at 38.

437 Investment incentives represent a "subsidy given to affect the location of the investment".

438 OECD Investment Policy Review: Malaysia, 2013.

439 *See* A. T. TAVARES-LEHMANN, P.TOLEDANO and L. JOHNSON, *Rethinking Investment Incentives*, Columbia University Press, 2016, at 3.

440 Not all incentives are geared toward attraction of FDI.

investor and/or investment project which have certain characteristics (e.g., investment in a certain sector, certain territory, of certain financial magnitude, or attached to a target such as employment or technological content), i.e., the incentive should be characterized by the notion of *specificity*. *Third*, the advantage should be measurable. Although this is important, the value of the incentive is not always easy to identify, much less to quantify. This represents a substantial challenge when assessing the costs, benefits, and effectiveness of incentive policies.

Generally, investment incentives differentiate in financial, fiscal and regulatory measures.

Financial incentives include the provision of grants, subsidies, loans, wage subsidies, job training subsidies, creation of new infrastructures, and support for expatriation costs. These types or incentives are more common to developed host states (rather than developing once), as resources constrained governments find it hard to pay money.

Fiscal incentives are tax provisions tailored to qualified investment projects that represent a favorable deviation from general tax law and regulations. These types of incentives aim at increasing the rate and return of certain investments or at reducing the related risks and costs by reducing tax burdens. Fiscal incentives include both lower taxation and outright exemptions from taxation. They imply reduction in, exemption from, or deferral of taxes payable in the host state and arising from income sources such as profits, dividends, and royalties. These investment incentives are the most used types of investment incentives.[441]

Regulatory incentives are "policies of attracting […] enterprises by means of offering them derogations from national or sub-national rules and regulation[s]".[442] In practice, these derogations have often meant "easing the environmental, social and labor-market related requirements placed on investors", including e.g., relaxing the standards for labor conditions (social dumping, in pejorative terms), and/or the

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441 *See* R. SENDLHOFER and H. WINNER, *Marginal Effective Tax Rates on Foreign Direct Investment*, in *Foreign Direct Investment*, 2000, at 43.

442 OECD, *Checklist for Foreign Direct Investment Incentive Policies*, 2003, at 17.

thresholds for environmental liabilities.[443] These regulatory derogation can be granted through several channels, including: (i) stabilization provisions included in investor-state agreements (which purport, among others, to excuse investors from having to comply with certain changes in the law that increase their costs of doing business); (ii) provisions in investor-state contracts that give investors greater rights and protection than those that would be available to them under domestic law; and (iii) laws, which provide to investors special substantive or procedural rights.[444]

Investment incentives operate often as a tool to attract FDIs as they reduce the entry costs (e.g., the costs of setting up a production in a foreign plant) of the investment. This is often reached by loosening socio-economic rights standards, and thus in violation on the state's obligation to protect, respect and fulfil human rights.[445]

In passing these regulatory derogations (and by making these promises to investors), the host state might breach its human right obligations under the Socio-Economic Covenant, including the obligations: (i) to respect, protect, and fulfill at the very least the minimum essential levels of Socio-Economic Rights; (ii) not take deliberately retrogressive measures;[446] and (iii) not to limit such rights unless strictly necessary to promote the general welfare of the host state in a democratic society (and to the extent that such limitations are compatible with the nature of these rights).[447]

Several empirical studies have analyzed the relationship between investment incentives and FDI inflows, and have concluded that favorable investment policies have

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443 *See* A. T. TAVARES-LEHMANN, P. TOLEDANO and L. JOHNSON, *Rethinking Investment Incentives*, Columbia University Press, 2016, at 31.

444 *Id*. For instance, laws establishing FTZs or other special economic zones, which provide that the general legal framework regarding labor, taxation, or other issues do not apply within the FTZ, thereby offering an incentive to invest in these zones.

445 *See* C. SMEKAL and R. SAUSGRUBER, *Determinants of FDI in Europe*, in *Foreign Direct Investment*, 2000, at 38.

446 *See* E/2015/59, Report of the United Nations High Commissioner for Human Rights dated July 21, 2015, para 23. See Chapter IV.

447 If that happens, the host state would be under the obligation to "review the adequacy of laws and identify and address compliance and information gaps, as well as emerging problems" and if necessary, intervene in the investment. General Comment No. 24. *See also* Chapter II, above.

in general a positive effect on attracting FDI flows.[448] This is of no surprise. There could be little doubt that certain incentives may contribute to attracting investors to some jurisdictions. However, effectiveness of the single measure depends on what is being offered, to what type of FDIs (resource-seeking FDI, market-seeking FDIs, and efficiency-seeking FDIs), and by what location. Some investors, such as resource seeking FDIs and market-seeking FDIs do not seem to be readily influenced by incentives when making investment decisions. As a matter of fact, investment incentives cannot fully compensate for the absence of certain fundamentals, such as the existence of natural resources, the relevant market, the availability of adequate human resources, and political stability among other factors.[449] Accordingly, there might be little sense in compromising human rights for tools that do not lead to the required result.[450]

Things are gradually changing and there seems to be a trend toward legislations that are more protectionist and attentive towards socio-economic human rights.[451]

4.2. FDIs Contracts as Determinants of FDI. Where do Human Rights Stand?

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448 *See* V. M. GASTANGA, J.B. NUGENT and B. PASHAMOVA, *Host Country Reforms and FDI Inflows: How Much Difference do they Make?*, in *World Development*, 1999, at 1299-1314; E. ASIEDU and D. LIEN, *Capital Control and Foreign Direct Investment*, in *World Developments*, 2004, at 479-490; G. PICA and J.V. RODRÌGUEZ MORA, *FDI, Allocation of Talents and Differences in Regulation*, CEPR Discussion Paper, 5318. London, Center for Economic Policy Research.

449 As with respect to political stability, including respect for human rights, as already mentioned above, human rights are increasingly becoming a determinant of the FDI decision making process. With this respect, statistics show that countries with legislation attentive to human rights (rather than legislation to loosen the related standards) tend to receive more FDIs than host states that do not. See OECD, *More Open Economies Receive more FDI, OECD*, December 19, 2011.

450 Against this background, why do host States pass measures that do not appear to contribute to their development, but might also jeopardize their economic development as well as the human rights of their population? The answer is straight forwarding: short-term or immediate profit that serve the interest of a limited group of persons. *See* Chapter V.

451 Based on the UNCTAD 2018 Report, between October 2017 and April 2018, about 30 per cent of newly introduced investment measures were restrictive or regulatory in nature. *See* UNCTAD, *World Investment Report. Investment and New Industrial Policies*, 2018, at 17, and 81.

To properly "connect the dots" it is necessary to see how FDIs are in practice incepted in the host country. Most FDIs enter into developing country through FDIs contracts, which include: (i) national resource concessions; (ii) public service concessions, and (iii) build-operate-and-transfer contracts and public private partnership.

4.2.1. Natural Resources Concessions

Natural resource concessions are investment contracts concluded between a host state and a foreign investor whereby a foreign investor undertakes vis-à-vis the host state the obligation to explore and/or extract given natural resources from a delimited area and for a certain period of time.[452] In turn and depending on the terms of the concession agreement, the host state might undertake vis-à-vis the investor the obligation to transfer some concessionary rights, including the right to receive a fixed sum for the resources extracted or shares in the proceeds of the sales, and property right over the concerned resources.[453]

These types of contracts (i) require considerable capital outlay from the foreign investor[454] who supplies the expertise and the equipment for the exploration and extraction activity; (ii) are executed typically for no less than 30-50 years; (iii) imply for the investor a considerable commercial risk in the event the area delimited for the concession yields less natural resources (and consequently less profit) then the one

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452 *See* E. LARYEA, *Contractual Arrangements for Rescue Investment*, in F. N. BOTCHWAY (ed.), *Natural Resource Investment and Africa's Development*, Edward Elgar, 2011, at 109 ff.

453 The concession does not entail necessarily the full transfer of property rights over the concerned natural resources, as public authorities usually maintain some form of ownership over the resources. *See* J. GILBERT, *Natural Resources and Human Rights: An Appraisal*, Oxford University Press, 2019, at 53.

454 The exploitation and extraction of natural resources is extremely capital intensive and, as a result, many resource-rich developing countries are unable to exploit and extract them without the help of FDIs. *See*, e.g., J. DE GREGORIO, *The Role of Foreign Direct Investment and Natural Resources in Economic Development*, in E. M. GRAHA (ed.), *Multinational and Foreign Investment in Economic Development*, Palgrave Macmillan, 2005, at 179-197.

originally predicted.[455] Based on the target host country, these contracts may also imply considerable economic, political, and human rights obligations risks.

As with respect to the latter, concession agreements raise several human rights-related concerns, including in relation to the power of host states to regulate the use of the concerned natural resources in a way compliant to certain human rights,[456] their impact on the right to property over the natural resources of indigenous people and local communities,[457] as well as public health and environmental-related concerns.[458]

4.2.2. Public Service Concessions

Public service concessions ("PSC") are investment contracts concluded between a foreign investor and a host state whereby: (i) a foreign investor undertakes to supply an essential public service (e.g., health care, education, security, water and sewage facilities, gas and electricity, waste management, public administration, etc.) to a certain area (e.g., municipality, town, etc.) for a certain period of time; and (ii) the host state undertakes to remunerate the investor through fees paid by the users of the service.[459] The fees are (or should be) to calculated in a way that guarantees to the investor a reasonable profit without being particularly burdensome on the final consumer.[460]

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455 *See*, e.g., B. K. CAMPBELL, *Regulating Mining in Africa: For Whose Benefit?*, in *Nordica African Institute*, 2004; L. COTULA, *The New Enclosure? Polanyi, International Investment Law and the Global Land Rush*, in *Third World Quarterly*, 2013, at 1605-1629.

456 Historically, the most well-known dispute over natural resources concessions emerged from oil and gas concession agreements. *See* C. GREENWOOD, *State Contracts in International Law – The Libyan Oil Arbitrations*, in BYbIL, 1982. *See also* L. COTULA, *Land, Property and Sovereignty in International Law*, in *Cardozo Journal of International and Comparative Law*, 2017, at 219, 286.

457 *See Sawhoyamaxa Indigeneous Community* v. *Paraguay*, Judgment dated March 29, 2006, Series C, No. 146; and *Kichwa Indigeneous People of Sarayaku* v *Ecuador*, Judgment Series C No. 4 (2012). *See also* L. COTULA, *Human Rights and Investor Obligations in Investor-State Arbitration*, in *Journal of World Investment and Trade*, 2016, at 148-57.

458 *See* C. L. LIM and J. HO, M. PAPARINSKI, *International Investment Law and Arbitration*, Cambridge, 2018, at 53.

459 *Id*.

460 See Chapter IV, below, Section V.

Alike the previous type of contracts, these contracts: (i) require considerable capital outlay from the foreign investor who supplies the expertise, the technology and the infrastructure necessary to supply the essential services; (ii) have a duration typically of 30-50 years; and (iii) imply a considerable commercial risk for the investor, which might not be able to recover the expected profit. Alike the previous type of contracts, public service concessions may also imply considerable economic risk, political, and human rights obligations risks.

As with respect to the latter, the risks is generally related to the scenario in which the host state intervenes in the investment in furtherance of a human rights obligation and to render certain minimum levels of public services accessible to its population[461] E.g., the host state changes the method of calculation of the fees that result excessively burdensome on the final consumer *de facto* impeding him to enjoy such services.

Many of the concluded and pending ICSID investment arbitrations against Argentina involved public service concessions which were signed during the privatization campaign initiated by Argentina in the early 90s.[462] These concessions were either revoked or renegotiated in light of the 2001 economic crisis. Other types of factual scenarios involved with these types of contract relate to: (i) investors'/host states' involvements in corruption to procure and win government contracts for the

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461 *See*, e.g., T. H. TIETENBERG and L. LEWIS, *Environmental and Natural Resources Economics,* 10th ed., *to Privatization*, Springer, 2012; and G. YARROW, *Economic Perspectives on Privatization*, in *The Journal of Economic Perspectives*, 1991, at 111-32; F. MARRELLA, *On the Changing Structure of International Investment Law: The Human Rights to Water and ICSID Arbitration*, in *International Community Law Review*, 2010.

462 *See*, e.g., *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentina*, ICSID Case No. ARB/03/19; *AWG Group Ltd. v. Argentina*, UNCITRAL; *Biwater Gauff (Tanzania) Ltd.* v. *United Republic of Tanzania*, ICSID Case No. ARB/05/22; *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentina, ICSID Case No. ARB/97/3 (formerly Compañía de Aguas del Aconquija, S.A. and Compagnie* Générale des Eaux v. Argentine Republic); *Aguas del Tunari, S.A.* v. *Republic of Bolivia*, ICSID Case No. ARB/02/3; *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3; and *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. Argentina*, ICSID Case No. ARB/07/26.

supply of essential services;[463] (ii) the breach of the right to property and land of indigenous communities;[464] and (iii) business practices undermining workers' rights.[465]

4.2.3. Build-Operate-and-Transfer Contracts and Public Private Partnerships

Build-Operate-and-Transfer Contracts ("BOT") are investment contracts executed between a host state and foreign investor whereby: (i) the investor undertakes to build and operate for a certain period of time a given infrastructure (e.g., airport and highways); and (ii) the host state guarantees the investor that it will recoup its investment through the collection of tolls or fees when operating the infrastructure.[466] Due to the public benefits that some form of infrastructures involve, BOT may resemble public concession contracts. The difference between the two types of contract lies in the eventual handling of the operation of the infrastructure to the host state.

The World Bank defines a public-private partnership ("PPP") as "a long-term contract between a private party and a government entity, for providing a public asset or service, in which the private party bears significant risk and management responsibility, and remuneration is linked to performance". This broad definition encompasses natural resources concessions, public service concessions and event BOT contracts. Therefore, the term PPP is an inclusive label used to denote contracts that do not fall within the other three types of contracts described.[467] Notably, these types of contracts include the development of tourism sites, housing projects, the

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463 *See World Duty Free Co. Ltd.* v. *Republic of Kenya*, ICSID Case No. ARB/00/7; *Metal-Tech Ltd. v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3; and *MOL v. Republic of Croatia*, ICSID Case No. ARB/13/32.

464 *See Burlington Resources Inc.*, *v. Republic of Ecuador*, Decision on Jurisdiction, ICSID Case No. ARB/08/5, 342(E)(2), 2010; *Kichwa Indigenous People of Sarayaku v.* Ecuador, Judgment Series C No. 4, 2012.

465 *See* S. B. LEINHARDT*, Some Thoughts on Foreign Investors Responsibility to Respect Human Rights*, in *Transnational Dispute Management*, 2013, at 5.

466 *See* C. L. LIM and J. HO, M. PAPARINSKI, *International Investment Law and Arbitration*, Cambridge, 2018, at 54.

467 *Id*.

licensing.[468] Both BOTs and the PPPs raise human rights concerns similar to the one raised by the other investment contracts described.

4.3. International Investment Agreement as Determinants of FDIs

Bilateral investment treaties ("BIT" or "BITs") are inter-state agreements generally executed between industrialized, capital-exporting countries, and developing capital importing countries aimed at promoting and protecting FDIs flows. They have therefore a double aim: to promote and protect FDIs. Although the obligations undertaken by the signatory parties are reciprocal, there is a general agreement that the two groups of states sign BITs for different reasons.

Developed countries are generally interested in the protectionist aim, and therefore sign them to guarantee that their MNCs investing in the developing country will: (i) do so safely and securely for the longest time possible;[469] and (ii) be compensated in the event the host state breaches its investment obligations under the relevant treaty. The protectionist aim is pursued by: (i) mitigating the risk (political and human rights obligations risk) that the host State will intervene in the FDIs through investment obligations that limit considerably the host State's regulatory powers; and (ii) granting FDIs the right to start investment arbitration proceedings in the event the host State breaches its investment obligations under the relevant BIT.

As further discussed below, this protectionist mechanism operates irrespective of the: (i) reasons underlying the host states' intervention in the investment; and (ii) investor's conduct either prior and/or during the establishment of the investment.[470]

Developing countries are mainly interested in the FDIs promotion aim. Accordingly, they invest time and other scarce resources to negotiate, conclude, sign

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468 *Id*.

469 *See* J. PAULSSON, *The Power of States to Make Meaningful Promises to Foreigners*, in *J. International Dispute Settlement*, 2010, at 341.

470 For instance, if a host State breaches an investment obligation in furtherance of its human rights obligation by adopting appropriate measures that might result in a negative impact on an FDI, the FDI will have the right to start investment arbitration proceedings. The FDI will have the right to start the proceedings also if the host state has *intervened* in the investment in order to put an end to an unlawful conduct of the FDI.

and ratify BITs that might secure them the capitals necessary to guarantee their economic development and, in turn, the progressive full realization of the socio-economic rights.[471] The ICSID Convention, which articulates the role of international investment in fostering economic development in its preamble, reinforces this view.[472] With this respect, some leading legal scholars have argued that investor/investment protection is the object of BITs, while fostering economic development is their purpose.[473]

But do BITs fulfil their stated purposes to promote and protect FDIs? This question has been recurrently asked in the last decades. As with respect to the protectionist aim, BITs have surely proven to work.

As with respect to the promotion purpose the answer is still uncertain. Despite the popularity of BITs, the debate over whether BITs (and related dispute settlement mechanism) are a key determinant in the investment decision process (and whether they are thus capable of attracting FDIs) is still ongoing. In the international literature, including the empirical one, evidence on the effects of BITs on FDIs are mixed. Early studies have suggested that BITs have very little if no effect on the investor's decision

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471 *See* T. H. MORAN et al., *Introduction and Overview*, in *Does Foreign Direct Investment Promote Development?*, 2005; and J. WILLIAMSON, *What Washington Means by Policy Reform, in Latin America Adjustment: How Much has Happened?,* John Williamson, 1990), at 6-7.

472 *See* Convention on the Settlement of Investment Disputes Between States and Nationals of Other States ("ICSID Convention"; "Considering the need for international cooperation for economic development, and the role of private international investment").

473 *See* A. VAN AAKEN, *Opportunities for a Limits to an Economic Analysis of International Economic Law*, 24, Working Paper No. 2010-09, available at: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1635390>.

Some tribunals have assumed a natural connection between investment protection and state development, observing that "to protect investment is to protect the general interest of development" (*see Amco Asia Corp. v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on Jurisdiction dated September 25, 1983). *See also Siemens A.G. v. Argentina*, ICSID Case No. ARB/02/8, Award dated February 6, 2007, at 290, according to which "the promotion and protection of such investments by means of a treaty may serve to stimulate private initiative and improve the well-being of both peoples".

to invest (and, therefore, on the FDI inflows).[474] This is confirmed by several studies and surveys according to which the vast majority of FDIs does not even consider BITs (and generally IIAs) when deciding where and how to invest,[475] and only gets interested in their existence at the litigation phase.

UNCTAD has also observed that BITs are unlikely to be *per se* attractors of significant FDI inflows.[476] What attracts foreign capital depends very much on the type of FDI (resource, market, or efficiency seeking FDIs) and on the political and economic climate existing in the host country as well as the level of respect for human rights.[477]

More recent studies, however, have reached opposite conclusions, finding instead a significant impact of BITs on FDI inflows.[478] According to these studies two effects generated by BITs are relevant in attracting FDIs: the commitment and the signaling effects. The *commitment effect* derives from the undertaking by host states

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474 *See* M. HALLWARD-DREIMEIER, *Do Bilateral Investment Treaties Attract FDI? Only a Bit … and it might Bite*, in *World Bank Policy Research Working Paper No. 3121*, Washington, D.C., World Bank, 2003; A WALTER, *The Political Economy of FDI Location: Why don't Political Checks and Balances and Treaty Constraint Matters?*, Working Paper 38, Singapore Institute of Defense and Strategic Studies; J. TOBIN and S. ROSE ACKERMAN, *Foreign Direct Investment and the Business Environment in Developing Countries: The Impact of Bilateral Investment Treaties*, Working Paper, 2003, at 587; K. P. GALLAGHER and M. B. L. BIRCH, *Do Investment Agreement Attract Foreign Direct Investment? Evidence from Latin America*, in *Journal of World Investment and Trade*, at 961-74; L. PÀEZ, *Regional Trade Agreements and Foreign Direct Investment: Impact of Existing RTAs on FDI and Trade Flows in the Andean Community and Implication of an Hemispheric RTA in the Americas*, Aussenwirtschaft, at 231-261; J. W. YACKEE, *Conceptual Difficulties in the Empirical Study of Bilateral Investment Treaties*, in *Brooklyn Journal of International Law*, at 405-462.

475 *See* L. POULSEN, *The Importance of BITs for Foreign Direct Investment and Political Risk Insurance: Revisiting the Evidence*, in *Yearbook on International Investment Law & Policy*, 2009/2010, Oxford University Press, available at: <http://discovery.ucl.ac.uk/1471858/1/Poulsen_bits%20pri%20yearbook.pdf, at 5>.

476 *See* UNCTAD, *The Role of International Investment Agreements in Attracting Foreign Direct Investment to Developing Countries*, 2, 2009, available at: <https://unctad.org/en/Docs/diaeia20095_en.pdf>. According to UNCTAD "there is and can never be a mono-causal link between the conclusion of an IIA and FDI".

477 *See* Chapter II, above.

478 *See* A. BERGER, M. BUSSE, P. NUNNENKAMP and M. ROY, *Do Trade and Investment Agreements Lead to More FDI? Accounting for Key Provisions inside the Black Box. International Economics and Economic Policy*, 2103, at 247-275; and J. DIXON and P. A. HASLAM, *Does the Quality of Investment Protection Affect FDI Flows to Developing Countries? Evidence from Latin America*, in *The World Economy*, 2015, at 1080-1108.

of strong investment obligations enforceable by investors through binding arbitration. This allows host states to credibly commit themselves to guarantee protection to the investment after its establishment. Credible commitments make it prohibitively expensive for governments to intervene in the investment by expropriating and/or otherwise reducing its value and/or profitability after its establishment. In other words, the possibility for investors to gain compensation through investment arbitration in case of a potential breach by the host State of its obligations under the BIT operates as a strong determinant of FDIs.[479]

The *signaling effect* instead operates vis-à-vis investors from non-signatory countries. BITs are legally binding only between the contracting parties and only investments from these states are protected under the relevant BITs. However, BITs can act as a signal to investors from non-signatory countries by letting them know that the host state is willing to treat foreign investors well.[480]

Some of the studies that found a positive correlation between BITs and FDIs have also concluded that BITs function as substitutes for good institutional quality. According to these findings, BITs are most effective in countries characterized by low quality institutions. These are also the countries where the probability that the political risk (in all its component) is more likely to occur.[481]

4.3.1. BITs Attract Investment by Mitigating the Political Risk

As discussed above, traditionally BITs have been framed as instruments aimed at mitigating the political risk (which is considered to be by far the major concern of investors operating in a foreign market as well as the most important component of

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479 *See* J. W. YACKEE, *Conceptual Difficulties in the Empirical Study of Bilateral Investment Treaties*, in *Brooklyn Journal of International Law*, 2008, at 405-462; T. ALLEE and C. PEINHARDT, *Contingent Credibility: The Impact of Investment Treaty Violations on Foreign Direct Investment*, in *International Organization*, 2011, at 401-432.

480 *See* E. NEUMAYER and K. SPESS, *Do Bilateral Investment Treaties Increase Foreign Investment to Developing Countries?*, in *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows*, 2009, at 2, arguing that the existence of BITs signals to foreign investors that the host country pursues the objective of attracting FDIs and will follow, in general, liberal policies towards foreign investments.

481 *Id*.

country risk),[482] by undertaking credible commitments. Economist have explained this concept in terms of time inconsistency.

4.3.1.1. Political Risk as a Time Inconsistency Problem

From an economic standpoint, political risk has been explained as a time inconsistency problem.[483] Time inconsistency, also known as dynamic inconsistency, describes situations in which "a future policy decision that forms part of an optional plan formulated at an initial date is no longer optimal from the viewpoint of a later date, even though no new information has appeared in the meantime".[484] The problem is similar to waiting "to tie oneself to the mast" but being unable to do so.[485] Economic theories have explained the logic underlying the time inconsistency problem in BITs by using a sequential two-stage game-theoretic problem involving an MNC and a host country (HC).

The stages will be discussed in the following paragraphs.

Phase one (negotiation): in this phase the HC is interested in the short-terms bolstering of its economic development by attracting FDIs to its market. To render its location more attractive to FDIs and to affect the ownership, location and internationalization aspect of the OLI paradigm, the HC might promise foreign investors certain investment incentives (either financial, fiscal or regulatory). For instance, the HC may: (i) allow repatriations of profit; (ii) waive certain tariffs or barriers or loosen certain human rights standard so as to diminish the investor's entry

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482 *See* M. BUSSE and J. L. GROIZARD, *Foreign Direct Investment, Regulations and Growth*, in *The World Economy*, 2007.

483 *See* J. SASSE, *An Economic Analysis of Bilateral Investment Treaties*, Gabler Research, 2009, at 16.

484 *See* O. J. BLANCHARD and S. FISCHER, *Lectures on Macroeconomics*, 1989, at 70-75; F. E. KYDLAND and E. C. PRESCOTT, *Rules Rather than Discretion: The Inconsistency of Optimal Plans*, in *Journal of Political Economy*, 1977, at 473 (presenting a model of dynamic inconsistency in the optimal taxation of domestically owned capital).

485 *See* A. GUZMAN, *Why LDC Sign Treaties that Hurt Them?: Explaining the Popularity of Investment Treaties*, in *Virginia Journal of International Law*, 1998, at 659.

costs; and (iii) agree to offer certain tax advantages, and/or enact regulatory measures offering derogations from national or sub-national rules and regulations.[486]

During stage one, the investor has two options: it can either invest or refrain from investing. If no investment takes place, the pay-off for both the HC and the MNC is null (the host states do not get the capital necessary to promote its economy and the FDI do not generate profit). If the investment takes place, the game moves to the second phase.

Phase two: If the MNC attracted by the favorable investment incentive decides to invest in HC, the game moves to the second stage.[487] At this stage the investment has already been made and HC might no longer need to attract FDIs to its market through advantageous legislative measures. The HC may only need to treat the investor well enough to keep the investment going. During that second phase, due to its nature, the investment cannot be disinvested fully. [488] Indeed, once the MNC has invested, a withdrawal of the investment would impose a high cost on the MNC.

During stage two, the HC can have an incentive to renege its promise and enact laws that are in contrast with preexisting advantageous regime and that might have thus a negative impact on the investment[489] (i.e., expropriate the investment). For instance, the HC may: (i) directly change the conditions or costs of entry or exit of foreign capital through restrictions (including new restrictions on repatriating profits); (ii) put up tariffs or nontariff barriers so as to increase the cost of importing supplies or increase the government's take from the export of outputs; and (iii) raise taxes,

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486 *See* R. COASE, *The Nature of the Firm*, Economica, 1937; O. E. WILLIAMSON, *The Economic Institutions of Capitalism: Firms, Markets, Relational Contracting*, 1985; and B. V. YARBROUGH and R. M. YARBROUGH, *International Institutions and the New Economics of Organization*, in *International Organization*, at 44.

487 As we have seen the favorable investment incentive is only one of the location factors.

488 As explained above, unlike cross-border portfolio investments, which can easily be pulled out and reinvested elsewhere, FDI has long time horizons and is generally not done for speculative purposes, but rather to serve domestic markets, exploit natural resources, or provide platforms to serve world markets through exports.

489 This shift in power has been summarized by A. Guzman as follows: "regardless of the assurances given by the host before the investment and regardless of the intentions of the host at the time, the host can later change the rules if it feels that the existing rules are less favorable to its interests than they could be".

impose new fees, or change regulations in a way that brings costs on the investment that diminish the value of the investment.

At the end of stage two, the HC has two options: it can either accommodate (do not change the regulation) or expropriate the investment (make the political risk materialize). If the HC accommodates, both players receive the share of cooperation gain: the MNC receives C_M (whereby C_M measures the profit realized by the investor) and the HC gains C_H (whereby C_H measures how much the HC gains through FDIs, be it through taxes or spillover effects; $C_H > 0$). If the HC expropriates: the MNC will most likely incur in a loss or damages (L_M), and the HC will gain W_H (where W_H measures how much the investment is worth if the host state expropriates).

From an economic prospective, at the end of stage two: (i) the political risk will not materialize and the HC will accommodate with a probability *x* if the investment yields a higher payoff to the HC when in the hands of the MNC (the expropriation gain is smaller than the cooperation gain; $x = W_H < C_H < 0$); and (ii) the political risk will materialize and the HC will expropriate with a probability *y*, if the investment yields a higher payoff to the HC when in its hands ($y = W_H > C_H > 0$).

According to this economic theory, a diligent and informed investor will be able to anticipate both the *x* probability and the *y* probability, and in both cases will invest whenever the chances of profits are high, $C_M > 0$. This includes the situation of the short-term profit seeker, who knows that the HC will expropriate, but invests because it predicts that the profit up to that moment will be worth it i.e., the profit $C_M > L_M$.

The following table summarizes the different scenario resulting from the two-stage game.

	Payoff HC	Payoff MLE	Equilibrium
1.	$C_H > W_H > 0$	$C_M > 0 > L_M \leq 0$	Invest, accommodate
2.	$C_H > W_H$	$C_M < 0 < L_M \geq 0$	Don't invest, accommodate

3.	$C_H < W_H$	$C_M < 0 > L_M \leq 0$	Don't invest, expropriate
4.	$C_H < W_H$	$C_M > 0 > L_M \geq 0$	Invest, expropriate

This game is made on the following four assumptions.

- The investor is a diligent and informed investor who prior to investing has diligently evaluated the advantages of the location as well as the related perceived country risks (including the economic, political, cultural and human rights risk);

- The investment incentive has been the only determinant or a major determinant in the investor's decision to invest;

- The investor is in a disadvantaged and weak position vis-à-vis the host states, which at one point will intervene in the investment due to purely opportunistic reasons (short-profit seeker host state) i.e., the model does not take into account the objective function of the government and the possibility that it will intervene in furtherance of human rights obligations; and

- The investment cannot be disinvested fully. In other words, once the MNC has invested, a withdrawal of the investment would impose a high cost on the MNC.

Finally, it should be noted that time inconsistency includes the notion that choices differ even though "nothing has changed", which must be understood in a way that there are no changes that could not have been predicted in the first place.[490] The underlying reasoning is that: (i) BITs with *clear* and *enforceable* rules protect and facilitate FDIs, by mitigating the political risk that the investor would otherwise face, and this mitigation of the risk, *all things being equal*, encourage investments; and (ii) FDIs foster the host states to attract FDIs as a means of advancing their economic development. As some leading scholars have said, BITs between a developed and a

490 J. P. SASSE, *An Economic Analysis of Bilateral Investment Treaties*, at 20.

developing country are found on the "grand bargain" of the promise of protection of capital in return for the prospect of more capital in the future.[491]

4.3.1.2. BIT as a Tool to Mitigate the Political Risk

On the basis of the above-mentioned two stages game and assumptions, BITs have internalized the political risk (i.e., the risk of opportunistic behavior on part of the host state or short-term profit seeker government) and have framed a mechanism that mitigates the political risk-related costs of an FDI investing in a developing country. If the host state intervenes in the investment: (i) the investor may start arbitration proceedings to recoup its losses; and (ii) it might face high costs, both in term of compensation and reputational damages.

With this last respect it should be noted that in the event of arbitration, the arbitral award will not only define the amount of compensation (which generally is extremely high), but will also impose reputational sanction (R) on the host state. These sanctions include the loss of future cooperation by other investors (who might refrain from investing in the future), and host states who might refrain from cooperation in the future (by refusing to sign additional bilateral investment treaties).

BITs traditionally framed as tools to mitigate political risk do not generally take into account the others risks analyzed above, including the human rights related risk as well as the risk of short-term profits seekers (including host states and investors).

This brings the question of where do Socio-Economic Human Rights stand in BITs?

4.3.1.3. Where Do Socio-Economic Human Rights Stand in BITs?

BITs framed as mechanisms to mitigate political risks (on the basis of the above-mentioned assumptions) make no due regard to human rights standards. Indeed,

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491 Concluding and maintaining treaties require a bargain from which both parties believe they will derive benefits.

BITs so devised traditionally do not refer to human rights standards, nor do they take into account social or environmental concerns.[492]

This failure has generally been explained with the fact that human rights and international investment law have traditionally been perceived as fields of law having little if nothing in common: human rights law is primarily concerned with the protection of human beings, whereas international investment law is a specialized regime aimed primarily at protecting foreign investors by mitigating the political risk.[493] This separation is however excessively generic and does not correspond to the reality. As the first and this chapter are aiming to show, FDIs are key in the process of guaranteeing the full realization of the socio-economic rights, and, in turn the economic development of host states.

The relevance of human rights for FDIs is gradually becoming apparent in the context of investment arbitration.[494] It is indeed through the "backdoor" of investment arbitration that human right standards are making their way in investment law.

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492 There have been several attempts to incorporate human rights obligations in investment treaties. A first attempt is represented by the Multilateral Agreement on Investment (MAI) dated April 20, 1998, proposed by the Organization for Economic Cooperation and Development (OECD) (see Multilateral Agreement on Investment: Draft Consolidated Text, p. 96, available at: <http://www1.oecd.org/daf/mai/pdf/ng/ng987r1e.pdf>. More recent examples of attempts to include human rights obligations within investment treaties include: (i) Article 810 of the Canada-Peru Free Trade Agreement, 2009 (available at: <http://international.gc.ca/tradecommerce/ trade-agreements-accords-commerciaux/agr-acc/peru-perou/fta-ale/background-contexte.aspx?lang=eng>); (ii) SADC Protocol on Finance and Investment dated August 8, 2006 (available at: <http://www.sadc.int/files/4213/5332/6872/Protocol_on_Finance__Investment2006.pd>); and (iii) South African Development Community, 'SADC Model Bilateral Investment Treaty Template with Commentary, 2012 (available at: <www.iisd.org/itn/wp-content/uploads/2012/10/SADC-Model-BIT-Template-Final.pdf>).

493 *See*, e.g., P. DUPUY, F. FRANCIONI and ERNST-ULRICH PETERSMANN, *Human Rights in International Investment Law and Arbitration*, Oxford University Press, 2009.

494 *See*, e.g., S. STEININGER, *What's Human Rights Got to Do with It? An Empirical Analysis of Human Rights References*, in *Leiden Journal of International Law*, 2018, at 33-58; S.W. SCHILL and K. TVEDE, *Mainstreaming Investment Treaty Jurisprudence. The Contribution of Investment Treaty Tribunals to the Consolidation and Development of General International Law*, in *The Law & Practice of International Courts and Tribunals*, 2014; and V. VADI, *Analogies in International Investment Law and Arbitration*, 2015.

First, although investment tribunals traditionally lack jurisdiction *ratione materiae* to hear human rights-related claims,[495] host states (and investors) are increasingly invoking socio-economic rights: (i) to justify governmental action having adverse effects on certain investments; and (ii) as counterclaim vis-à-vis investors for human rights violations perpetrated by the latter. By ways of example, in *Siemens*[496] and *CMS Gas*,[497] Argentina argued that the economic measures it undertook to tackle the 2000-2001 economic crisis were necessary also to guarantee the minimum essential levels of human rights of its population. In *Azurix*,[498] Argentina argued that consumers' rights (to water) should have prevailed over the interests of private investors (in this case the service provider) and that a conflict between a BIT and a human rights treaty must be solved in favor of human rights. In *Urbaser*, Argentina claimed that the foreign shareholder of the Argentinian company AGBA S.A. had breached its investment obligations under a water distribution and sewage concession

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495 Investors' access to investment treaty arbitration is only allowed as part of the protection offered to investors under the relevant BIT for claims arising out of the investment. Therefore, the scope of the arbitral tribunal jurisdiction is limited to these types of disputes, and cannot be extended to others. *See*, e.g., *Biloune and Marine Drive Complex Ltd v. Ghana Investments Centre and the Government of Ghana* (UNCITRAL), Award on Jurisdiction and Liability dated October 27, 1989 (concerning the arrest and detention for 13 days of foreign investor Mr. Biloune, who was eventually deported to Togo), whereby the arbitral tribunal stated that it had no jurisdiction to hear every human rights violation of foreign investors, but only these violations affecting the investment. *See also Yukos Universal Limited* (Isle of Man) *v. the Russian Federation*, PCA Case No. AA 227, Final Award dated July 18, 2014 (whereby the arbitral tribunal held that it is not a human rights court; nevertheless, it is within the scope of the tribunal's jurisdiction to consider the allegations of harassment and intimidation as they form part of the factual matrix of the claimants' complaints that the Russian Federation violated its obligations under the ECT). *See also Bernhard von Pezold and Others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15; *Border Timbers Limited, Border Timbers International (Private) Limited, and Hangani Development Co. (Private) Limited* v *Republic of Zimbabwe*, ICSID Case No. ARB/10/25, Procedural Order No. 2 dated June 26, 2012, para. 60.

496 *See Siemens v. Argentina*, ICSID Case No. ARB/01/12, Award dated July 14, 2006.

497 *See GMS Gas Transmission Co v. Argentina*, ICSID Case No. ARB/01/08, Award dated May 12, 2005.

498 *See Azurix v. Argentina*, ICSID Case No. ARB/01/12, Award dated July 14, 2006; *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Liability dated July 30, 2010; *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability dated October 3, 2006, ¶ 226.

contract in Buenos Aires by failing to make the necessary investment to guarantee the population's human rights to water.[499] For the first time in *Urbaser* and arbitral tribunal recognized that MNCs might theoretically have human rights obligations.

Second, arbitral tribunals are increasingly referring to human rights standard and the case law of human rights regional courts (including the ECtHR),[500] as guiding principles in interpreting relevant provisions of BITs.[501] Specifically, arbitral tribunals have used human rights: (i) to define the concept of what constitute "*de facto*" or "*creeping*" expropriation[502] or fair and equitable treatment under the relevant

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499 The arbitral tribunal accepted jurisdiction over the counterclaim advanced by Argentina mainly based on a broadly formulated investor-State arbitration clause, which according to the tribunal allowed Argentina to advance a human rights-related claim against the foreign investor if such claim was in connection with the investment. *See Urbaser S.A., Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. Argentina*, para. 1187.

500 By the same token, investment tribunals have relied on Inter-American Convention on Human Rights and related case law. *See*, e.g., *IBM World Trade Corp. v. Republic of Ecuador* (ICSID Case No. ARB/02/10), Decision on Jurisdiction dated December 22, 2003, para. 72; and *El Paso v. Argentina*, Award dated October 31, 2011, para. 598.

Two traditional legal sources are generally used to incorporate human rights into investment arbitration: (i) Article 31(3)(c) of the Vienna Convention on the Laws of Treaties, which allows taking into account "any relevant rules of international law applicable in the relations between the parties" in the interpretation of a BIT; and (ii) Article 38(I) of the ICJ Statute (see S. STEININGER, *What's Human Rights Got to Do with It? An Empirical Analysis of Human Rights References* in *Leiden Journal of International Law*, 2018, at 45-46).

501 *See Urbaser S.A., Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. Argentina* (providing that "BIT cannot be interpreted and applied in a vacuum. The Tribunal must certainly be mindful of the BIT's special purpose as a Treaty promoting foreign investments, but it cannot do so without taking the relevant rules of international law into account. The BIT has to be construed in harmony with other rules of international law of which it forms part, including those relating to human rights"). *See also El Paso v. Argentina*, Award dated October 31, 2011, para. 598.

With this respect, it has been suggested that this is so because there is a certain proximity between the protection to foreign investors offered under international investment treaties (and customary law), and the protection existing under human rights treaties: the provisions on the protection of the right to property in the latter, and the rules regulating direct and indirect expropriation in the former are a clear example of this. *See* E. DE BRABANDERE, *Human Rights and International Investment Law*, Working Paper Series No. 2018/075 – HRL – March 26, 2018, at 1.

502 *See Ronald S. Lauder v. Czech Republic*, UNCITRAL, Award dated September 3, 2001, para 200 (citing to the Decision of the European Court of Human Rights, *Mellacher and Others v. Austria* (1989 Eur.Ct.H.R.; ser. A, No. 169, holding that a "*formal*" expropriation is a measure aimed at a "*transfer of property*", while a "*de facto*"

investment treaty,[503] including the notion of legitimate expectations;[504] (ii) to set forth the applicable standards for damages assessment in cases of expropriation;[505] and (iii) as authority on a number of points concerning individual rights, including the right to water.[506]

However, incorporating human rights in investment law through the "backdoor" of investment arbitration is not an *efficient* solution for several reasons.

First, the decision of the arbitral tribunal will depend on several variables, including: (i) the relevant applicable law; (ii) the ability of the parties to advance and successfully argue human rights arguments; and (iii) the attitude of the arbitral tribunals towards human rights arguments. Leaving human rights question entirely to these variables may impact negatively on the predictability of the system. Predictability is a desirable aspiration of any system of justice, having also an efficiency value as it helps reducing transaction costs by giving clear and therefore trusty and credible commitments/signals to prospective governments (and investors).[507]

Second, an "unfortunate" interplay of the above-mentioned variables may also lead to "erroneous" awards i.e., awards in which the arbitral tribunal finds a defective behavior by the host State (and the investor) even where no such behavior has taken

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expropriation occurs when a State deprives the owner of his "right to use, let or sell (his) property". *See also* G. SACERDOTI, *Bilateral Treaties and Multilateral Instruments on Investment Protection*, 1997, at 379-382.

503 *See Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award dated 6 May 2013, para. 172.

504 *See Total S.A. v. Argentina* (ICSID Case No. ARB/04/1), Decision on Liability dated December 27, 2010, para. 129; *Continental Casualty Company v. Argentina*, ICSID Case No. ARB/03/9, Award dated September 5, 2008, para. 261 (holding that the legislation on which investors might rely is subject to subsequent modifications, and possibly to withdrawal and cancellation, within the limits of respect of fundamental human rights and *ius cogens*).

505 *See ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary* (ICSID Case No. ARB/03/16), Award dated October 2, 2006, para. 497 (citing to Decision of the European Court of Human Rights, *Papamichalopoulos and Others v. Greece* (1966) E.H.R.R.).

506 *See Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, Award dated May 29, 2003, para. 122.

507 *See* P. DUPUY, F. FRANCIONI and U. PETERSMANN, *Human Rights in International Investment Law and Arbitration*, Oxford University Press, 2009.

place. Even if "erroneous", these awards may impose exorbitant costs on the host State's budget, which include the compensation (which per se might outweigh the host State's budget) and the reputational costs (namely, the loss of future cooperation by other investors who might refrain from investing in the host State). These costs might limit additionally the resources necessary to guarantee the fulfilment of the socio-economic rights.[508]

The increasing evidence of these (and other) substantial costs, including litigation and reputational costs associated with investor-state arbitration, might indicate that the costs of BITs outweigh their benefits for developing countries.[509] Indeed, as investor-state disputes proliferate, host States and international organizations have increasingly called into question the legitimacy of the BIT regime.[510] The main complaint is that BITs unnecessarily limit the host State's ability to foster and promote its best public interests, including its prime responsibility and duty to protect, promote, and implement the human rights of its population.[511]

5. Concluding Remarks on Chapter III

Although FDIs can have negatives impact on socio-economic rights, they are absolutely key to the progressive full realization of these rights. By the same token, although to certain FDIs (such as resources seeking FDIs and/or short profit seeker FDIs) still target countries where human rights are abused to secure short-term profits, respect for socio-economic rights is increasingly becoming a determinant of the FDI investment decision.

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508 *See* Section V.

509 *See*, e.g., ALLEE, TODD and CLINT PEINHARD, *Delegation Differences: Bilateral Investment Treaties, and Bargaining over Dispute Resolution Provisions*, in *International Studies Quarterly* 54(1):1-26; ALLEE, TODD and CLINT PEINHARD, *Evaluating Three Explanations for the Design of Bilateral Investment Treaties*, in World Politics, at 47-87; LAUGE N. SKOVGAARD, and E. AISBETT, *When the Claim Hits: Bilateral Investment Treaties and Bounded Rational Learning*, in World Politics.

510 *See* K. J. VANDENVELVE, *Bilateral Investment Treaties: History, Policy and Interpretation*, Oxford *University* Press, 2010.

511 *See* C. L. LIN, J. HO and M. PAPARINSKIS, *International Investment Law and Arbitration*, Cambridge University Press, 2018, at 73.

To raise the "technical" and "financial" resources necessary to fulfill their human rights obligations, developing countries adopts measures aimed at attracting FDIs, including investment incentives and BITs. These tools aim at rendering their location more attractive to FDIs by, inter alia, reducing the costs and risks that a decision to invest in a foreign market often entails. However, this is often reached at the expenses of the protection of human rights. For instance, to reduce FDI's entry costs, host States can pass investment incentives that loosen certain human rights standards, thus breaching their obligations under human rights law.

BITs instead reduce FDIs' costs related to the political risk by limiting the regulatory power of host States, including the power that are necessary to discharge their human rights obligations. For example, the provisions of BITs may constrain host States from fully implementing new human rights legislation.

In a world of increasing inequality, the legitimacy of institutions that give precedence to the property rights of 'the Haves' over the human rights of 'the Have Nots' is inevitably called into serious question.

- David Korten -

IV. THE LEGAL PROTECTION OF FDI(S): WHERE DO HUMAN RIGHTS STAND?

1. General Considerations

The human rights of MNCs may not certainly extend as widely as the rights of human beings. Indeed, there are rights (such as most Socio-Economic Rights) which are personal and cannot be conferred on juridical persons. However, most legal jurisdictions recognize the entitlement of MNCs to several fundamental rights, including the right to property.[512]

At domestic level, all civilized nations recognize the right to property although with some variations.[513] These variations often relate to the different types of political and legal (common vs civil law) systems prevailing in a given State,[514] each of which may decide how to regulate the scope, the extent and the entitlement to hold property rights (including in relation to MNCs)[515] as well as the potential clashes between different types of property rights and/or between different types of property rights and other fundamental human rights (e.g., property rights vs other socio-economic rights).[516] With specific regard to this last point, most systems will set forth the circumstances under which property rights shall be deprived (generally for reasons of public utility or social interest and upon payment of just compensation). In this sense, property law and property rights are simply part of the regulatory mechanisms by which societies allocate control over resources.[517]

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512 Other rights include the right to a fair trial, to privacy as well as to some forms of freedom of expression. *See*, e.g., M. K. ADDO, *The Corporation as a Victim of Human Rights Violations*, in *Human Rights Standards and the Responsibility of Transnational Corporations*, Kluwer Law International, 1999, at 192.

513 *See* J. WAINCYMER, *Balancing Property Rights and Human Rights in Expropriation*, in *Human Rights in International Investment Law and Arbitration*, Oxford, 2009, at 277.

514 *Id*. Systems ranging from communist ones calling for common ownership to *laissez faire* free market systems, advocating for the broadest right of individual to acquire and retain property.

515 *Id*. Including in relation to new property rights (i.e., new kinds of things over which property rights can be allocated, such as new technologies, patent on discoveries with regard to natural phenomena).

516 *Id*.

517 *Id*.

At an international level, the right to property (also with respect to corporations) is recognized as a fundamental human right by several international human rights instruments, including the Universal Declaration, the American Convention on Human Rights ("ACHR"), and the European Convention on Human Rights ("ECHR"). The latter provides the best example of the applicability of human rights standards to corporations as victims.[518] The practice of the European Court of Human Rights ("ECtHR") has been to accept complaints from corporations claiming to be victims of human rights violations under the broad heading of "non-governmental organizations"[519] under Article 35 of the ECHR.[520]

The above-mentioned international human rights instruments regulate, among others, the content as well as the circumstances under which property rights can be limited. For instance, Article 1, Protocol 1 of the ECHR provides that "[e]very natural or legal person is entitled to the peaceful enjoyment of his possessions".[521] This provision goes further on in clarifying that "no one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law".[522] By the same token, Article 21 of the ACHR provides that "[e]veryone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society".[523]

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518 *See* M. K. ADDO, *The Corporation as a Victim of Human Rights Violations*, note 535 above.

519 See, e.g., Sunday *Times v. United Kingdom*, Eur. Ct. H. R., Series A.30 (1979); 2 E.H.R.R. 245, *Markt Intern Verlag GmBH and Kaluse Beerman v. Germany*, Eur. Ct. H.R., Series A.164 (1989); 12 (1990) E.H.R.R. 161 and *Groppera Radio AG* v. *Switzerland*, Eur. CT. H.R., Series A.173 (1990); 12 (1990) E.H.R.R. 321.

520 Specifically, Article 35 of the Convention provides that "any person, non-governmental organization or group of individuals claiming to be the victim of a violation by one of the High Contracting parties of the rights set forth in the Convention can file a complaint before the Court. *See* ECHR, Article 34.

521 Article 1, Protocol 1 to the European Convention on Human Rights. By the same token, the Universal Declaration provides that "[e]veryone has the right to own property alone or as well as in association with others". *See* Universal Declaration, Article 17.

522 *Id*. The Protocol further clarifies that "preceding provisions shall not, however, 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".

523 American Convention on Human Rights, Article 21.

Paragraph 2 of this same provision further clarifies that "[n]o one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law."[524]

Although international investment law does not normally speak of property but of "investment", the legal concept and economic reality of the right to *property* lie at the very heart of this field of law.[525] As a matter of fact, investment law aims at protecting the property rights of corporation against the unduly interference in these rights by the host state. However, unlike human rights treaties, BITs rarely include provisions aimed at solving potential clashes between different types of property rights and/or between different types of property rights and other fundamental human rights (e.g., property rights vs other socio-economic rights). This failure raises a fundamental challenge, namely the extent to which MNCs' property rights can be reduced in furtherance of social goals and/or other socio-economic rights. An issue that, under current internal investment law is solved by arbitral tribunals, which to this aim are increasingly seeking guidelines from human rights treaties and/or human rights case law.[526]

This chapter will analyze the interplay between host states' human rights obligations under human rights treaties and host state's investment obligations under BITs. To this end, the Chapter will be organized as follows. Section 2 will provide an overview of the main obligations undertaken by host states under BITs and potential limitations thereon. The overview is necessary in order to give legal substance to the above-mentioned mechanism described by economists as political risk mitigation tool.[527]

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524 *Id*.

525 *See* U. KRIEBAUM and C. SCHREUER, *The Concept of Property in Human Rights Law and International Investment Law*, in *Human Rights Democracy and the Rule of Law*, S. Breitenmoser (Eds.), Liber Amicorum Luzius Wildhaber, 2007, at 743 - 762.

526 *See* C. REINER and C. SCHREUER, *Human Rights and International Investment Arbitration*, in *Human Rights in International Investment Law and Arbitration*, Oxford University Press, 2009, at 94.

527 *See* Chapter III, Section 4.3.1.2.

Section 3 will focus on host states' obligation to treat investors in a fair and equitable manner ("FET") (with a specific focus on the investor's legitimate expectations standard). The choice of the FET standard is not random, as this standard more than any other reflects the difficulties relating to balancing investors' property rights with other Socio-Economic Rights.[528] Section 4 will further discuss these difficulties.

Finally, Section 5 will discuss the Argentine arbitration "saga" generated by the 2001-2002 Argentine crisis. As it will be seen, the "saga" and the underlying factual and historic background provides an excellent preview of the relevance of human rights for investments.

For the purpose of Sections 3-5, of particular relevance will be the considerations made in the previous chapters on: (i) the normative content of the host State's human rights obligations and their relevance to FDIs; and (ii) the determinants of the investment decision, including specific advantages (such as mineral resources, accessibility to certain markets, short-term profit, etc.), the country risk (and its different elements), as well as specific investment incentives.

To borrow a quote from Mr. David Korten, the aim of this chapter is to show that "the legitimacy of institutions that give precedence to the property rights of 'the Haves' over the human rights of 'the Have Nots' is [or should be] inevitably called into serious question".[529]

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528 As pointed by leading legal scholars, the standard has shown to have the potential to reach into the *domaine réservé* of the host State (ultimately limiting such domain) more than any other BIT standard. *See*, e.g., M. JACOB and S. SCHILL, *Fair and Equitable Treatment: Content, Practice, Method*, in International Investment Law, 2019, at; J. SALACUSE, *The Law of Investment Treaties*, Oxford University Press, 2010, at 221. *See also* Dissenting opinion of Mr. Pedro Nikken in the case of *Suez*, according to which the arbitral tribunal had paid more attention to "what claimants have considered to be the scope of their rights than what the parties defined as the extent of their obligations (*Suez, Sociedad General de Aguas de Barcelona, S.A.and Vivendi Universal, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19 and *AWG Group* v Argentina (joint cases), Decision on Liability dated July 30 , 2010, Separate Opinion of Arbitrator Pedro Nikken, para 27).

529 Mr. David Korten is a former Professor of the Harvard Business School as well as a political activist.

2. The Host State's Obligations under the BITs: Overview and Limitations

2.1. Overview of the Main Standards of Protection

BITs provide international legal protection to foreign investors by imposing on host States certain obligations. These obligations are generally drafted in the format of standards. The most important ones include: (i) the FET; (ii) the most-favored nation ("MFN") and national treatment ("NT") standards; (iii) the full protection and security standard; (iv) the standard relating to direct and indirect expropriation; and (v) other standards, such as the umbrella and the transfer of funds clauses.

First, under the FET standard, a host State undertakes to treat foreign investors in a fair and equitable manner. The standard will be treated in details in the following sub-sections. For purposes of this paragraph, it is sufficient to note that FET is a self-standing standard (i.e., an absolute standard), which is not contingent upon other parameters. It is inherently undefined and flexible in nature. Accordingly, it affords protection against alleged improper interference by host states in a variety of situations. For this reason, FET is the most often invoked protection standard in investment disputes.[530]

Second, most BITs provide for MFN.[531] Under this standard, host States undertake to treat foreign investors in a manner not less favorable than the treatment

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530 *See* G. SACERDOTI, *BIT Protections and Economic Crises: Limits to Their Coverage, the Impact of Multilateral Financial Regulation and the Defence of Necessity*, in *ICSID Review*, 2013, at 6. See also on the topic: C. BINDER and P. JANIG, *Investment Agreements and Financial Crisis*, in *Research Handbook on Foreign Direct Investment*, 2019, at 647-683.

531 *See*, e.g., on the topic: R. DOLZER and C. SCHREURER, *Principle of International Investment Law*, Oxford University Press, 2008; Z. DOUGLAS, *The International Law of Investment Claims*, Cambridge University Press, 2009; Z. DOUGLAS, *The MFN Clause in Investment Arbitration: Treaty Interpretation Off the Rails*, in *Journal of International Dispute Settlement*, Vol. 2, Issue 1, 2011, at 97-113; T. GRIERSON, WEILER and I. LAIRD, *Standards of Treatment* in Peter Muchlisnki, Federico Ortino and Christoph Schreuer (eds.), *The Oxford Handbook of International Investment Law*, Oxford University Press, 2008, at 259-304; F. HOUNDE and F. PAGANI, *Most-Favoured Nation Treatment in International Investment Law*, in OECD (ed.), *International Investment Law: A Changing Landscape*, OECD, 2005, at 127-161; Y. RADI, *The Application of the Most-Favored-Nation Clause to the Dispute Settlement Provisions of Bilateral Investment Treaties: Domesticating the Trojan Horse*, 2007, EJIL, at 757-774; A. REINISCH, *How Narrow are Narrow Dispute Settlement Clause in Investment Treaties?*, in *Journal of International Dispute Settlement*, 2011, at 115-174.

guaranteed to nationals and companies of any other state. Investment tribunals only rarely have been called to address claims alleging violations of MFN as a substantive treatment. Rather, most of the MFN debate generally evolves around the finding of the arbitral tribunal in the *Mazzefini* case according to which claimants were deemed entitled to rely on a MFN clause to "import" in the proceedings a more favorable procedural treatment available under a third country BIT of the host state.[532] Since then the debate regards the extent of applicability of the treatment. According to a first approach the treatment may extend not only to procedural advantages, but also to admissibility and jurisdictional issues.[533] According to a stricter approach, the treatment only applies to substantive treatment provisions.[534]

Most BITs combine the MFN standard with the NT standard.[535] The latter requires the host state to accord foreign investors the same treatment accorded to its own nationals.[536] In other words, the provision aims at creating a level playing field between foreign and local investors by preventing protectionist measures whereby host States might tend to favor their own investors to the detriment of foreign ones.[537] NT is, however, rarely accorded without limitations and many BITs provide that such

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532 *Emilio Agustin Mazzefini v. Spain*, ICSID Case No. ARB/97/7, Decision on Jurisdiction dated January 25, 2000.

533 *See* S. SCHILL, *The Multilarization of International Investment Law*, Cambridge University Press, 2009; S. PARKER, *A BIT at a Time: the Proper Extension of the MFN Clause to Dispute Settlement Provisions in Bilateral Investment Treaties*, in *the Arbitration Brief*, 2012, Vol. 2, Issue 1, at 30.

534 *See* Z. DOUGLAS, *The MFN Clause in Investment Arbitration: Treaty Interpretation Off the Rails*, note above 554.

535 *See*, e.g., F. BAETENS, *Discrimination on the Basis of Nationality: Determining Likeness in Human Rights and Investment Law*, in Stephan Schill (ed), *International Investment Law and Comparative Public Law*, Oxford University Press, 2010, at 279-315; and A. K. BJORKLUND, *National Treatment* in August Reinisch (ed.), *Standards of Investment Protection*, Oxford University Press, 2008.

536 The fundamental difference between the MFN standard and the fair and equitable treatment standard is that the former is a relative standard, depending on the treatment accorded to other investors, while the latter is an absolute standard that "provides a fixed reference point."

537 *See Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc*. v *Mexico*, ICSID Case No. ARB(AF)/04/5, NAFTA, Award dated November 21, 2007, para 193.

treatment will apply only where the foreign and domestic investor finds themselves in "identical" or "similar" situations.[538]

As opposed to the FET, the MNF and the NT standards are not self-standing. Their content indeed depends upon the treatment granted to other foreign investors or local nationals.[539]

Third, the "full protection and security" clause is a frequent standard that relates to the amount of protection a host State must provide to the investment *vis*-à-*vis* third parties. Similarly, to the FET standard, there is an intrinsic difficulty in giving an exact normative content to this standard.[540] Generally, it is assumed that this clause is aimed at additionally amplifying the obligations that the contracting parties have otherwise taken upon themselves. However, where this is not the case, this clause requires host States to exercise due diligence in the protection of foreign investment as opposed to creating "strict liability" which would render the host State liable for any destruction of the investment even if caused by persons whose acts could not be attributable to the State.[541]

Forth, virtually all BITs contain provisions concerning expropriation (either direct or indirect) and nationalization of property held by foreign investors. These provisions formulate the conditions under which a governmental taking is to be considered lawful, i.e., the governmental act should (i) serve a public purpose; (ii) be conducted in a non-discriminatory manner; (iii) be followed by prompt, adequate and effective compensation; and (iv) be made in accordance with due process of the law. As with

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538 *See* R. DOLZER and M. STEVENS, *Bilateral Investment Treaties*, Martinus Nijhoff Publishers, 1995; R. D. BISHOP – J. CRAWFORD – W. M. REISMAN, *Foreign Investment Disputes. Cases, Materials and Commentary*, in Kluwer Law International, 2005, at 1152.

539 *See* A. REINISCH, *National Treatment*, in *International Investment Law. A Handbook*, 2018, at 847.

540 *See* R. DOLZER and M. STEVENS, *Bilateral Investment Treaties*, note 561. R. D. BISHOP, J. CRAWFORD and W. M. REISMAN, *Foreign Investment Disputes. Cases, Materials and Commentary*, in Kluwer Law International, 2005, at 1061.

541 *Id*.

respect to the question of compensation, although the specific determination of compensation remains uncertain, most treaties have adhered to the Hull-Formula.

BITs generally do not define the term expropriation. This failure has been explained by the fact that a host State can implement several measures which, although do not qualify *de jure* as an act of expropriation, might have on an investor *de facto* effects similar to expropriation. Such measures "tantamount to expropriation" are generally known as "indirect", "creeping" or "de facto" expropriation.[542] The expropriation clauses in most BITs therefore commonly include references to indirect measures and accord them the same legal treatment.[543]

Provisions safeguarding investors against indirect expropriation may generally be breached, as is the case of FET,[544] by general measures applicable also to domestic investors. This typically happens when economy-wide or sector-wide measures are adopted, notably in a case of crisis, including regulatory measures such as freezing of tariffs and exchange measures.[545] However, what really constitutes indirect expropriation is still unclear. The determination is naturally of significance both to the investor and to the host State. Specifically, for the investor the line of demarcation between measures for which no compensation is due and actions qualifying as indirect expropriations may well make the difference between the burden to operate (or abandon) a non-profitable enterprise and the right to receive full compensation (either from the host State or under an insurance contract).[546] For the host State, the definition determines the scope of the State's power and, in certain instances, the obligation, to enact legislation that regulates the rights and obligations of the owners

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542 *See* R. DOLZER and M. STEVENS, *Bilateral Investment Treaties*, note 561.

543 *Id*.

544 The distinction between breach of FET and indirect expropriation is typically based on the level of interference with the right to property.

545 *See* G. SACERDOTI, *BIT Protections and Economic Crises: Limits to Their Coverage, the Impact of Multilateral Financial Regulation and the Defence of Necessity*, ICSID Review, 2013, at 6. See also C. LEBEN, *La liberté normative de l'Etat et la question de l'expropriation indirecte* in Charles Leben (ed.), *Le contentieux arbitral transnational relatif à l'investissement* (Anthemis 2006) 163, 173– 5; R. DOLZER – C. SCHREUER, *Principles of International Investment Law*, Oxford University Press, 2008, at 96–101.

546 *See* R. DOLZER and M. STEVENS, *Bilateral Investment Treaties*, note 561.

in instances, where compensation may fall due. It has been argued that the host State is prevented from taking any such measures where these cannot be covered by public financial resources.[547]

Fifth, most BITs provide also for other standards, including the so-called "umbrella clause" and "transfer of funds clause". Under the "umbrella clause", a host State undertakes *vis*-à-*vis* foreign investors to observe any obligation it has assumed with regard to investments in its territory by investors of the other contracting state.[548] The "transfer of funds" relates instead to the import of funds to initiate the business and to the repatriation of profits. Small countries may especially be concerned about their current account balance and therefore impose restrictions on the in- and outflow of capital. Although virtually all treaties deal with this matter and there is an inherent conflict of interest between investors and States, the transfer of funds is rarely the subject of arbitral proceedings.[549]

2.2. Limits to the Application of BITs' Protection

Leading legal scholars have distinguished four categories of regulatory regimes and legal principles that might limit the rights guaranteed to investors into BITs when it comes to the application of BITs.[550] All of these categories refer to situations in which the host State is facing a situation that puts at risk the very existence of the State. These categories include: (i) restrictions arising from treaties other than the relevant BIT; (ii) restrictions arising from the same BIT; (iii) general and specific exceptions (so-called non precluded measures); and (iv) applicable customary international law.

2.2.1. Restrictions Arising from Treaties other than the Text of the BIT (and Custom)

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547 *See* HIGGINS, *The Taking of Property by the State*, in *III Recueil des Cours*, 1982, at 267, and R. DOLZER, *Indirect Expropriation of Alien Property*, in *ICSID Review*, 1986, at 41.

548 *Id*.

549 *Id*.

550 G. SACERDOTI, *BIT Protections and Economic Crises*, note 553.

The application of a BIT may be restricted by other treaties, either multilateral or bilateral, in force between the parties. Generally, reference is made to multilateral treaties regulating financial matters, such as the IMF, the OECD Liberalization Codes, and the GATS provisions on financial services. These provisions include host States' obligations that may authorize derogations from a BIT or require it not to apply certain treaty based commitments.[551] As pointed out by leading legal scholar and practitioners, the relevance and effect of such external regulations depend not only on their content, but also on their relationship with the relevant BIT.[552] The following factors should be taken, *inter alia*, into account when analyzing this relationship: (i) the lack of formal hierarchy among the different sources of international law; and (ii) the parties' membership to both set of rules as well as the applicability of the principles codified in the Vienna Convention on the Laws of Treaties ("Vienna Convention"), including the rules on the lex *posterior derogate anteriori* and the *lex specialis derogat generali*.

First, under current international law, there is no formal hierarchy among the sources of international law. Accordingly all sources are considered to have the same rank, including customary norms.[553] Some hierarchical relations might arise primarily on a number of considerations such as the level of specialty and/or the temporal relationship existing between the two norms.[554] There exist only two generally accepted deviations from the formal equality of norms rule in public international law. The first exception concerns *jus cogens* norms i.e., norms accepted and recognized by

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551 *Id*. *See*, e.g., M. KOSKENNIEMI, Fragm*entation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission dated April 13, 2006, UN Doc A/CN4/L 682, paras 410 – 480; C. MCLACHLAN, *The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention*, in *International and Comparative Law Quarterly*, 54(2), 2005, at 279-320.

552 *See* G. SACERDOTI, *BIT Protections and Economic Crises*, note 553.

553 *See*, e.g., D. SHELTON, *Normative Hierarchy in International law*, in *The American Journal of International Law*, 2006, at 291-323. Thus, for instance, treaty norms do not prevail over customary norm (and vice versa).

554 *See* Articles 30 and 31 of the Vienna Convention which offer some guidelines. For instance, Article 30 provides for the lex *posterior derogate anteriori* and the *lex specialis derogat generali* principles in relation to "successive treaties relating to the same subject matter".

the international community of States as a whole as norms from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.[555] The second exception is represented by the Charter of the United Nations, which claims supremacy over other international agreements as per Article 103 of the UN Charter Nations.[556]

Certain legal scholars have also argued that norms which display fundamental global values and principles (although not of a *jus cogens* nature) such as human rights norms should be given a higher rank.[557] The *ratio* of this reasoning is the same that it applies to the two recognized exceptions, namely the need to protect certain values that are held dear by the international community and that, therefore, must prevail by their very content over other norms of international law.

Second, in balancing the relationship, the parties' membership to both set of rules (i.e., BIT vs external regulations) should be taken into account. Indeed, the scenario in which both BIT parties are also parties to the multilateral rules should differ from cases where only the host State is bound by the latter. If only the host State

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555 *See* Article 53 of the Vienna Convention according to which "[a] treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."

See also, K. D. BEITER, *Establishing Conformity Between TRIPS and Human Rights: Hierarchy in International Law, Human Rights, Obligations of the WTO and Extraterritorial State Obligations Under the International Covenant*, in H. Ullrich et al. (eds.), TRIPS plus 20, Springer, 2016, at 445-505.

556 *See* Article 103, UN Charter ("[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail").

557 *See*, e.g., P. WEIL, *Towards Relative Normativity in International* Law?, in *American Journal of International Law*, 77(3), 1983, 413-442, 1983; and M. DUPUY – J. E. VIÑUALES, *Human Rights and Investment Disciplines* in Bungemberg – GRIEBEL- Hobe – Reinisch, *International Investment Law. A Handbook*, 2019, at 1754. Although technically of recent vintage, the idea of overriding international norms is much older. Some disputes decided in the 19th century and relating to practices of slavery illustrate the early foundations of the concept of international public policy or order public international.

(and not also the home State of the investor) is subject to multilateral rules (as might often be the case in respect of certain financial regulations such as the OECD Codes), it is considered that the host State may not rely on those rules to justify its breach of a BIT provision.[558] When instead both BIT parties (the host and the home States) are also parties to the multilateral rules allowing (or compelling) restrictive measures, the relationship between the two sets of rules can be seen according to two different approaches which both lead to the third factor listed above.

Third, the applicability of the customary rules on interpretation as codified by the Vienna Convention. It should be noted that these rules were meant to provide treaty interpretation guidance and not also rules aimed at solving conflict of norms.[559] In the case when both BIT parties are also parties to the multinational regime, the two sets of rules might be seen according to the following two different approaches. According to a first approach, the host State may be relieved from its obligations toward protected investors of the other party. This solution can be based on the rule codified under Article 30 of the Vienna Convention, according to which the multilateral rules would prevail over the BIT provisions because more specific (*lex specialis derogat generali*).[560] Article 30 of the Vienna Convention requires however that the two set of rules relate to "the same subject-matter". When that's not the case, the same solution might be reached by applying Article 31(3)(c) of the Vienna Convention, according to which the BIT must be interpreted in its "context", "in the light of its object and purpose", taking into account "any relevant rules of international law applicable in the relations between the parties".[561]

Under the second approach, it is the BIT's obligation that must prevail over the other obligations because it represents *lex specialis* in respect of relevant multilateral instruments, so its application should remain unaffected by the multilateral provisions.

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558 *See* G. SACERDOTI, *BIT Protections and Economc Crises*, note 553, at 6. *See also Corn Products International Inc* v *United Mexican States*, ICSID Case No. ARB (AF)/04/1, Award dated January 15, 2008, paras 161 et seq.

559 *See* E. DE BRABANDERE, *Human Rights and International Investment Law*, Working Paper Series No. 2018/075 – HRL dated March 26, 2018.

560 Vienna Convention, Article 30.

561 Vienna Convention, Article 31(3)(c).

A further fundamental distinction to be taken into consideration is whether the measures taken by the host State are mandatory under the relevant treaty regimes, or whether those measures are merely allowed or authorized under the non-BIT regulation as a derogation from multilateral commitments.[562]

2.2.2. Restrictions Arising from the Same BIT

Certain BIT might include provisions that limit the subject matter of the treaty, either in general or in respect of specific subject matters. These limitations are particularly relevant in the event of an investment dispute insofar as they limit the jurisdiction of the tribunal to hear a case.[563] If the dispute does not fall within the agreed boundaries, then the claimant lacks the substantive right it invokes.[564]

The BIT limitations might affect the coverage of the treaty (and, therefore, the jurisdiction of the arbitral tribunal) *ratione personae*, *temporis*, *materiae*, and *loci*.[565] With specific regard to the limitations *ratione materiae*, the BIT might exclude from the jurisdiction of the arbitral tribunal certain subject matters or narrow down the subjective jurisdiction of the arbitral tribunal to specific categories of cases.[566] With respect to the first case, a common example is taxation.[567] With respect to the second case, a common example are limitations that exclude certain protection standard (normally, the FET).[568] Other examples of limitation clauses include provisions

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562 *See* G. SACERDOTI, *BIT Protections and Economc Crises*, note 553, at 6.

563 *See*, e.g., G. SACERDOTI, *BIT Protections and Economic Crises*, note 553; G. SACERDOTI, *The Application of BITs in Time of Economic Crisis: Limits to their Coverage, Necessity, and the Relevance of the WTO Law*, in *General Interests of Host States in International Investment Law*, (ed.), G. SACERDOTI, P. ACCONCI, M. VALENTI, and A. DE LUCA, Cambridge University Press, 2014, at 9-11.

564 *Id.*, Simply because the treaty does not attribute such rights to investors of either party. These issues are usually raised by the respondent host State at a preliminary stage and tend to be decided at the outset in a separate jurisdictional phase.

565 *Id.*

566 *See* F. FONTANELLI*, Jurisdiction and Admissibility in Investment Arbitration. The Practice and Theory*, Brill, 2018, at 35.

567 *See*, e.g., US-Latvia BIT, Article 10.

568 BITs that do not contain FET clauses include the New Zealand-Singapore FTA of 2001, the New Zealand-Thailand Closer Economic Partnership Agreement (EPA) of 2005, the Albania-Croatia BIT of 1993, the Croatia-Ukraine BIT of 1997 as well as several BITs concluded by Turkey.

excluding from the protection coverage of the treaty certain assets (e.g., public bonds) or certain types of measures (e.g., those enacted for prudential purposes and in relation to public concerns).[569]

2.2.3. General and Specific Exceptions

Certain treaties might include clauses (so called non-precluded measure clauses) that shelve the application of the relevant treaty in certain 'exceptional' situations (such as situations of emergency or when the security interest of a state is at stake).[570] In other words, these provisions provide that governmental actions taken in particular circumstances do not amount to a breach of the relevant BIT provision (primary rule).[571]

The difference between "exceptions" and limitations to the BIT coverage (either general and/or specific) is often blurred but of extreme importance and deserve some additional observations.[572] The notion of exception evokes *per se* the notion of derogation and refers to a specific instance of non-applicability of a general rule because the exception, which is a *lex specialis*, derogates the general rule, i.e., namely the *lex generalis*. There are several consequences arising from this distinction.[573] *First*, a limitation must be objectively constructed in light of the object, purpose and context of the treaty. Exceptions are instead subject to strict (restrictive) interpretation, in conformity with the very purpose of the clause. *Second*, the successful invocation of

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See, e.g., UNCTAD, *Fair and Equitable Treatment*, *A Sequel*, United Nations, 2012, at 18. *See also*, F. FONTANELLI*, Jurisdiction and Admissibility in Investment Arbitration*, note 586; Z. DOUGLAS, *The International Law of Investment Claims*, Cambridge University Press, 2009, at 235.

569 *See*, e.g., J. P. SASSE, *An Economic Analysis of Bilateral Investment* Treaties, Gabler, 2010, at 45.

570 *See* A. TURYN – F. PEREZ AZNAR, *Drawing the Limits of Free Transfer Provisions*, in *The Backlash against Investment Arbitration. Perceptions and Reality* (ed.), Michael Waibel, Asha Kaushal, Kyo-Hwa Liz Chung, and Claire Balchin, Kluwer Law International, 2010.

571 *See* W. BURKE-WHITE, *The Argentine Financial Crisis: State Liability under BITs and the Legitimacy of the ICSID System*, in *Asian Journal of WTO & International Health Law and Policy*, Vol. 3, No. 1, 2008, 199-234.

572 *See* G. SACERDOTI, *BIT Protections and Economic Crises*, note 553, at 6.

573 *Id*.

a limit (either general or specific) will generally result in the arbitral tribunal lacking jurisdiction *ratione materiae* in case a dispute later arises.[574] By contrast, an exception will be applicable in principle (and the tribunal would have jurisdiction to hear the case), but a specific exceptions which operates because of the circumstances of the case may render the provision invoked by the investor not applicable.[575] *Finally*, the distinction may affect the applicable burden of proof. In general, it is for the claimant to show that the relevant treaty provision is indeed applicable to the matter raised; it is for the respondent to establish the contrary, invoking the applicability of the exception.[576]

Exception clauses might be either general or specific. An example of treaty provision containing general exceptions is Article XX of the GATT, which lists ten types of domestic measures to which WTO Members may resort in certain conditions.[577] Among the specific exception clauses, some examples expressly provide that the BIT should not constrain the host State from adopting measures necessary to protect the public order[578] or to protect essential interests of security.[579] An example of specific exception is provided by Article XI of 1991 Argentina-US BIT, according to which the "[t]reaty shall not preclude the application by either Party of […] measures necessary for the maintenance of public order […] or the protection of its own essential security interests".[580] This Article has been at the hearth of most arbitration proceedings arising from Argentine's crisis.[581]

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574 *Id*.

575 *Id*.

576 *Id*.

577 *See* Article XX, GATT.

578 *See*, e.g., Article XI of the Argentina-US BIT; Article 6(2) of the Argentina-India BIT; Article 5.b. of the Argentina-Mexico BIT; and Article 3(2) of the Argentina/Belgium/Luxemburg BIT.

579 *See* Article XI of the Argentina-US BIT.

580 *Id*.

581 *Id*. This article has been at the heart of Argentina's defence in several disputes arising from the 2001 financial crisis. One of the key questions faced by the arbitral tribunals was whether Article XI provided for a self-standing provision or whether it was contingent upon the preconditions of the necessity defense set forth under customary international law (as codified by Article 25 of the International Law Commission (ILC)).

2.2.4. Applicable Customary International Law

Host States may invoke applicable customary international principles as grounds for escaping from BIT obligations in case of crisis, including the principles that preclude wrongfulness such as necessity and/or fundamental change of circumstances. The "necessity" circumstance is expressly codified at Article 25 of the Draft Articles on State Responsibility, according to which "[n]ecessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act: (a) is the only way for the State to safeguard an essential interest against a grave and imminent peril; and (b) does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole. 2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if: (a) the international obligation in question excludes the possibility of invoking necessity; or (b) the State has contributed to the situation of necessity."[582]

Recourse to this defense is subject to a number of strict conditions, and, as pointed out by leading legal scholars (and as shown by the Argentine experience), the availability of this defense in respect of economic crises is problematic for many reasons.[583]

Arbitral tribunals took two different approaches. According to a first approach, a governmental conduct can be excused under Article XI if it meets all the requirements set forth in Article 25 of the ILC draft. Under the second approach instead, Article XI does not represent a specification of the narrow defence against responsibility that would otherwise stem from a measure in breach of an international obligation, as set forth in art 25 of the ILC draft. The provision operates rather as an exception to the application of the primary treaty obligations, such as that of providing fair and equitable treatment to US investors by the Argentine Republic under the BIT. *See* G. SACERDOTI, *BIT Protections and Economic* Crises, note 553. *See also* A. K. BJORKLUND, *Economic Security Defenses in International Investment Law*, in *Yearbook on Investment Law and Policy* (ed.), K. P. Sauvant, 2008-2009, at 479-494; JOSÉ E. ALVAREZ – K. KHAMSI, *The Argentines Crisis and Foreign Investors: A Glimpse into the Hearth of Investment Regime*, in *Yearbook on Investment Law and Policy* (ed.), K. P. Sauvant, 2008-2009, at 379-477.

582 Article 25 of the Draft Articles on State Responsibility.

583 *See* G. SACERDOTI, *BIT Protections and Economic Crises*, at 6, note 553.

First, the requirement that measure adopted by the host State might be "the only way for the State to safeguard an essential interest against a grave and imminent peril" is an almost impossible requirement to be met.[584] Moreover, the requirement appears to be impractical in respect of economic crises that develop over time (and that are rooted back into history, as shown by the example of Argentina) and to encourage inaction on behalf of the host State.[585]

Second, equally impossible to be met is the requirement that "the State has not contributed to the situation of necessity". Causation in economic matters does not lend itself to a strict deterministic evaluation. Some contribution by the country concerned, normally non-insignificant, will almost always be found, except in the most extreme instances, amounting to force majeure or as a consequence of the unlawful use of force against such State.[586]

3. The Fair and Equitable Treatment Obligation ("FET")

FET is a key element of contemporary international investment law.[587] The standard is found in nearly all BITs as well as in some multinational and regional conventions, including Article 1105(1) of the North American Free Trade Agreement ("NAFTA") and Article 10(1) of the Energy Charter Treaty.[588] Under this standard host

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584 *See* G. BÜCHELER, *Proportionality in Investor-State Arbitration*, Oxford University Press, 2015, at 265.

585 *See* G. SACERDOTI, *BIT Protections and Economic Crises*, 2013, at 6, note 553. It would appear that a state should let the situation become desperate, up to the ultimate peril, in order to be able to enact remedial measures contrary to previous international commitments without incurring responsibility.

586 *Id.*

587 The original purpose and intent behind the FET standard were to protect investors against the many types of unfairness committed by the host state (including arbitrary cancellation of licenses, harassment of an investor through unjustified fines and penalties, or other hurdles with a view to disrupting a business), by providing a gap-filling device.

588 A relatively recent study of 365 BITS revealed that only 19 of those treaties did not make reference to FET. *See* I. TUDOR, *The Fair and Equitable Treatment Standard in the International Law of Foreign Investment*, New York, Oxford University Press, 2008, at 23; M. JACOB and S. SCHILL, *Fair and Equitable Treatment: Content, Practice, Method*, in International Investment Law, 2019.

States undertake to treat the foreign investor who has invested in their territory in a fair and equitable manner.[589]

3.1. The Concepts of "Fair" and "Equitable"

What is fair and equitable? BITs do not generally provide for a definition of FET. According to the Concise Oxford dictionary "fair" is defined as "just, unbiased, equitable, in accordance with rules".[590] The Cambridge dictionary instead defines fairness as "the quality of treating people equally or in a way that is *right* or *reasonable*".[591] Thus, the common understanding given to the fair treatment is that of a *right* and *reasonable* treatment with the aim to achieving equality between all the parties involved.[592]

What is right and reasonable is not a static element. According to natural law scholars, what is "right" may vary depending on a particular historic moment (e.g., the social facts underlying the contract as well as the concepts of justice, authority and

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589 *See*, e.g., generally on the topic. M. JACOB and S. SCHILL, *Fair and Equitable Treatment: Content, Practice, Method*, in *International Investment Law*, 2019; C. CAMPBELL, *House of Cards: the Relevance of Legitimacy Expectations under Fair and Equitable Treatment Provisions in Investment Treaty Law*, in *Journal of International Arbitration*, 2013, at 361-379; B. CHOUDHURY, *Evolution or Devolution? – Defining Fair and Equitable Treatment in International Investment Law*, JWIT, 2005, 297-320; R. DOLZER, *Fair and Equitable Treatment: A Key Standard in Investment Treaties*, in *International Law*, 2005, 87-106; H. HAERI, *A Tale of two Standards: 'Fair and Equitable Treatment' and the Minimum Standard in International Law*, 2011, International Arbitration, 27-46; J. HAYNES, *The Evolving Nature of Fair and Equitable Treatment (FET) Standard: Challenging its Increasing Pervasiveness in light of Developing Countries' Concerns – The Case of Regulatory Rebalancing*, in JWIT, 2013, at 114-146; M. HIRSH, *Between Fair and Equitable Treatment Standard and Stabilization Clause: Stable Legal Environment and Regulatory Change in International Investment Law*, JWIT, 2011, at 783-806; M. POTESTÀ, *Legitimate Expectations in Investment Treaty Law: Understanding the Roots and Limits of a Controversial Concept*, 2013, ICSID Review, 88-122; C. SCHREUER, *Fair and Equitable in Arbitral Practice*, 2005, JWIT, 357-386; E. SNODGRASS, *Protecting Investors' Legitimate Expectations – Recognizing and Delimiting a General Principle*, 2006, ICSID Review; I. TUDOR, *The Fair and Equitable Treatment Standard in the International Law of Foreign Investment*, New York, Oxford University Press, 2008.

590 The Concise Oxford Dictionary of Current English, Eighth edition, Clarendon Press, Oxford, 1990, at 420. *See also* UNCTAD, *Fair and Equitable Treatment*, at 7, note 591.

591 Cambridge International Dictionary of English, Cambridge, 1996.

592 UNCTAD, *Fair and Equitable Treatment*, at 7, note 591.

freedom of a given society).[593] Fairness in the procedural field implies the necessity for any legal system to ensure the right of all parties to be respected and that every step of the procedure follows the formal indication of the law.[594] Based on the foregoing, fairness has an evolutionary character and implies the idea of justice and reasonableness.

The concept of reasonableness is also broad and vague. However, it generally refers to both substantive and procedural requirements, including necessity, proportionality, transparency and participation.[595] In the context of international law, certain scholars have suggested three tests to verify whether a host State's conduct complies with the principle of reasonableness: the measure/end or suitability test; cost effectiveness or necessity test and cost/benefit or proportionality test.[596]

As with respect to the second element of the FET standard i.e., "equity" or equitableness, the concept derives from the Latin word *aequus* meaning equal division. In the context of law, the concept (i) commands an equitable application of the law in order to avoid, in practice, absurd or unreasonable results; (ii) relates to an idea of equilibrium; and (iii) suggests a balancing process of the interests concerned based on a reasonable assessment of the situation also in light of the circumstances of the case (which should give to the concerned person what he deserves). The standard seems to evoke certain elements of the proportionality test applied by the ECtHR.[597]

Based on a plain meaning of the words, "fair and equitable" treatment within the context of investment law requires an attitude to governance based on an unbiased set of rules that should be applied with a view to doing justice to all interested parties that may be affected by a State's decision in question, including the host State's

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593 *See* R. SALEILLES, *L'école Historique et le droit naturel*, in *Revue Trimestrielle de droit civil*, 1902, at 97.

594 For instance, an important right is for example the respect of the equality of arms between parties.

595 *See* F. ORTINO, *From 'Non-Discrimination' to reasonableness': A Paradigm Shift in International Economic Law'*, Jean Monnet Working Paper, 01/05 (2005).

596 *Id*. This proposal is interesting since it suggests that reasonableness can be quantified, diminishing considerably the vagueness of this concept.

597 *See* Chapter II, above.

population at large, as well as its human rights.[598] *First*, it is fair that foreign investors and their investment are not given, in practice, a treatment less favorable that the one offered by the host State to its nationals. *Second*, it is fair that national treatment should not be less favorable that the one accorded to foreign investment by international law. *Third*, it is fair to take into consideration the behavior of the investor at a certain stage since it would be clearly unfair to compensate an unlawful and/or bad behavior. Fairness transmits to FET the idea of *reasonableness* and *justice* as well as an evolutionary and flexible character because "what is fair in a determinate time and phase and place may not be in a different setting".[599]

The substantive content of the FET depends to a large extent on the specific formulation contained in the relevant BIT.[600]

3.2. Types of FET Clauses

Based on the formulation of the standard, BITs can generally be divided into BITs that mention the FET: (i) in the preamble; (ii) in the conventional text of the treaty either as a self-standing standard or in conjunction with other protection standards; and (iii) in combination with a reference to international law. Only a few BITs do not contain any reference to FET at all.[601]

First, FET in the preamble serves to identify the general tone of the treaty. The reference however does not add any substantive obligation beyond and above the one that are provided by the actual text of the treaty.[602] The most frequent types of

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598 UNCTAD, *Fair and Equitable Treatment*, at 7, note 591.

599 *See* I. TUDOR, *The Fair and Equitable Treatment Standard in the International Law of Foreign Investment*, at 127, note 611.

600 An empirical research concluded on 358 BITs revealed that the existing FET clauses contain a number of provisions that assign to the FET standard a different meaning. The research included BITs signed by 10 states (Argentina, Australia, Bangladesh, Canada, France, Japan, Romania, Saudi-Arabia, Switzerland, and the United States).

601 BITs that do not contain FET clauses include the New Zealand-Singapore FTA of 2001, the New Zealand-Thailand Closer Economic Partnership Agreement (EPA) of 2005, the Albania-Croatia BIT of 1993, the Croatia-Ukraine BIT of 1997 as well as several BITs concluded by Turkey. *See*, e.g., UNCTAD, *Fair and Equitable Treatment*, at 18, note 591.

602 *See* I. TUDOR, *The Fair and Equitable Treatment Standard*, in *The International Law of Foreign Investment*, at 28, note 611.

preambles[603] containing a FET link the standard to the stability of the host State's legal framework. For instance, the preamble of the US-Argentina BIT provides that "fair and equitable treatment of investment is desirable in order to maintain a stable framework for investment and maximum effective use of economic resources".[604]

Second, the FET can appear alone or with reference to other protection standards. The clauses that only enunciate the FET standard alone (so-called unqualified approach) simply state the host State's obligation to accord fair and equitable treatment to the protected investment.[605] For instance, the Argentine-Italy BIT provides that "[i]investment made by investors of each Contracting Party shall at all times be accorded fair and equitable treatment."[606] The unqualified approach has given rise to the question of whether FET clauses formulated in this way can be interpreted in light of the minimum standard of treatment of aliens under customary international law or whether they refer to an unqualified autonomous standard to be considered on a case-by-case basis.[607]

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603 Including, US-Argentina, US-Armenia, US-Bulgaria, US-Czech and Slovak Republics, US-Democratic Republic of Congo, US-Ecuador, US-Estonia, US-Grenada, US-Jamaica, US-Kazakhstan, US-Kyrgyzstan, US-Latvia, US-Mongolia, US-Moldova, US-Romania, US-Sri-Lanka, US-Tunisia, US-Turkey, US-Lithuania, US-Cameroon, US-Poland, US-Russian Federation.

604 US-Argentina BIT, Preamble. In several disputes between U.S. investors and Argentine under that BIT, tribunals have relied on the wording of this preamble to state that a lack of regulatory stability amounted to a breach of the FET. See, e.g., C*MS Gas Transmission Company* v. *The Republic of Argentina*, ICSID Case No. ARB/01/8, Award dated, para 274-276; *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc.* v. Argentine Republic (ICSID Case No. ARB/02/1), Decision on Liability of October 3, 2006, para 124; and *Enron Corporation and Ponderosa Assets, L.P.* v. Argentine Republic, ICSID Case No. ARB/01/3, paras 260-261.

605 *See* I. TUDOR, *The Fair and Equitable Treatment Standard in the International Law of Foreign Investment*, at 24, note 611; UNCTAD, *Fair and Equitable Treatment*, at 20, note 622.

606 The Italian version provides as follows "[c]iascuna Parte Contraente assicurerà sempre un trattamento giusto ed equo agli investimenti di investitori dell'altra". By the same toke the US-Australia BIT provides that "[e]ach contracting Party shall at all times ensure fair and equitable treatment to investments". Similarly, Article 4 of the Argentine-Australia BIT.

607 *See*, e.g., UNCTAD, *Fair and Equitable Treatment*, at 21, note 591. *See also*, A. ORAKHELASHVILI, *The Normative Basis of Fair and Equitable Treatment*, in *Archiv des Völkerrechts*, 2008, 74-105; H. HAERI, *A Tale of two Standards: 'Fair and Equitable Treatment' and the Minimum Standard in International Law*, 2011, in *Journal of*

FET may also contain reference to other treatment standards. The most commonly encountered standards are the NT and the MFN clauses. There are a number of variations of these types of clause. For instance, the France-El Salvador BIT includes the FET, the NT and the MFN clauses in two different paragraphs as follows: "[e]ach one of the Contracting Parties engages to ensure within its territory fair and equitable treatment, in conformity with the principles of international law, to investments of the nationals and companies of the other Party and to ensure the exercise of this recognized right is not limited *de jure* or *de facto*. This treatment well be at least equal to that accorded by each contracting Party to the nationals or companies of the most favored nation".[608]

The second drafting variations gathers the different standard in one phrase. *First*, the three standards may be mentioned in the same article without any causal link between each other. *Second*, there are clauses that contain the three standards together placed in a relationship. For instance, the Romania-Czech Republic BIT provides that "[e]ach Contracting Party shall in its territory accord investments and returns of investor of the other Contracting Party treatment which is fair and equitable and not less favorable than that which it accords to investments and returns of its own investors or to investments and returns of investors of any third State whichever is more favorable".[609] In these clauses, the MFN and the NT standard set forth the minimum level of the FET while they also make clear that a State may go beyond this limit and offer a better treatment to its foreign investors.[610]

Third, the FET standard can be put in relationship also with reference to international law.[611] FET referring to international law can have different

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International Arbitration, at 27-46; M. PAPARINSKIS, *The International Minimum Standard and the Fair and Equitable Treatment*, Oxford University Press, 2013; and M. JACOB and S. SCHILL, *Fair and Equitable Treatment: Content, Practice, Method*, in *International Investment Law*, 2019.

608 *See*, France-El Salvador BIT 1993, Article 5. I. TUDOR, *The Fair and Equitable Treatment Standard, in the International Law of Foreign Investment*, at 31, note 611.

609 *See* I. TUDOR, *The Fair and Equitable Treatment Standard*, in *the International Law of Foreign Investment*, at 32, note 611.

610 *Id*.

611 UNCTAD, *Fair and Equitable Treatment*, *A Sequel*, at 22, note 591.

formulation.[612] A first example is provided by the FET clauses referring to international law alone. For example, the Argentine-France BIT provides that "chaque des Parties contractantes s'engage à assurer, sur son territoire et dans sa zone maritime, un traitement juste et équitable, conformément aux principes du droit international, aux investissement affectés par des investitures de l'autre Partie et à faire en sorte que l'exercice de droit ainsi reconnu ne soit entravé ni on droit, ni en fait".[613]

Other examples of FET contemplate the reference to international law along with a non-exhaustive list of host State's behaviors that are contrary to the FET standard. For instance, the 1998 France-Guatemala provides that: "[e]ach one of the Contracting Parties engages to ensure, within its territory, fair and equitable treatment, in conformity with the principles of international law, to the investments of the nationals and the companies of the other Party and to ensure that the exercise of this recognize right is not limited *de jure* or *de facto*. Especially, even though not exclusively, are considered to limit *de jure* or *de facto* FET, all restrictions on the acquisition and transport of raw and auxiliary materials, of energy and combustible substances, as well as on the means of production and exploitation of all kinds, all limits to sell and transport products within the country and abroad, as well as all measures having similar effects".[614] According an empirical study, out of the 365 BIT analyzed, only 2 contain this kind of detailed provisions.[615]

Finally, some FET formulations link international law to other standards of protection, including full protection and security. For instance, the US-Argentine BIT provides that "[i]nvestment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less

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612 *Id*., at 25-26.

613 Argentina-France BIT 1991. See, e.g., *Azurix v. Argentina*, ICSID Case No. ARB/01/12, Award, 4 July 2006, para. 361. See also *Duke Energy v. Ecuador*, ICSID Case No. ARB/04/19, Award, 18 August 2008, para. 337, and *Lemire v. Ukraine*, ICSID Case No. ARB(AF)/98/1, Decision on Jurisdiction and Liability, 21 January 2010, para. 253.

614 France-Guatemala BIT of 1998, Article 4.

615 *See* I. TUDOR, *The Fair and Equitable Treatment Standard, in the International Law of Foreign Investment*, at 27, note 611. The list is useful to delimitate the scope of the provision.

than that required by international law."[616] It has been claimed that this FET standard formulation is not strictly linked to the stipulation of international law.[617]

The reference to international law in the FET standard raises a number of interpretative questions, including whether it is relevant to a finding of violation of FET if a host State is violating other international obligations, including those arising from human rights treaties. Another question is to what extent the breach of international public law includes human rights standards.[618] These questions are particularly relevant to the topic at issue.

As this section shows, although FET varies on its formulation, its main characteristic is that it remains inherently undefined and flexible. Due to this key feature, the majority of successful claims pursued in international arbitration are based on a variation of this standard.[619] Host State actions in breach of the FET standard have involved the following head of claim: denial of justice; lack of due process; harassment/coercion, lack of transparency; lack of stability of the legal/business environment, and frustration of the investors' legitimate expectation. The last one is among the most invoked claims and will be the focus of next section.

3.3. The Legitimate Expectations Obligation

The FET standard has been interpreted so as to include the host state's obligation to protect the investor's legitimate expectations, including the expectation that the legal framework on the basis of which the investment was made would remain

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616 US-Argentina BIT1991.

617 UNCTAD, *Fair and Equitable Treatment*, at 23, note 591.

618 *See* B. SIMMA and T. KILL, *Harmonization Investment Protection and International Human Rights: First Step Toward a Methodology*, in C. Binder et al. (eds.) *International Investment Law for the 21st Century: Essays in Honor of Christoph Schreurer* (New York, Oxford University Press, 2009, at 678; JOSÉ E. ALVAREZ, *The Public International Law Regime Governing International Investment*, in *Hague Academy of International Law*, 2011, at 181-182.

619 *See*, e.g., UNCTAD, *Fair and Equitable Treatment*, Executive Summary, note 591; R. DOLZER and C. SCHREURER, *Principle of International Investment Law*, Oxford University Press, 2012, at 130; C. L. LIM, J. HO and M. PAPARINSKIS, *International Investment Law and Arbitration. Commentary, Awards and other Materials*, 2018, at 263-278.

unchanged for the whole lifecycle of the investment (regulatory stability obligation).[620] The expectations are essential elements of the investor-state relationship, and as such should be protected.[621] This is especially so when the host state has extended specific promises to the investor (including in the form of investment incentives).[622]

As with the case of indirect expropriation,[623] the investor's legitimate expectations may generally be breached by general measures applicable also to domestic investors. This typically happens when economy-wide or sector-wide measures are adopted, notably in case of crisis, including regulatory measures such as freezing of tariffs and exchange measures. This however typically happens also when the host state acts in furtherance of its human rights obligations. However, whether an investor should be entitled to advance a legitimate expectation claim in these circumstances may depend very much on the factual and legal context. The determination is naturally of significance both to the investor and to the host state.

As noted with respect to indirect expropriation, for the investor the line of demarcation between governmental measures that do not breach the investor's legitimate expectations (and for which no compensation is due) and governmental actions qualifying as a breach of the same may well make the difference between the burden to operate (or abandon) a non-profitable investment and the right to receive compensation.[624] For the host state, the definition determines the scope of the state's

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620 The concept of legitimate expectations is not included in any of the FET provisions in the historic BITs and as such is an arbitral innovation. UNCTAD, *Fair and Equitable Treatment*, at 9, note 591. However, as it will be seen under chapter V below, some of the new generation BITs include a specific reference to the investor's legitimate expectations in the FET provision.

621 The investor's legitimate expectations are even considered to be a "dominant" or "key" element of the FET standard. In *Saluka*, the tribunal held that "the standard of 'fair and equitable treatment' is […] closely tied to the notion of legitimate expectations which is the dominant element of the standard". *See Saluka Investments B.V.* v. *The Czech Republic*, UNCITRAL, Partial Award dated March 17, 2006, para 302.

622 *See* Chapter III above, Section 4.

623 *Id*. As a matter of fact, the distinction between breach of FET and indirect expropriation is typically based on the level of interference with the right to property. *See* G. SACERDOTI, *BIT Protections and Economic Crises: Limits to Their Coverage, the Impact of Multilateral Financial Regulation and the Defense of Necessity*, at 6, note 553.

624 *See* R. DOLZER and M. STEVENS, *Bilateral Investment Treaties*, Martinus Nijhoff Publishers, 1995, at 99.

power and, in certain instances, the obligation to enact legislation that regulates the rights and obligations of the owners in instances where compensation may fall due.

When it comes to legitimate expectations, the following two approaches have been registered by arbitral tribunals: (i) strict regulatory stability; and (ii) soft regulatory stability.

3.3.1. Strict Regulatory Stability

Under the first reading, the FET provision requires strict regulatory stability. According to these reading the foreign investor can (or should be able to) legitimately rely on the expectation that the host states' regulatory framework under which the investment was made would not be subsequently modified (at least in a substantial manner) in a way detrimental to the investment. Under this approach, a mere change to the regulatory framework (irrespective of the underlying reasons) would be *per se* sufficient to trigger a violation of the FET standard.

For instance in *Tecmed* v *Mexico*, the arbitral tribunal found that FET requires the contracting parties to guarantee to international investors "treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment, including the expectation that the host state would act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor".[625]

Other arbitral tribunals have relied on the reference to "stability" of the regulatory environment contained in the relevant BIT's preamble. For instance, in *Occidental* the arbitral tribunal relied on the statement found in the relevant BIT's preamble,[626] according to which FET is *desirable* in order to maintain a stable framework for the investment and the maximum effective utilization of the economic resources.[627] By the same token, in *CMS* by relying on the reference contained in the

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625 *See Tecmed v. Mexico*, ICSID Case No. ARB(AF)/00/2 Award dated May 29, 2003, para 154.

626 The 1993 Ecuador- United States Bilateral Investment Treaty.

627 On this basis, the arbitral tribunal concluded that the host State was under an "obligation not to alter the legal and business environment in which the investment has

1991 US-Argentina BIT, the arbitral tribunal stated that "a stable legal and business environment is an essential element of fair and equitable treatment".[628]

Between 2006 and 2007, relying on the above precedents, a number of arbitral tribunals deciding on the Argentinian "saga" reached the same conclusions. For instance, in *Enron* the arbitral tribunal held that a key element of the FET standard is the requirement of a "stable framework of the investment", which has been prescribed by a number of decisions.[629] By the same token, in *LG&E*, the arbitral tribunal stated that the stability of the business framework was an essential element of the FET standard.[630] In *Sempra*, the arbitral tribunal identified the key issue as follows: "what counts is that in the end the stability of the law and the observance of the legal obligations are assured, thereby safeguarding the very purpose and object of the protection sought by the treaty".[631] The *Sempra* tribunal discarded the relevance of any justifications underlying the government's introduction of changes in the legal and business framework, including the existence of the severe economic and financial crisis that had stroke Argentina in the period 2000-2001.

3.3.2. Soft Regulatory Stability

The second reading of the FET provides for a soft regulatory obligation. Under this reading, the investor's legitimate expectations would be protected only if certain requirements are met including: (i) the existence of a host state's conduct capable of generating expectations that become legitimate to the investor (e.g., a specific

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been made". *See Occidental v Ecuador*, LCIA Case No. UN3467, Award dated July 1, 2004, para 183.

628 *CMS* v *Argentina*, ICSID Case No. ARB/01/8, Award dated May 12, 2005, para. 274. The same conclusion was reached in *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic* (ICSID Case No. ARB/02/1), Decision on Liability dated October 3, 2006, para 124; and *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award dated May 22, 2007, paras. 260-261.

629 *Id*.

630 *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc.* v. *Argentine Republic* (ICSID Case No. ARB/02/1), Decision on Liability dated October 3, 2006, paras. 124, and 131.

631 *Sempra Energy International* v. *The Argentine Republic*, ICSID Case No. ARB/02/16, para. 300.

promise); (ii) a reasonable and justifiable level of expectations of the investor also in light of the specific circumstances of the case (including the different components of the country risk).[632] This reading focuses on the substantive reasonableness of the regulatory change rather than on the mere existence of the change to be assessed against the different test of proportionality, including suitability, necessity, and cost-benefit balancing.[633]

3.3.2.1. Specific Conduct by the Host State

As to the first element, arbitral tribunal are increasingly sharing the view that there must be a *specific* action by the host state referred to the investor and able to generate the investor's legitimate expectation (e.g., a *specific* promise or representation of stability given by the host state and relied upon by the investor at the moment of entering of the investment).[634]

In *EDF* v *Romania*, the arbitral tribunal stated that: "[e]xcept where specific promises or representations are made by the state to the investor, the latter may not rely on a bilateral investment treaty as a kind of insurance policy against the risk of any changes in the host State's legal and economic framework. Such expectations would be neither legitimate nor reasonable".[635] By the same token, in *Continental*, it was stated that relevance should be given to "the specificity of the undertaking […] [G]eneral legislative statements engender reduced expectations, especially with 'competent major international investors in a context where the political risk is high.

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632 *See* Chapter III above.

633 *See* C. HECKELS, *Proportionality and Deference in Investor-State Arbitration: Balancing Investment Protection and Regulatory Autonomy*, Oxford, 2016; M. POTESTÀ, *Legitimate Expectations in Investment Treaty Law: Understanding the Roots and the Limits of a Controversial Concept*, in ICSID Review, 2013, at 34; C. CAMPBELL, *House of Cards: The Relevance of Legitimate Expectations under Fair and Equitable Treatment Provisions in Investment Treaty Law*, in *Journal of International Arbitration*, 2013, at 379.

634 *Parkerings-Compagniet AS* v. *Republic of Lithuania*, ICSID Case No. ARB/05/8, Award dated September 11, 2007, para 332. *See also* NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v. Kingdom of Spain, ICSID Case No. ARB/14/11, Award dated May 31, 2019.

635 *EDF (Services) Limited* v. *Romania*, ICSID Case No. ARB/05/13, Award dated October 8, 2009, para 217. *See also PSEG Global Inc. and Konya Ilgin Elektrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award dated January 19, 2007, paras. 241-241.

Their enactment is by nature subject to subsequent modification'".[636] More recently, in *Antaris* v *the Czech Republic*, the arbitral tribunal stated that to generate the investor's legitimate expectations, there should exist a "clear and explicit (or implicit) representation […] made by or attributable to the state in order to induce the investment".[637] Accordingly, "provisions of general legislation applicable to a plurality of persons or category of persons, do not create legitimate expectations that there will be no change in the law".[638]

After all, a generic and unqualified promise not to change the legal framework would be "inappropriate", "unrealistic",[639] excessively burdensome and costly on the host state.[640]

First, economic and legal life is by nature evolutionary. Accordingly, as correctly stated in *Continental*, it would be inappropriate "and unconscionable for a country to promise not to change its legislation as time and needs change, or even more to tie its hands by such a kind stipulation in case a crisis of any type of origin arose".[641]

Second, it would be extremely burdensome and costly for a host state to undertake *vis*-à-*vis* the investors the commitment to never change the legal framework, especially when the changes are determined by external factors over which the host State has no control. For instance, in *Gami* the actions of the host state within the sugar industry were dependent on the evolution of national consumption and production (an element over which the host state was deemed to have no control). Accordingly, the host state's decision to take certain measures following the dramatic

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636 *Continental Casualty Company* v. *The Argentine Republic*, ICSID Case No. ARB/03/, Award dated September 5, 2008, para 261(ii).

637 *Antaris and Göde* v. *The Czech Republic*, PCA Case No. 2014-01, Award dated May 2, 2018, paras. 262-264.

638 *Id*.

639 *Saluka Investments B.V.* v. *The Czech Republic*, UNCITRAL, Award dated May 7, 2004, para 304.

640 *Id*.

641 *Continental Casualty Company v. The Argentine Republic*, ICSID Case No. ARB/03/9, Award dated September 5, 2008, para. 258. The Continental tribunal was the first to oppose the reading giving excessive relevance to the link between stability and FET in the preamble.

reduction in the national consumption did not violate the FET obligation, even if it had a negative impact on the investor's investment.[642]

Third, and more importantly, such a long-standing commitment would be unrealistic and not credible insofar as host states have the right to regulate. For instance, in *Parkerings* the arbitral tribunal stated that it is "each States' undeniable right and privilege to exercise its sovereign legislative power. A host state has the right to enact, modify or cancel a law at its own discretion".[643] By the same token, in *Phillip Morris* the arbitral tribunal clarified that "it is common ground in the decisions of more recent tribunals that the requirements of legitimate expectations and the legal stability as manifestation of the FET standard do not affect the host state's rights to exercise its sovereign authority to legislate and adapt its legal system to changing circumstances".[644]

Finally, the host state has not only the right but also the duty to regulate in order to guarantee the minimum essential levels of human rights of its population.[645] In *Total* the arbitral tribunal stated that "State parties to a BIT do not […] relinquish their regulatory powers nor limit their responsibility to amend their legislation in order to adapt it to changes and the emerging needs and requests of their people in the normal exercise of their prerogatives and *duties*. Such limitations upon a government should not lightly be read into a treaty which does not spell them out clearly nor should they be presumed".[646]

Subsequently, the arbitral tribunal in *El Paso*, stated as follows: "[t]he tribunal cannot follow the line of cases in which fair and equitable treatment was viewed as implying the stability of the legal and business framework. Economic and legal life is by nature evolutionary […]. It is unconceivable that any state would accept that,

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642 *Gami Investments, Inc. v. The Government of the United Mexican States*, UNCITRAL, Award dated November 15, 2004.

643 *Parkerings v. Lithuania*, ICISD Case No. ARB/05/8 dated October 8, 2009, para 217.

644 *Philip Morris v. Uruguay*, ICSID Case No. ARB/10/7, Award dated July 8, 2016, para 342.

645 *See* Chapter III, above.

646 *Total v. Argentina*, ICSID Case No. ARB/04/1, Decision on Liability dated December 27, 2010, para. 115.

because it has entered into BITs, it can no longer modify pieces of legislation which might have a negative impact on foreign investors, in order *to deal with modified economic conditions* and must guarantee absolute legal stability. In the Tribunal's understanding, FET cannot be designed to ensure the immutability of the legal order, the economic world and the social universe and play the role assumed by stabilization clauses specifically granted to foreign investors with whom the state has signed investment agreements".[647]

3.3.2.2. Investor's Conduct and the Circumstances of the Case

As with respect to the second element, the investor's expectations should be reasonable and justifiable in light of his conduct (both prior and after the making of the investment) as well as the specific circumstances of the case.[648] Certain tribunals have taken into account these elements at the liability stage when examining the legality of the host state's behavior to dismiss the investor's claim. Other tribunals instead have considered these elements at the compensation stage.

3.3.2.2.1. The Investor's Conduct Prior to the Making of the Investment: The Due Diligence Obligation

In analyzing the investor's legitimate expectations, arbitral tribunals are increasingly considering whether, prior to the making of the investment, the investor has acted diligently and prudently by, *inter alia*, analyzing: (i) both the basic legislation (such as the legislation relating to the licensing requirements) as well as the entire legal framework potentially applicable to the investment; and (ii) all the element of the country risk related to the target host country (including, the political, economic,

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647 *El Paso* v. *Argentina*, ICISD Case No. ARB/03/15, Award dated October 31, 2011, paras. 352 and 367-368. *See also Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Award dated June 21, 2011, paras. 285, 290, and 291.

648 *See Biwater Guaff* v. *Tanzania*, ICISD Case No. ARB/05/22, Award dated July 18, 2008, para. 602.

Certain leading scholars have argued that the behavior of the investor is relevant at all stages i.e., in determining whether the FET standard has been breached, in determining the causal relationship between the conduct, the impugned act and the alleged harm suffered, and in determining the amount of the compensation awarded. P. MUCHILINSKI, *Caveat Investor? The Relevance of the Conduct of the Investor under the Fair and Equitable Treatment Standard*, 2006, 55 ICLQ, 530.

financial, cultural and human rights risks).[649] After all, the investor' cost-benefits analysis (discussed in details above),[650] which should include also a due diligence of the legal framework contributes not only to the formation of the investor's decision to invest but also to its expectations as to the ways in which his investment could develop in a particular country.[651] For instance, an investor who decides to invest in a country characterized by a recurrent unstable political and economic situation (like Argentina), cannot legitimately expect the same level of stability as an investor who invests in the US or in another country.[652] By the same token, an investor (especially a "competent major international investors")[653] who knows that a given risk would materialize but nevertheless invests because it considers the investment profitable anyways, cannot then claim legal protection under a BIT. The expectation should be legitimate in order to receive international protection and BITs cannot operate as "insurance policies against bad business judgments" of imprudent foreign investors.[654]

First, the investor should evaluate the whole legal framework applicable to the investment, including basic regulations as well as foreseeable potential amendments. By way of example, in *Mamidoil* the arbitral tribunal underlined the relevance of the

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649 *See* Chapter III, above.

650 *Id*.

651 *See*, e.g., I. TUDOR, *The Fair and Equitable Treatment Standard in the International Law of Foreign Investment*, Oxford University Press, 2008, at 164 ("the foreign investor is aware of a certain number of elements at the beginning of its investment, concerning the host State. These elements are connected to the social and political situation of that determined State – in other words, the business climate, and also the legislative and administrative framework. These general elements will be taken into account by the Investor not only in his decision to invest in one country rather than in another but also in the every-day contact with the State and its administration. These elements will be the glasses through which the Investor will judge its investment activity in the host State. ICSID Tribunals underlined the importance of the preliminary observation phase of the conditions of the host State by foreign Investors and reiterated the fact that the ICSID system is not an insurance system that pays for an imprudent foreign investor").

652 This is so regardless of the specific assurances and promises received by the host State.

653 *Continental Casualty Company v. The Argentine Republic*, ICSID Case No. ARB/03/9, Award dated September 5, 2008, para. 261(ii).

654 *Mazzafini* v *Spain*, ICSID, ARB/97/7, final award rendered on November 13, 2000, para 65. *See also* F. DUPUY, *La Protection de l'attente légitime des parties au contrat, étude de droit international des investissements à la lumière du droit comparé*, Humnboldt Universität/Université Paris II, 2007.

investor's diligence in assessing whether an investment is covered or protected by a BIT.[655] Specifically, Albania argued that the claimant had failed to conduct any due diligence assessment of the basic Albanian regulation and had failed to seek the relevant construction permits (including, construction, environmental and exploitation permits). Although the tribunal found that the investor's failures amounted to a trivial illegality, it underlined the fact that illegality of the investment can arise out of the inconsistency with substantive and procedural domestic law, and that, therefore, investors are required to identify all requirements and diligently comply with them.[656] In *Methanex*, the arbitral tribunal held that the investor could not have ignored the conditions of the regulatory and political context prevailing in California and the United states at the time of the investment.[657] Similarly, in *Plama* the arbitral tribunal reasoned that a *diligent* investor should have been aware of the debates at the parliament relating to the potential changes of the relevant environmental law.[658] In *Chemtura*, *Occidental*, *Unglaube*, *Copper Mesa*, and *Charanne*, the arbitral tribunals reasoned that *sophisticated* investors could not reasonably expect that no regulatory changes would intervene in their respective industries during the period relevant for their investment.[659]

Second, the investor should consider (and it generally considers it as part of its cost-benefit analysis)[660] in its due diligence the relevant country risk (and all its

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655 *Mamidoil Jetoil Greek Petroleum Products Societe S.A. v. Republic of Albania*, ICSID Case No. ARB/11/24, Award dated March 30, 2015.

656 *Id*.

657 *Methanex Corporation* v. *United States of America*, UNCITRAL.

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

659 *Chemtura Corporation* v. *Government of Canada*, UNCITRAL (formerly Crompton Corporation v. Government of Canada), Award dated August 2, 2010; *Occidental Petroleum Corporation and Occidental Exploration and Production Company* v. *The Republic of Ecuador*, ICSID Case No. ARB/06/11, Award dated October 5, 2012; *Marion Unglaube* v. *Republic of Costa Rica*, ICSID Case No. ARB/08/1, Award dated May 16, 2012; *Copper Mesa Mining Corporation* v. *Republic of Ecuador*, PCA No. 2012-2, Award dated March 15, 2016; *Charanne and Construction Investments* v*. Spain*, SCC Case No. V 062/2012, Award dated January 21, 2016.

660 *See* Chapter III above.

component), also in light of the specific circumstances of the case.[661] These circumstances are connected to the social and political situation of the host state, namely the business climate.[662] In *Bayindir*, the arbitral tribunal stated that "the Claimant could not reasonably have ignored the volatility of the political conditions prevailing in Pakistan at the time it agreed to the revival of the contract".[663] By the same token, in *Nagel* the arbitral tribunal underlined that the investor had failed to take "sufficient account that the country was still in state of transition, in which the Government and the public authorities were laboring to develop the newly born democratic system and to create a well-functioning market economy".[664] Similarly, in *Genin* the arbitral tribunal gave particular relevance to the circumstances underlying the financial situation of Estonia in which the investor knowingly had chosen to invest: "it is imperative to recall the particular context in which the dispute arose, namely, that of a renascent independent state, coming rapidly to grips with the reality of modern financial, commercial and banking practices and the emergence of state institutions responsible for overseeing and regulating areas of activity perhaps previously unknown. This is the context in which the Claimant knowingly chose to invest in an Estonian financial institution, EIB".[665] On this basis, the arbitral tribunal dismissed the investor's claim.

A similar position was taken in *Olguin* where the arbitral tribunal dismissed the investor's FET claim on the basis of the difficult financial situation of the host state, which was not unknown to the investor and should have determined him to act with

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661 *See* Chapter II above.

662 *See*, e.g., I. TUDOR, *The Fair and Equitable Treatment Standard in the International Law of Foreign Investment*, Oxford University Press, 2008, at 164.

663 *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S.* v. *Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award dated August 27, 2009. By way of illustration, irrespective of the assurances received from the host States, it is foreseeable by a diligent investor investing in a highly volatile political environment that the investment will most likely be affected by further disruptions.

664 *William Nagel v. The Czech Republic*, SCC Case No. 049/2002, Award dated September 9, 2003, para. 293.

665 *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia*, ICSID Case No. ARB/99/2, Award dated June 25, 2001, para, 348.

more prudence.[666] The investor's excessive confidence in the local financial system had no solid basis and, therefore, he could not seek compensation for his losses.[667] In *Parkerings*, the arbitral tribunal held that the investor's legitimate expectations are protected provided the investor had exercised due diligence. Specifically, a diligent investor is an investor able to "anticipate that the circumstances could change, and thus structure its investment in order to adapt it to the potential change of the environment.[668]

Finally, in *Impregilo*, whose eminent members disagreed on several key issues, agreed on the following: "[t]he legitimate expectations of the investors […] have to be evaluated considering all circumstances. In the arbitral tribunal's understanding, fair and equitable treatment cannot be designed to ensure the immutability of the legal order, the economic world and the social universe and play the role assumed by stabilization clauses specifically grated for foreign investors with whom the state has signed investment agreements. The legitimate expectations of foreign investors cannot be that the state will never modify the legal framework, especially in times of crisis".[669] In any event, the arbitral tribunal concluded that "certainly investors must be protected from *unreasonable* modifications of the legal framework".[670]

Interestingly, certain arbitral tribunals have qualified the potential changes to the regulation as a business risk inherent in the transaction. For instance, in *MTD* the tribunal considered that the investor, which has acted negligently in assessing the regulatory risk affecting the acquisition of a plot of land further development, had to bear part of the damages that it has suffered.[671] The tribunal reasoned that such damage arose from the business risk because the investor could have prevented it if

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666 *Eudoro Armando Olguín* v. *Republic of Paraguay*, ICSID Case No. ARB/98/5, Award dated July 26, 2001.

667 *Id.*, para. 65.

668 *Parkerings-Compagniet AS* v. *Republic of Lithuania*, ICSID Case No. ARB/05/8, Award dated *September* 11, 2007, paras. 329-333.

669 *Impregilo* v *Argentina*, ICSID Case No. ARB/07/17, Award dated June 21, 2011, paras. 285, 290-291.

670 *Id.*

671 *MTD Equity Sdn. Bhd. and MTD Chile S.A.* v. *Republic of Chile*, ICSID Case No. ARB/01/7, Award dated May 25, 2004.

it had deployed better business judgment. Specifically, the tribunal stated that "the claimant incurred costs that were related to their business judgment irrespective of the breach of the fair and equitable treatment under the BIT.[672]

3.3.2.2.2. The Obligation to Act in Good Faith and in Accordance with the Law

First, the investor has an obligation to act in good faith. It is surely contrary to good faith the decision of the investor who: (1) despite knowing the risks related to a given location, decides to invest because of an interesting return in the investment; and (ii) later introduces a claim in which he holds the host state accountable for the suffered losses (mainly due to the deliberate decision to invest in the host state). For instance, in *Generation Ukraine*, the tribunal declared that: "[t]he Claimant was attracted to Ukraine because of the possibility of earning a rate of return on its capital in significant excess to the other investment opportunities in more developed economies. The Claimant thus invested in Ukraine on notice of both the prospects and the potential pitfalls. Its investment was speculative. The Tribunal rejects the claimants submission that an 'indirect global expropriation of the company's rights and property occurred'".[673] By the same token, in *Olguin*, the tribunal considered that the investor had "his reasons […] for investing in that country, but it is not reasonable for him to seek compensation for the losses he suffered on making speculative, or at best, a not very prudent investment. The tribunal feels that prudence would have prompted a foreigner arriving in a country that have suffered severe economic problems to be much more conservative in his investments".[674]

Certain BITs include provisions which provide protection only to investments made in accordance with the law (legality clause and/or requirement).[675] The legality requirement has important consequences in practice since an investment not made in

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672 *Id.*, para. 242.

673 *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award dated September 16, 2003.

674 *Eudoro Armando Olguín v. Republic of Paraguay*, ICSID Case No. ARB/98/5, Award dated July 26, 2001, para. 75.

675 S. W. SCHILL, *Illegal Investments in International Arbitration*, January 4, 2012.

accordance with the host state's law will not be a "protected investment" under the BIT.[676]

Several arbitral tribunals have recognized an implicit obligation of the investor to act in accordance with the law, regardless of the presence of the legality requirement in a BIT. For instance, in *Phoenix* the tribunal affirmed that the investors' obligation to make the investment in accordance with the law "is implicit even when not expressly stated in the relevant BIT".[677] By the same token, in *Gustav Hamester* it was held that the investor's obligation to act in accordance with the law is a "general principle" that "exist[s] independently of specific language to this effect in the Treaty".[678] In *Fraport* it was stated that "[a]s for policy, BITs oblige governments to conduct their relations with foreign investors in a transparent fashion. Some reciprocal if not identical obligations lie on the foreign investor. One of those is the obligation to make the investment in accordance with the host state's law. It is arguable that even an investment which is not made in accordance with host state law may import economic value to the host state. But that is not the only goal of this sector of international law. Respect for the integrity of the law of the host state is also a critical part of development and a concern of international investment law".[679] In *Inceysa*, the tribunal held that an "in accordance with local laws" requirement is "a clear manifestations of international public policy".[680]

Certainly, contrary to the legality requirement are practices by which an investor tries to obtain a more favorable treatment than the one he would normally be entitled

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676 *See also*, F. BALCERZAK, *Investor – State Arbitration and Human Rights*, Brill | Nijhoff, 2017, at 134.

677 *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award dated April 15, 2009, para. 101.

678 *Gustav F W Hamester GmbH & Co KG* v. *Republic of Ghana*, ICSID Case No. ARB/07/24, Award dated June 18, 2010, para. 124.

679 *Fraport AG Frankfurt Airport Services Worldwide v. The Republic of the Philippines*, ICSID Case No. ARB/03/25, Award dated August 16, 200, para. 402.

680 *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, Award dated August 2, 2006, paras 246, 252. See also *Yaung Chi Oo Trading Pte. Ltd. v. Government of the Union of Myanmar*, Award dated March 31, 2003, para 58, stating that "the general rule that for a foreign investment to enjoy treaty protection it must be lawful under the law of the host State".

to, or a normal treatment but under more favorable conditions (i.e., corrupt practices). Moreover, corrupt practices also refer to undue influence or abuse of power or fraud. For instance, the distortion by the investor of its quality (i.e., the investor representing to have the technical and financial qualities to do a job) in order to obtain a contract or to conduct business in the host state is a corrupt practice. In *Azinian*, the claimants obtained the concession agreement by misrepresenting the local authorities that they: (i) possessed extensive competence and experience in the field of waste management (although they did not); and (ii) were planning to invest an important amount of capital and create an important number of jobs (which they did not have).[681]

Clearly, equally contrary to the legality requirement are investor's conduct contrary to human rights law.[682]

3.3.2.3. The Balancing of the Interests Involved

Arbitral tribunals are increasingly starting considering the balancing act between a presumed investor's legitimate expectation and the host state's right and/or duty to regulate, especially in the event of major economic crisis. For instance, the arbitral tribunal in *Perenco* noted that "the search is *for a balanced approach* between the investor's reasonable expectations and the exercise of the host state's regulatory and the other powers".[683]

In following the balanced approach, in *Antaris* the arbitral tribunal stated that "[a]n expectation may be engendered by changes to general legislation, but, at least, in the absence of a stabilization clause, they are not prevented by the fair and equitable treatment standard if they do not exceed the exercise of the host state's normal

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681 *Robert Azinian, Kenneth Davitian, & Ellen Baca v. The United Mexican States*, ICSID Case No. ARB (AF)/97/2, Award dated November 1, 2009.

682 *See* Chapter IV below.

683 *Perenco Ecuador Ltd. v. The Republic of Ecuador and Empresa Estatal Petròleos del Ecuador* (Petroecuador), ICISID Case No. ARB/08/6, Decision on Remaining Issues of Jurisdiction and Liability dated September 12, 2014 para 560; *Lemire* v *Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability dated January 10, 2010, paras 284-285; *El Paso v. Argentina*, para 358 ("a balance should be established between the legitimate expectation of the foreign investor to make a fair return on its investment and the right of the host State to regulate its economy in the public interest"). *See further* J. BONNITCHA, *Substantive Protection Under Investment Treaties*, Cambridge, at 175-90. See also Saluka, para 306.

regulatory power in the pursuance of a public interest and no not modify the regulatory framework relied upon by the investor at the time of its investment outside the acceptable margin of change. […] The requirements of the legitimate expectations and legal stability as a manifestation of the FET standard do not affect the state's right to exercise its sovereign authority to legislate and to adapt its legal system to changing circumstances".[684] In *Philip Morris*, the arbitral tribunal stated that "changes to general legislation (at least in the absence of a stabilization clause) are not prevented by the fair and equitable treatment standard if they do not exceed the exercise of the host state's normal regulatory framework relied upon by the investor at the time of its investment 'outside of the acceptable margin of change'".[685]

A balanced approach is a proportional approach. As succinctly discussed under chapter II above, the concept of "proportionality" has played (and plays) a key role in the case law of the ECtHR and the IACtHR"). In *James and others* v. *UK*, the court noted that a governmental measure depriving a person of its property must entertain "a reasonable relationship of proportionality between the means employed and the aim sought to be realized".[686]

Arbitral tribunals are increasingly importing the proportionality approach of the ECtHR to investment disputes. Most of the cases relates to indirect expropriation (which as explained above share many characteristics of the FET standard). For instance, in *Tecmed* the arbitral tribunal expressly referred to the *James and others* ECtHR case to support the principle that "[t]here must be a reasonable relationship of proportionality between the charge or weight imposed to the foreign investor and the

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684 *Antaris and Göde v. The Czech Republic*, PCA Case No. 2014-01, Award dated May 2, 2018, paras 262-264.

685 *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7 (formerly FTR Holding SA, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, Award dated July 8, 2016. *See also*, e.g., J. B. MUS, *Conflict between Treaties in International Law*, in *Netherlands International Law Review*, 1998, Vol. 54, Issue 3, at 208, 227; E. DE. BRABANDERE, *Human Rights and International Investment Law*, in *Research Handbook on Foreign Direct Investment*, 2019, at 639, 1998. See also, *Flemingo DutyFree Shop Private Limited* v. *Republic of Poland*, UNCITRAL, Award dated August 12, 2016, para 551.

686 ECtHR, *James and others* v. *UK*, February 21, 1986, Application No. 8793/79, para 50. See also Chapter III, Section II 2.3.2.

aim sought to be realized by an expropriatory measure".[687] By the same token, reference to ECtHR case law was made in *Azurix*, *Lauder*, and *Thunderbird*.[688] Specifically, in the latter, Mr. Wälde in a separate opinion stated that "the ECtHR or the Inter-American Court of Human Rights were more appropriate comparators for investment disputes (because of their mixed nature), than inter-State dispute settlement".[689]

4. The Fair and Equitable Standard and Human Rights

As shown under chapter II above, human rights obligations often demand more from host states than the mere no-interference.[690] Indeed, the obligations to respect, protect and fulfill human rights stand for positive actions that host states might need to undertake in order to fulfil the enjoyment of these rights.[691] At the same time, host states conclude international investment agreements with other states (and/or international investment contracts with investors) to attract FDIs to their markets and to collect the "financial" and "natural" resources necessary to promote their development.[692] To this end, host state might compromise their socio-economic obligations, and pass legislation not compliant with their human rights obligations.[693] However, sooner the host state will be under an obligation to intervene in order to remedy the situation by introducing a new regulation compliant with these standards.[694] Yet when a host state adopts a regulatory measure in light of its

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687 *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, Award dated May 29, 2003, para. 122.

688 *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Award dated July 14, 2006, para 312; *Ronald S. Lauder* v. *The Czech Republic*, Final Award dated September 3, 2001, para. 200.

689 *International Thunderbird Gaming Corporation* v. *The United Mexican States*, UNCITRAL, Separate Opinion of Thomas Wälde dated December 1, 2005, para. 13.

690 *See* Chapter II above, Section 2.3.

691 *Id*.

692 *Id*.

693 *Id*.

694 *See* M. DUPUY and J. E. VIÑUALES, *Human Rights and Investment Disciplines*, at 1752, note 580. To attract FDIs to their market and lower the entry costs for investors, host States might make *vis*-à-*vis* foreign investors "promises" that collide with their human rights obligations. For instance, when entering a water concession agreement with an investor, the host State might pass some regulatory measures that collide with its

international human rights obligations, these changes might be perceived by the concerned investors as affecting their legitimate expectations that the relevant legislation will remain unchanged (regulatory stability obligation).[695] Such a scenario might well develop into a dispute in which one of the core issues will be the balancing between the host state's human rights and the investment obligations.

Within this context, the host state, acting as a respondent might advance the following human rights arguments. *First*, the host state might argue to have acted in a manner allegedly contrary to the FET standard in order to meet its obligations to respect and fulfill, at very least, the minimum essential levels of its' populations' socio-economic rights, as required by the Socio-Economic Covenant.[696] This situation may generally be related to the occurrence of a severe economic and financial crisis in the host state, which has hindered severely the peaceful enjoyment of the population's human rights and has required an intervention by the host state.[697] However, this situation may occur also when the host state acts in order to remedy to a previously enacted legislation not complaint with its human rights standards.

Second, the host state might argue to have acted in a manner allegedly contrary to FET in order to put an end to a human rights violation perpetrated by an investor, as required by its obligation to protect human rights under the Socio-Economic Covenant.[698] This category may also include situations where the violation is committed by the investor in complicity with or, at the very least, with the knowledge of the host state.[699] The factual scenario will generally be related to one of the main

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obligation to guarantee certain percentage of water that are necessary to guarantee accessible levels of water to the population. When that happens the host State might be challenged with protests and complaints by its population whose human rights are breached, and it might then be led to try to remedy the situation by introducing new regulations (in line with its human rights obligations (human rights risk)).

695 *Id*.

696 *See* Chapter II above, Section 2.3.

697 F. BALCERZAK, *Investor – State Arbitration and Human Rights*, at 23-60, note 51.

698 *Id*.

699 *Id*., at 60.

reasons behind the involvement of MNCs in developing countries, namely the privatization of public services.[700]

So far, arbitral tribunals called to decide on human rights matters have taken three different approaches. *First*, they have denied the relevance of human rights within the context of investment disputes.[701] *Second*, several tribunals have affirmed the relevance of human rights in *abstracto*, but denied it in *concreto*.[702] *Third*, certain arbitral tribunals have recognized the relevance of human rights at the damage stage.[703] *Finally*, only in a recent case, the arbitral tribunal has recognized both in *abstracto* and in *concreto* the relevance of human rights to investment disputes.[704]

The different approaches of arbitral tribunals show that there exists no consensus among arbitrators on how to approach human rights issues in investment matters. This depends to a large extent on: (i) the vague manner in which the relevant obligations are drafted; and (ii) the culture and attitude of both the parties and the arbitrators to the dispute toward human rights law and arguments. With respect to this last point, an arbitrator might give due consideration to a host state's human rights defense to the extent that such defense is raised in the first place. However, despite the relevance of human rights to most investment disputes, host states have been so far reluctant to make human rights arguments. The reasons are several and can be categorized in legal, factual, strategic and cultural.

From a legal point, the host state will have to successfully demonstrate and document, among others, that human rights law is also the law applicable to the dispute. This is made particularly difficult by the fact that BITs generally do not contain

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700 *Id.*, 60-72.

701 *Id. See also Compañia del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica, ICSID Case No. ARB/96/1*.

702 *Sempra Energy International v. The Argentine Republic, ICSID Case No. ARB/02/16; Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8; and *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12.

703 *Id. MTD Equity Sdn. Bhd. and MTD Chile S.A.* v. *Republic of Chile*, ICSID Case No. ARB/01/7, Award dated May 25, 2004.

704 *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26, Award dated December 8, 2016.

human rights standards nor do they provide for limitations and or non-precluded measures exceptions relating to human rights.[705]

From a factual point, the host state will have to successfully demonstrate and document, among others, that the human rights obligation made it necessary to hinder the situation of the concerned investor in a concrete case. This link may be particularly difficult to establish due to the numerous elements involved.

From a strategic (and partially cultural) point, the host state may be reluctant to raise human rights defenses because it might have been complicit in the human rights violation committed by the investor. Moreover, it might be discouraged by the fact that human rights arguments in previous cases have proved to be unsuccessful.[706]

Finally, from a cultural perspective, there is still a prevailing shared view that human rights have nothing to do with investment law. This might lead to frame unconvincing human rights arguments within the context of host state's defenses. For instance, in *Azurix* Argentina appears to have made "a half-hearted effort to argue" the incompatibility between human rights treaties and investment law.[707] Accordingly, the arbitral tribunal argued that "the matters have not been fully argued" and that it failed "to understand the incompatibility in the specifics of the instant case."[708]

4.1. Human Rights Law as Part of the Law Applicable to the Dispute

FET claims that rely on human rights arguments must be first analyzed from the perspective of the applicable law. BITs generally do not contain references to human rights norms and obligations. Accordingly, human rights standards (including the one provided by the Socio-Economic Covenant) might enter into the reasoning by

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705 *See* Chapter IV, above.

706 *See* F. BALCERZAK, *Investor – State Arbitration and Human Rights*, at 27, note 51, stating that "[i]t can be understood that one of the reasons why Argentina failed to invoke human rights arguments was that such attempts undertaken in the course of previous proceedings were unsuccessful".

707 J. D. FRY, *International Human Rights Law in Investment Arbitration: Evidence of International Law's Unity* in *Duke Journal of Comparative & International Law*, 2007, at 106.

708 *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Award dated July 14, 2006, para 261.

interpreting the relevant FET clause so as to take into account parallel international human rights obligations.

The exercise might appear easier in the cases in which the relevant BIT contains references to public international law either in the FET clause and/or in the arbitration clause.[709] When this is the case, the host state might argue that the notion of general public international law implicitly incorporates human rights law and related standards against which the FET should be interpreted.

The exercise becomes harder when the BIT does not contain any reference to public international law at all. However, human rights can be incorporated in several different ways.

First, the host state can resort to the systematic integration argument under Article 31 of the Vienna Convention, according to which the BIT (and in particular the FET) should be interpreted "in good faith in accordance with the ordinary meaning" (which requires a balancing of all the interests involved); (ii) in its "context and in the light of its *object* and *purpose*", which is to guarantee legal protection to the "financial" and "technical" resources necessary to promote the host state's development and the well-being of its population (also in light of the particular circumstances of the case and the rights involved);[710] and (iii) taking into consideration "any relevant rules of international law applicable in the relations between the parties", including the Socio-Economic Covenant, as interpreted by the Socio Economic Committee.[711] After all

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709 *See* Chapter IV above, Section 3.2.

710 As required by Article 2.1. of the Socio-Economic Covenant ("[e]ach State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measure".). *See also* Chapter III above, Section 2.3.

711 See. e.g., N. J. CALAMITA, *International Human Rights and the Interpretation of International Investment Treaties: Constitutional Considerations*" in Freya Baetens, *Investment Law within International Law. Integrationist Perspectives*, Cambridge University Press, 2013, at 178.

international treaty provisions cannot be interpreted in a vacuum as they belong to the same legal order, namely the international legal order.

Several leading legal scholars have confirmed this approach.[712] For instance, in analyzing the expropriatiory character of a measure undertaken by Mexico within the

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712 *See*, e.g., C. MCLACHLAN, *Investment Treaties and General International Law*, in *International and Comparative Law Quarterly*, 2008, at 369 ("[i]nvestment treaties are not self-contained regimes. International law is a legal system, and investment treaties are creatures of it and governed by it"); V. S. VADI, *Reconciling Public Health and Investor Rights: the Case of Tobacco*, in *Human Rights in International Investment Law and Arbitration*, in Pierre-Marie Dupuy, Francesco Francioni, and Ernst-Ulrich Petersmann, 2009, at 485 ("[a]ccording to the cannon of systematic interpretation, investment treaties should not be considered as self-contained regimes, but as an important component part of public international law. Accordingly, arbitrators should adopt a holistic approach, taking human rights treaties and relevant customary international law into account when they interpret relevant investment treaty provision"); J. KROMMENDIJK – J. MORIJN, *Proportional by What Measure(s)? Balancing Investors' Interests and Human Rights by Way of Applying the Proportionality Principles in Investor-State Arbitration*, in *Human Rights in International Investment Law and Arbitration*, in Pierre-Marie Dupuy, Francesco Francioni, and Ernst-Ulrich Petersmann (Eds.), 2009, at 427 ("[t]he law of this regime should not be applied and interpreted in a 'clinical vacuum,' nor read in 'clinical isolation from public international law', to borrow a phrase from the first dispute in the WTO Context"); L. E. PETERSON – K. R. GRAY, *International Human Rights in Bilateral Investment Treaties and in Investment Treaty Arbitration*, International Institute for Sustainable Development, 2003, at 28 ("[t]ribunals will often have to recourse to interpret investment treaty rights in light of the applicable rules of international law. And it is here that there may be important scope for tribunals to consider applicable human rights treaties which have been acceded to by host states"); A. V. AAKEN, *Fragmentation of International Law: The Case of International Investment Protection*, University of St. Gallen Law School, Law and Economic Research Paper Series Working Paper, 2008, at 27 ("[t]ribunals are aware that human rights issues are at stake and they have the interpretational freedom to take the human rights obligations of host states into account when adjudicating upon indirect expropriation as well as fair and equitable treatment"); U. KRIEBAUM, *Foreign Investment & Human Rights*, *The Actors and Their Different Roles*, 2013, 10:1, *Transnational Dispute Management*, at 13 ("[t]hrough treaty interpretation, human rights norms may influence the meaning of the terms and provisions of the investment treaty. They can be of importance, for example, to determine the meaning of the fair and equitable treatment standard and of the full protection and security clauses, with regard to decisions on direct or indirect expropriation or the international minimum standard. Furthermore, human rights considerations can find their way through the concept of 'legitimate expectations'. This concept has a role in all protection standards"); S. L. KARAMANIAN, *The Place of Human Rights in Investor – State Arbitration*, 2013, in *Lewis & Clark Law Review*, 2013, at 444 ("[t]he Challenge of the Tribunal is to dissect the treaty language in the context of the applicable law. For example, human rights principles could give effect to the meaning of fair and equitable treatment clause or the state's obligation to afford customary international minimum standard of treatment of aliens to the investment, such as the standard set forth in Article 1105 of the NAFT Chapter 11"); L. G. GARCIA, *The Role of Human Rights in*

context of the *Tecmed* case, it was stated that "Mexico could support the non-expropriatory character of its measure based on human rights arguments by reference to the International Covenant of Economic, Social and Cultural Rights (ICESCR) and the international Covenant on Civil and Political Rights (ICCPR). Given that both parties have concluded the above human rights instruments, a balanced approach between their human rights and BIT obligations would require a reading of the investment provisions consistent with the ICESCR and the ICCPR. However, the lack of explicit reference to ICESCR and the ICCPR in current investment agreements means that they can only be invoked by general virtue of principles of treaty interpretation".[713] Certain scholars have even argued that "international investment tribunals have not only the authority but the *obligation* to consider international human rights norms while interpreting and applying BITs".[714] This is so as, "[n]either the limited jurisdiction of investment tribunals nor the applicable choice of law rules prevent the consideration of other international law in the interpretation of BITs".[715]

This reasoning has been followed also by international courts, and more recently, by certain arbitral tribunals. For instance, the ICJ, which was called to interpret Article I o the 1955 Treaty of Friendship and Commerce between the United

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International Investment Law, in N. JANSEN CLAMITA, David Earnest, Markus Burgstaller (eds.), *The Future of ICSID and the Place of Investment Treaties in International Law*, British Institute of International and Comparative Law, 2013, at 39 ("[h]uman rights may be relevant when interpreting investment treaty standards of protection. This become more apparent as investment treaty case law shows divergence of views amongst investment tribunals with respect to the content of investment protection obligations […] Can an investment treaty tribunal rely on jurisprudence from human rights bodies though? The answer is yes"); D. DESIERTO, *Public Policy in International Economic Law. The ICESCR in Trade, Finance, and Investment*, Oxford University Press, 2015, at 317 ("[w]ithin the investment treaty regime, the State can assert its regulatory freedom to vindicate public interest or human rights concerns within the interpretation of the primary norm asserted to constitute the treaty breach (e.g., interpretation of the IIA standard of treatment alleged to have been violated such as fair and equitable treatment and indirect expropriation)".

713 *See* A. DIMOPOULUS, *EC Free Trade Agreements: An Alternative Model for Addressing Human Rights in Foreign Investment Regulation and Dispute Settlement?,* in *Human Rights in International Investment Law and Arbitration*, in Pierre-Marie Dupuy, Francesco Francioni, and Ernst-Ulrich Petersmann (eds.), 2009, at 592.

714 *See* S. PAHIS, *Bilateral Investment Treaties and Human Rights Law: Harmonization through Interpretation*, International Commission of Jurists, 2011, at 1.

715 *Id*.

States and Iran (provision bearing certain similarities with modern BITs), held that: "under the general rules of treaty interpretation, as reflected in 1989 Vienna Convention on the Law of Treaties, interpretation must take into account 'any relevant rules of international law applicable in relations between the parties' (Art. 31, para 3 (c)). The Court cannot accept that Article XX, paragraph 1(d) of the 1955 Treaty was intended to operate wholly independently of the relevant rules of international law on the use of force, so as to be capable of being successfully invoked, even in the limited context of a claim for breach of the Treaty, in relation to an unlawful use of force. The application of the relevant rules of international law relating to this question thus form an integral part of the task of interpretation entrusted to the Court by Article XXI, paragraph 2, of the 1955 Treaty".[716]

As with respect to arbitral tribunals, in *EDF* the arbitral tribunal did not deny the "potential significance or relevance of human rights in connection with international investment law", although it concluded that human rights were not relevant for the facts of the case.[717] Similarly, in *Micula* the arbitral tribunal held that "in interpreting the BIT […] it may take into account, as directed by Article 31(3)(c) of the Vienna Convention on the Law of Treaties, any relevant rules of international law", including "Article 15 of the Universal Declaration of Human Rights".[718] In *Al-Warraq*[719] the arbitral tribunal devoted an entire section of its award analyzing the relevant human right (i.e., Article 14 of the Civil Covenant) as well as its relevance to the case and concluded that "the Claimant did not receive fair and equitable treatment as enshrined in the ICCPR [Civil Covenant]".[720] Finally, more recently in *Urbaser*, it was stated that

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716 Case concerning Oil Platforms (Iran v. USA), ICJ Judgment dated November 6, 2003, ICJ Rep. 2003, para 41.

717 *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A.* v. *The Argentine Republic*, ICSID Case No. ARB/03/23, Award dated June 11, 2012, para 912.

718 *Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.*L. v. *Romania*, ICSID Case No. ARB/05/20, Award dated September 24, 2008, paras 87-88.

719 Hesham T. M. Al Warraq v. Republic of Indonesia, UNCITRAL, Award dated December 15, 204, paras 556-621.

720 *Id.*, para 621.

BITs have "to be constructed in harmony with other rules of international law of which it forms part, including those relating to human rights".[721]

Second, another argument that can be framed so as to include human rights is the international public policy argument. Specifically, the host state may argue that failure to interpret BITs in accordance with human rights standard would be contrary to international public policy ("*ordre public international*"). The argument can reflect the one raised by Pierre Lalive in an article dating back to the 1985 in which he illustrated the foundation of the concept of international public order by departing from two cases dating back to the 19th century and relating to the actual practice of slavery.[722] The view were further confirmed by reference to a 1963 ICC arbitration involving corruption and bribery whereby the sole arbitrator stated that "contracts which seriously violate *bonos mores* or international public policy are invalid".[723] The arbitrator further added that corruption is an international evil, which is contrary to good morals and to an international policy common to the community of nations. Although the arbitrator was applying French law to the contract, he grounded the prohibition of corruption not only on national legislation, but also on general principle of law understood as enunciating a rule of international public policy. By applying the same reasoning, one could argue that interpreting treaty protection so as to allowing governmental actions to breach human rights (for instance, survival rights) would be contrary to international public order.

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721 *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa* v. *The Argentine Republic*, ICSID Case No. ARB/07/26, Award dated December 8, 2016, para 1200. Conclusions of the Work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and the Expansion of International Law, adopted by the ILC at its 56th session, 2006, YBILC, vol. II, part two.

See also P. M. DUPUY – J. E. VIÑUALES, *Human Rights and Investment Disciplines*, at 1756, note 580. The same principles have been put forth earlier by the WTO Appellate Body in its very first report, and more recently have been shared by the ILC Study Group on the fragmentation of international law in 2006.

722 *Id*. *See also* P. LALIVE, *Ordre Public transantional (ou réellement international) et arbitrage international*, in *Revenue de l'arbitrage*, 1986, at 329-371.

723 *See* G. BORN, *International Arbitration: Cases and Materials*, Wolters Kluwer.

Third, leading scholars have pointed out to another way in which human rights can be imported within the system, i.e., in situations in which the host state's municipal law applicable to a certain host state contract or concession agreement rights establishes a constitutional link between public international law and the municipal legal order.[724] When, in particular, the national constitution of the host state contains an option in favor of monism granting primacy to public international law, the latter partakes to the law applicable to the dispute.[725] This happens when the national constitution of the host state contains an option in favor of monism granting primacy to public international law and human rights law over BITs. In which case, it would be argued that the human rights law prevails of treaty protection and it is the law applicable to the dispute.[726] This legal framework does not authorize per se the host state to avail itself of the relevant provisions of its constitution without constraint so as to repudiate its promises *vis*-à-*vis* the investors. However, when negotiating a contract with a host state, the investor should take due notice of the constitutional law that could affect the implementation or interpretation of a contract with the host state.[727]

4.2. Human Rights Obligation vs FET Standard

The host state would have to show further that the human rights obligation prevails over FET. The construction of the argument is maybe particularly difficult by the fact that, as explained above, under current international law, there exists no

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724 *See* P. M. DUPUY – J. E. VIÑUALES, *Human Rights and Investment Disciplines* 9, at 1764, note 580.

725 *See* Chapter V, below, Paragraph 5.

726 *Piero Foresti, Laura de Carli & Others* v. *The Republic of South Africa*, ICSID Case No. ARB(AF)/07/01, Award dated August 4, 2010; *Siemens A.G.* v. *The Argentine Republic*, ICSID Case No. ARB/02/8 dated January 7, 2007, para 75. *See also*, P. M. DUPUY – J. E. VIÑUALES, *Human Rights and Investment Disciplines* 9, at 1764, note 580.

727 *See* S. LEADER, *Human Rights, Risks, and New Strategies for Global Investment*, 2006, International Economic Law, 657-705. *See* P. M. DUPUY – J. E. VIÑUALES, *Human Rights and Investment Disciplines* 9, at 1764, note 580.

formal hierarchy among the sources of international law except for *jus cogens* norms.[728]

There are only few core human rights which are expressly recognized as norms of *jus cogens* (e.g., the prohibition against torture and slavery). Only these norms automatically take precedent over trade and investment agreements. Therefore, any international investment agreement that prevents host states from performing its *jus cogens* human rights obligations and/or encourage it to breach these obligations should be considered null and void. With this respect, in *Aloeboetoe et al* v. *Suriname*, the Inter American Court of human rights ("IACtHR") stated that "[t]he court does not deem it necessary to investigate whether or not the agreement is an international treaty. Suffice it to say that even if they were the case, the treaty would be today null and void because it contradicts the norms of *jus cogens superviniens*".[729]

When it comes to human rights not having the rank of *jus cogens* however the question is referred to the decision of the adjudicatory body, which will be called to perform a balancing exercise between the: (i) two conflicting host state obligations (namely the obligations of the host state under the relevant BIT and its human rights obligations); and (ii) human rights i.e., the property rights of the investor as protected under the BIT and the socio-economic rights of the host state's population as protected under the relevant human rights Convention. In this context, an international arbitrator, especially if not familiar with human rights law, will rely on the substance and rationale of the argument made the host state. The argument will have to: (i) identify the scope and extent of the human rights obligation, external to the treaty; and (ii) to show the existence of a substantial relationship between the human rights obligations and the investment obligations.

First, the meaning and scope of the human rights obligation external to the treaty should be carefully assessed in order to determine its scope and extent. This exercise is often complicated by the fact that most human rights obligations are formulated in a broad and vague stance and generally have not yet been elaborated

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728 *See* Chapter IV above, Section 2.2.1.

729 *Aloeboetoe et al. v. Suriname*, Inter-American Court of Human Rights, Judgment dated September 10, 1993.

by treaty bodies (as it is the case of most socio-economic human rights). However, this relative indeterminacy is considerably reduced by referring to the specific (and authoritative interpretative) standards elaborated by international organizations, and in particular by the Socio-Economic Committee.[730] For instance, as detailed above, General Comments Nos. 2, 4, 7, 14, 15, 18, and 23 delimit and clarify the normative content of the host state's obligations with respect to the right to work, adequate standard of living conditions, water, and health (including the minimum core obligation to guarantee to everyone sufficient, safe, acceptable, physically accessible and affordable level of enjoyment of these rights).[731]

Second, this external rule must be shown to have a substantial legal relationship with the interpreted provision. Within the context of human rights, host States will have to successfully demonstrate and document the extent to which the human rights obligation made it necessary to hinder the legal situation of the concerned investor. So far, international courts and arbitral tribunals have been reluctant to recognize the prevailing nature of human right obligations over the investment obligations, absent a specific conflict rule and/or the breach of the *ordre public international*.[732]

First, the issue was considered by several decisions of the IACtHR. In *Yakye Axa*, the IACtHR was called to strike a balance between, on the one hand, the investor's property rights under a concession agreement and, on the other hand, certain entitlement of an indigenous people (both rights being protected under Article 21 of the ACHR. The ACHR held that "the restriction of the right of private individuals to private property might be necessary to attain the collective objective of preserving

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730 *See* P. M. DUPUY and J. E. VIÑUALES, *Human Rights and Investment Disciplines*, 2019, at 1756, note 580.

731 *URBASER S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa* v. *The Argentine Republic*, ICSID Case No. ARB/07/26 dated December 8, 2016, paras 1156-1166. In Urbaser, Argentina invoked the Socio-Economic Covenant and General Comment No. 15, to delimit the normative content of the right to water (see, in particular, para 1164).

732 P. M. DUPUY – J. E. VIÑUALES, *Human Rights and Investment Disciplines*, at 1756, note 580.

cultural identities in a democratic pluralistic society".[733] It added, however, that such restriction would only be "proportional, if fair compensation is paid to those affected pursuant to Article 21(2) of the Convention." In *Sawhoyamaxa*, the ACHtRT was once again called to take a position on whether communal property prevails over private property. Although the court did not express a clear position on the matter, it stated that "restitution of traditional lands […] is the reparation measure that best complies with the restitution *in integrum* principle" and ordered the state to ensure that the indigenous community enjoys ownership rights over their ancestral lands. Moreover, it held that the obligations under a bilateral *investment treaty cannot justify* the violation of human rights.[734]

Arbitral tribunals have been equally reluctant to openly address normative conflicts. Although, they do refer to hierarchical relations between domestic and international law, they tend to avoid stating that a given norm of international law may take precedent over another. For instance, in *Saur* the arbitral tribunal stated that Argentina's human rights obligations with respect to the right to water were compatible with its investment obligations under the BIT insofar as the two obligations operate on a different level.[735]

4.3. Human Rights vs Legitimate Expectations

As discussed under sections above, legitimate expectations are considered to be the "key" and/or predominant element of the FET standard. In the context of this chapter, the interpretation of the FET standard could be problematic if, in application, the investor's expectations conflict with requirements of international human rights law. As noted by leading legal scholars, avoiding such conflict requires: (i) "informing what constitute a 'legitimate' expectation with what is required by host states under

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733 Inter-American Court of Human Rights, *Yakye Axa Indigenous Community* v. *Paraguay*, Judgment dated June 17, 2005, para 145.

734 Inter-American Court of Human Rights, Case of the Sawhoyamaxa Indigenous Community v. Paraguay, Judgment of March 29, 2006, para 140.

735 *SAUR International SA* v. *Republic of Argentina*, ICSID Case No. ARB/04/4, award dated May 22, 2014, para. 331. *See also* B. FARRUGIA, *The Human Right to Water: Defenses to Investment Treaty Violations*, in Arbitr Int, 2015, 31, at 265 *et seq.*

human rights treaties";[736] and (ii) setting the "stage for a balancing process between the investor's legitimate expectations and the state's legitimate needs to develop its policies".[737]

Chapter II of this work described in details "what is required of states under human rights treaties".[738] Chapter III instead described in details, among others, some of the elements that investors and host states take into consideration when, respectively, deciding to invest and adopting favorable investment incentives.[739] The elements as well as human rights considerations may find their way into investment law through the prism of the 'legitimate expectations'.[740]

4.3.1. The Host State Conduct

Prior to entering into an investment agreement and/or treaty, states are under the obligation to take into account all their international legal obligations, including those related to human rights.[741] However, as discussed above, to attract FDIs to their market host states often make promises that are not in line with their human rights obligations and/or that even induce them to breach these obligations.[742] Should the host state honor an investment promise that is contrary to its human rights obligations? Is a treaty that disables or even encourages a host state to breach its human rights obligations null and void?

As with respect to the first question if the host state undertakes an investment obligation that prevents (or even encourages it to breach human rights) it to perform

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736 *See* S. PAHIS, *Bilateral Investment Treaties and Human Rights Law: Harmonization through Interpretation*, in *International Commission of Jurists*, 2011, at 1.

737 *See* T. W. WÄLDE, B. SABAHI, *Compensation, Damages and Valuation*, in Peter Muchlinski, Federico Ortino, Cristoph Screuer, The Oxford Handbook of International Investment Law, 2008, at 1089.

738 *Id*.

739 *See* Chapter II, above.

740 *See* U. KRIEBAUM, *Foreign Investment & Human Rights*, *The Actors and Their Different Roles*, 2013, 10:1, *Transnational Dispute Management*, at 13.

741 *See* P. M. DUPUY – J. E. VIÑUALES, *Human Rights and Investment Disciplines*, at 1750, note 580.

742 *See* Chapter III above, Section 4.1.

its human rights obligations under the human rights treaty, it will be answerable for any resulting breach under international human rights law (including customary international law) as well as its constitution.

This is the position expressed by the European Commission of Human Rights as of 1958, according to which "[i]t is clear that, if a State contracts treaty obligations and subsequently concludes another international agreement which disables it from performing its obligation under the first treaty, it will be answerable for any resulting breach of its obligation under the earlier treaty".[743] In practical terms, this means the proliferation of human rights litigation before national courts, and international human rights courts as well as reputational damages. All of which might represent a serious costs and burden on the host state's budget.[744] If, however, to comply with its human rights obligations, the host state does not honor the investment promise (that is contrary to its human rights obligations), it will most likely face the costs related to the enforcement phase of the commitments, including the arbitration costs, the award damages, and the reputational costs.

As with respect to the second question, the international agreement and/or investment treaty will be considered null and void if contrary to a human rights *jus cogens* obligations and or the *ordre public international*. In all the other cases an argument might be put forward that an interpretation of the BIT (and/or contract) that has the effect of inducing the host state to breach its human rights obligations would be contrary to the international public order.[745] In this context, it might be recalled the recommendation provided by General Comment No. 24 of the Socio-Economic Committee according to which, before entering into investment agreements or contracts, host states should: (i) identify any potential conflict between [their] obligations under the Covenant and *under trade or investment treaties* as well as *refrain from entering into* such treaties *where such conflicts are found to exist* (as

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743 *Id.*, at 1752. See also ECommHR, Decision No. 235/56 dated June 10, 1958. Yearbook 2, 256, 300.

744 *See* Chapter V below.

745 *Inceysa Vallisoletana S.L.* v. *Republic of El Salvador*, Award dated August 2, 2006, paras 246, 252.

required under the principle of the binding character of treaties);[746] and (ii) make sure that by entering into such treaties they do *not derogate from the obligations* under the Covenant.[747]

4.3.2. The Investor's Conduct

The reasoning should take into consideration also the conduct of the investor both before and after the establishing of the investment. Specifically, had the investor acted diligently prior to making the investment decision? In performing its cost-benefit analysis, had the investor evaluated carefully the whole legal framework (including, the host state's human rights obligations under international and constitutional law) as well as the host state's related risks (including the human rights risk)?[748] Had the investor acted in accordance with the law (including human rights law) and/or good faith both prior and after entering the investment? What consequences if he did or did not?

4.3.2.1. Human Rights Due Diligence

As explained above, the investor's due diligence of the target country cover and/or should cover the whole legal framework applicable to the investment, including all human rights instruments (both legally binding and not in nature). The normative content of these obligations is specified in numerous instruments readily available, including in the General Comments of the Socio-Economic Covenants, the UNGP, the Global Compact, the ILO Tripartite Declaration.[749] Accordingly, a diligent and informed investor when making the decision to invest (and negotiating a contract with a host State) should take due notice of the following obligations that could affect the implementation and/or interpretation of a contract with a host state.

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746 *See* UNCESCR, General Comment No. 24, State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities, UN Doc. E/C.12/GC/24, para 13.

747 *Id.*

748 See Chapter III above, Section 3.

749 See Chapter II above, Section 2.4.

First, a diligent and informed investor might expect that the host state might honor its human rights obligation to:[750]

- Continuously implement all "appropriate measures" to guarantee the progressive full realization of all socio-economic rights;[751]
- Refrain from taking any deliberately retrogressive measures which might imply a step backward in the level of enjoyment of these rights;[752]
- Guarantee, at the very least, the minimum essential levels of each socio-economic right provided by the Socio-Economic Covenant, especially in times of economic crisis;[753]
- Ensure that private actors, including corporations do not violate socio-economic rights;[754]

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750 See Chapter II above, Section 2.3.

751 UNCESCR, General Comment No. 3, para. 9. *See also* E/2015/59, Report of the United Nations High Commissioner for Human Rights dated July 21, 2015, para 22.

752 *See* E/2015/59, Report of the United Nations High Commissioner for Human Rights dated July 21, 2015, para 23.

753 *See* UNCESCR, General Comment No. 3, the Nature of States Parties' obligations (Art. 2, par. 1), UN Doc. E/1991/23, para. 9. For instance, the host State's minimum core obligation with respect to the right to: (i) work "include the obligation to adopt and implement a national employment strategy and plan of action based on and addressing the concerns of all workers on the basis of a participatory and transparent process that includes employers' and workers' organizations" (*see* UNCESCR (2006) General Comment No. 18, the Right to Work, UN Doc. E/C.12/GC/186, para. 31); (ii) health, include the obligation to adopt and implement national public health strategy and plan of actions (*see* UNCESCR, General Comment No. 14, The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights), UN Doc. E/C.12/2000/4 dated August 11, 2000); and (iii) water, ensure "access to the minimum essential amount of water", and to "water facilities and services on a non-discriminatory basis, especially for disadvantaged or marginalized groups", and (ii) "adopt and implement a national water strategy and plan of action" (see UNCESCR, General Comment No. 15, The Right to Water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights), UN Doc E/C.12/2002/11, paras 1-4).

754 *See* J. H. KNOX, *Horizontal Human Rights*, in *American Journal of International Law*, 2018, at 1.

- Regularly assess the impact on human rights of international investment agreements so as to allow for the adoption of any corrective measures that may be required;[755]

- Not derogate from the obligations under the Covenant in trade and investment treaties that they may conclude;[756]

- Adopt a legal framework requiring business entities to exercise human rights due diligence in order to identify,[757] prevent and mitigate the risks of violations of Socio-Economic Covenant rights, to avoid such rights being abused, and to account for the negative impacts caused or contributed to by their decisions and operations and those of entities they control on the enjoyment of Covenant rights;[758]

- Revoke business licenses and subsidies from offenders, if and to the extent necessary; and revise relevant tax codes, public procurement contracts, export credits and other forms of State support, privileges and advantages in case of human rights violations;[759] and

- "[R]egularly review the adequacy of laws and identify and address compliance and information gaps, as well as emerging problems".[760]

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755 *Id*.

756 *Id.*

757 Specifically, "[i]n exercising human rights due diligence, businesses should consult and cooperate in good faith with the indigenous peoples concerned through indigenous peoples' own representative institutions in order to obtain their free, prior and informed consent before the commencement of activities".

758 UNCESCR (2017), General Comment No. 24, para 13. *See also*, Guiding Principles on Business and Human Rights, A/HRC/17/31, endorsed by the Human Rights Council in its resolution 17/4, principles 15 and 17.

759 *Id*. **[**See the conclusions attached to the resolution concerning decent work in global supply chains, adopted by the General Conference of the International Labor Organization at its 105th session, para. 16 (c)**]**.

760 UNCESCR, General Comment No. 24, para 15. **[**Guiding Principles on Business and Human Rights, principle 17 (c). See also A/HRC/32/19.Add.1, para. 5, and Human Rights Council resolution 32/10**]**.

This approach is confirmed by leading legal scholars[761] as well as by recent case law. Specifically, in Urbaser the arbitral tribunal stated that "the host state is bound by obligations under international law and constitutional laws. Therefore, the host State is legitimately expected to act in furtherance of rules of law of a fundamental charter".[762]

Second, a diligent and informed investor will and/or should give due regard to its human rights responsibilities as codified by all legal instruments, existing standards and practices elaborated by the different international organizations and specialized UN agencies (some of which dates back to the early 70s) on the topic of business and human rights.[763]

For instance, a diligent and informed investor must be aware that UNGP,[764] calls for all business enterprise, *inter alia*, to:

- Respect all internationally recognized human rights set forth in the International Bill of Human Rights (consisting of the Universal Declaration of Human Rights and the two International Covenant), as well as in the principles concerning fundamental rights in the eight ILO core conventions

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761 B. SIMMA – T. KILL, *Investment Protection and Human Rights*, at 705, note 643 ("[a] tribunal in interpreting what is and what is not a legitimate exception should have reference also to the host State's obligations under international human rights law. Whatever expectations an investor might have had, these must have included an expectation that the State would honour its international human rights obligation"); U. KRIEBAUM, *Human Rights of the Population of the Host State in International Investment Arbitration*, in *Journal of World Investment & Trade*, 2009, at 669 ("there can be no legitimate excitations that are contrary to human rights law"); F. BALCERZAK, *Investor – State Arbitration and Human Rights*, at 173-174, note 51 ("the legitimate expectation of the investors of investors should encompass host States' international obligations to respect, protect and fulfil human rights").

762 *Urbaser S.A. and Consorcio de Aguas Bilbao Biskaia, Bilbao Biskaia Ur Partzuergoa* v. *Argentine Republic*, Award dated December 8, 2016, paras 621.

763 *Id*.

764 Which does not create new international law obligations but rather elaborates the implications of existing standards and practices for States and businesses; integrating them within a single, logically coherent and comprehensive template.

(as set out in the Declaration on Fundamental Principles and Rights at Work);[765]

- Take into consideration, depending on the specific circumstances of the case, any additional human rights standards, and treaties;[766]

- Express their commitment to meet their human rights responsibilities through a statement of policy (or whenever means an enterprise employs to set out publicly its responsibilities and commitments), which should be approved and issued by the management on the business.[767]

- Perform human rights due diligence assessments (both prior and after starting the investment) aimed at identifying, preventing (also with the assistance of human rights expertize), mitigating and accounting for how they address adverse human rights impacts.[768]

This approach has been confirmed by leadings legal scholars[769] as well as by recent case law. Arbitral tribunals are indeed increasingly measuring the legitimate

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765 UNGP, at 9.

766 UNGP, at 14.

767 UNGP, at 16-17.

768 *See* Chapter II above, Section 2.4.4.

769 *See*, e.g., S. B. LEINHARDT, *Some Thoughts on Foreign Investors Responsibilities to Respect Human Rights*, in *Transnational Dispute Management*, 2013, at 23 ("if considering whether legitimate expectations should be protected under the FET standard, the tribunal should also consider whether the investor violated its responsibilities to respect HR. If the population, for example, cannot be supplied with drinking water because the investor did not apply proper business standards, its expectations should not be taken as legitimate if the host terminates the 'expectedly stable business environment' in order to protect its population"); Y. RADI, *The 'Human Nature' of International Investment Law*, in *Transnational Dispute Management*, 2013, at 15 ("when a state creates legitimate expectations with regard to regulatory framework, it knows – or at least it is expected to know – what the consequences of that specific economic/investment policy are with regard to human rights. Quite the contrary, when a state enacts measures for protecting human rights from a situation threatening their enjoyment by local societies in an unpredictable context, the circumstances are totally different. The state acts under urgency. It is in principle unable to foresee the necessity to enact special measures for safeguarding human rights. For instance, after having granted a license for the production of the medicine, proof comes from the science revealing that this product is a threat to health, then, there is no alternative way for that state than to ban the production of medicine. In the same vein, if scientific research concludes that a chemical product is dangerous for

expectations against the investor's human rights responsibilities. Two cases can be cited in respect of environmental concerns. In *Perenco*, claimant had taken control over the extraction operation of two blocks from a previous operator without a proper environmental assessment. In an interim decision on a counter-claim brought by Ecuador, the arbitral tribunal discussed Perenco's liability for environmental damages caused under both a strict liability and a fault-based liability. The discussion on fault liability took into consideration the duty of care, particularly in light of the best industry practice, which requires the performance of an environmental assessment prior to staring the work. In assessing Perenco's liability for the environmental damage of the relevant blocks, the tribunal paid attention to Perenco's failure to perform the assessment as well as other displays of negligence and concluded that: "the company's failure to document the environmental condition of the two blocks at the time of acquisition of its interests, its failure to conduct the statutorily required audits in 2004, its use of outdates environmental documents during the course of the operation, its failure to obtain necessary licenses, the increase in the incidence of nonconformities detected in the 2006 and 2008 audit, […] *do* paint a picture of responsible environmental steward".[770]

By the same token, in *Plama*, the tribunal stated that a diligent investor should have been aware of the debates at the parliament relating to the potential changes of the relevant environmental law.[771]

Third, as noted above, a diligent and informed investor should take into consideration the host state's obligations in relation to the specific political, economic, and financial circumstances prevailing at the time the investment is made. Specifically,

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the environment, what else can the state do other than to ban its production? In these cases, the circumstances surrounding the conflict between the interests of the investor and the state and the absence of any other available means for protecting human rights justify in principle the infringement of the legitimate expectations of investors and turn legal the relevant state practice, which is deemed to be necessary for the protection of public interest and therefore to pass the test of proportionality").

770 *Perenco Ecuador Ltd.* v. *The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador* (Petroecuador), ICSID Case No. ARB/08/6, Interim Decision on the Environmental Counterclaim dated August 11, 2015.

771 *Plama Consortium Limited* v. *Republic of Bulgaria*, ICSID Case No. ARB/03/24.

the investor should take due notice of the fact that under the Socio-Economic Covenant, the host state is under an obligation to guarantee the minimum essential levels of socio-economic rights under any circumstances,[772] even more in time of economic crisis. For instance, if the host state is facing a situation endangering its population survival rights (e.g., a high percentage of people are rendered homeless or deprived of essential medical care or essential water or energy supply necessary to survive or enslaved) the host state is under an obligation to intervene regardless of the effects that this measure might have on other rights. As noted above, survival rights are clearly of a different order of importance than certain civil and political rights, the restriction of which does not necessarily endanger a person's very survival. The same is true for the property rights of businesses, which might be "touched" by measures undertaken by states in fulfilling their socio-economic human rights obligations.[773]

To sum it up, whatever expectations an investor may have with respect to the target country, the expectations must encompass the host state's obligations to respect, protect and fulfil human rights as well as its human rights responsibilities, in light of the specific circumstances of the case.[774] This is so regardless of the host State's ability and/or willingness to fulfil its own human rights obligations,[775] and any specific commitment undertaken by the host state.[776] As will be discussed under Section V below, these commitments might often result not credible.

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772 B. SAUL, D. KINLEY, and J. MOWBRAY, *The International Covenant on Economic, Social and Cultural Rights. Commentary, Cases and Materials*, at 256, note 28.

773 *See* Chapter II above, Section 2.3.

774 *See* B. SIMMA – T. KILL, *Investment Protection and Human Rights*, at 705, note 794; A. DIEHL, *The Core Standard of International Investment Protection. Fair and Equitable Treatment*, in *Kluwer Law International*, 2012, at 512-513. P. M. DUPUY - JORGE J. E. VIÑUALES, *Human Rights and Investment Disciplines: Integration in Process*, at 1752, note 580.

775 UNGP, at 13. United Nations Human Rights Council, *Guiding Principles on Business and Human Rights*.

776 As a matter of fact, there can be no credible host State's commitment that is contrary to human rights law, and sooner the host State will need to intervene in order to remedy the situation by introducing new regulation complaint with its human rights obligations. Accordingly, if a State passes legislation that is in clear breach of human

An investor that fails to perform such a human rights due diligence should not be allowed to invoke its legitimate expectation as there can be no investor's legitimate expectations that are contrary to human rights law.[777] By the same token, an investor who willingly invest in a country knowing *a priori* that there might be a high probability that the human rights risk will materialize,[778] but estimates that the profit up to the materialization of the risk would be high enough to make the investment profitable anyways (short-term profit) should equally not be allowed to invoke the legitimate expectations. This conduct will be contrary to human rights standards or, at the very least, to the obligation to act in accordance with the law and good faith.

This takes the conclusions very close to the positive obligation of the host states under human rights treaties to ensure that the activities of third parties, such as reckless investors, do not encroach on the human rights of individuals (and in particular on the one analyzed under chapter one above that are the one most often touched by investment's activity).[779]

5. The FET Standard, Human Rights: Some Specific Considerations on the Case of Argentina

As already mentioned above, notwithstanding the relevance of human rights to investment law, human rights arguments are still rarely invoked in investment disputes. The analysis may be focused on the arbitration disputes generated by the Argentine 2001-2002 crisis ("Argentine Crisis"), which due to the peculiarities of the underlying cases represented a fertile ground for human rights arguments.

The following section will provide a succinct overview of the historical and economic background relating to the Argentine Crisis. It is interesting to note that

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rights standard, the corporation should avoid investing in this country. An investor who fails to do so cannot be protected under the FET standard.

777 *See*. U. KRIEBAUM, *Human Rights of the Population*, *Human Rights of the Population of the Host State in International Investment Arbitration*, at 669, note 794.

778 This of course will depend to a great extent also on the specific political and socio-economic circumstances prevailing in the country at the time the investment was made.

779 *See* P. M. DUPUY – J. E. VIÑUALES, *Human Rights and Investment Disciplines*, at 1748-1749, note 580. *See also*, ECtCHR, *Taskin and others* v. *Turkey*, Application No. 461179/99, Judgment dated March 30, 2005.

most of the claimants that brought investment claims against Argentina in relation to the Argentine Crisis: (i) had invested in sectors key to certain socio-economic human rights, e.g., the distribution and management of water and energy services; and (ii) may have invested Argentina knowing (or, at least, foreseeing the possibility) that an economic or financial crisis could materialize following their establishment in the country.

5.1. Factual Background of the Argentine Crisis

5.1.1. The Period 1990-2000

In the late 1980s, Argentina underwent an economic crisis characterized by deep recession and hyperinflation, the inefficient operation of many publicly-owned companies (including those responsible for public utilities), and a dramatic shortage of investments. The crisis had a strong negative impact on the local population.[780]

To overcome the crisis, the Argentine government developed an ambitious economic recovery plan ("Plan"). The Plan targeted primary foreign investors as the capital generated by the same was deemed essential for the successful recovery of the country's economy, and in turn, the situation of the local population. The Plan included several legislative measures, including the following.[781]

First, the Plan included Law No. 23.928 dated March 27, 1991 (*Ley de Convertibilidad*), which provided for the implementation of a fixed exchange rate, pegging the austral (the then Argentine currency) to the U.S. dollar.[782] Moreover, the Convertibility Law established that the monetary base had to be fully backed by

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780 *See*, e.g., J. F. ACOSTA, *Los Tratados Bilaterales de Inversión y el Arbitraje Internacional. La Experiencia Argentina Reciente*, Advocatus, Cordoba, 2016.

781 *Id*.

782 See, e.g., Ley 23.928 available at: <http://servicios.infoleg.gob.ar/infolegInternet/anexos/0-4999/328/texact.htmDecree>. The law was followed by several Decrees, including Decree No. 1853 dated September 1, 1993 which provided for the guarantee of: (i) equal treatment between local and the foreign investors; (ii) free transfer of profits and repatriation of capital, at all times and without restrictions on the amounts; and (iii) the possibility to enter into a foreign investment without the need of previous approval by the government. See, e.g., J. F. ACOSTA, *Los Tratados Bilaterales de Inversión y el Arbitraje Internacional. La Experiencia Argentina Reciente*, Advocatus, Cordoba, 2016.

international reserves, while the Central Bank was restrained from financing budget deficits. The measure targeted Argentina's inflation, a problem that has slow down the country's economy since the beginning of the 1900sand that was (and still is) of particular concern to foreign investors investing in Argentina.[783] The measure was, therefore, aimed at mitigating the economic and financial risks related to investing in Argentina,[784] a risk that was well known by all investors investing in Argentina in that period.

Second, the Plan included Law No. 23.697 dated August 18, 1989 (*Reforma del Estado*),[785] which was aimed at the privatization of a large number of government-run industries ("Privatization Plan"), including the energy sector (*Gas del Estado*)[786] and

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783 It was allowed to use both currencies interchangeably for any economic activity. This was the reason why millions of people took loans in the U.S. dollars, even though their income was in the local currency.

784 *See* Chapter III.

785 *See* Ley 23.697 available at: <http://servicios.infoleg.gob.ar/infolegInternet/anexos/0-4999/98/texact.htm>.

786 The Privatization Plan was followed by the following regulatory measures.

First, Gas Law (*Ley del Gas*), which: (i) established a comprehensive regulatory structure for the provision of natural-gas transport and distribution services; (ii) created a public agency (*Ente Nacional Regulador del Gas*; "ENARGAS") to oversee the industry and to collect tariffs on the price of gas paid by consumers; and (iii) required ENARGAS to set forth the gas transport and distribution tariffs at fair and reasonable levels so as to allow licensed utility providers to recoup a "reasonable rate of return", after accounting for costs, defined as a rate similar to that applied to activities of similar risk and adequately related to the level of efficiency and satisfactory performance of the transport or distribution service. Profitability was to be measured against other activities of comparable risk. The tariffs were to be reviewed and adjusted every five years based on international market indicators that reflected changes in the value of the goods and services representatives of the activities of the service provider.

Second, Decree No. 1738/92 dated September 28, 1992, which clarified that the: (i) gas transportation and distribution tariffs were to be calculated in U.S. Dollars and then expressed in Argentine pesos; and (ii) Government could not rescind or modify the licenses executed in furtherance of the Gas Law without prior consent of the licensees.

Third, Decree No. 2255/92 dated September 28, 1992 (*Reglas Básicas de la Licencia*), which supplemented the Gas Law and the above-mentioned regulation and approved prototype licenses for natural-gas transport and distribution and further clarified that: (i) the government had undertaken to compensate the licensees fully for any losses resulting from changes to the guaranteed tariff system; and (ii) the tariffs had to be reviewed and adjusted on the basis of the U.S. Producer Price Index ("PPI adjustment"), adequately related to the level of efficiency and satisfactory performance of the transport or distribution service.

the water management and distribution system.[787] The Privatization Plan was deemed necessary in order to bring market efficiency to poorly managed public services also with the aim to guarantee to Argentina's local population the essential levels of energy and water necessary for their survival.[788]

To render the country location more attractive to FDIs, the relevant regulatory measures provided to investors certain regulatory incentives and guarantees, including: (i) the guarantee that the gas and water transportation and distribution tariffs would be calculated in U.S. Dollars and then expressed in Argentine pesos and that would be periodically adjusted so as to guarantee a certain reasonable profit; (ii) a clear legal framework that could not have been unilaterally modified by Argentina; and (iii) the granting of "licenses" instead of "concessions" with a view to offering the highest degree of protection to prospective investors.[789]

As a consequence of the new legislation, the state-owned company (*Gas del Estado*) was divided into two transportation companies and eight distribution companies. *Transportadora de Gas del Norte* ("TGN") was one of the companies created for the gas transportation. Each of the ten business units were transferred to newly-created companies, which were to operate with a license under the legal framework in force described above. An international bidding process was set in place by Resolution No. 874/92 issued by the Ministry of Public Works and Services and conducted pursuant to the *Pliego de Bases y Condiciones para la Licitación* (Bidding Rules). Under these Bidding Rules, both foreign and domestic investors were free to bid on the shares. The purpose of the Bidding Process was the purchase and sale of the majority interest in each of the licensed companies created by Decree No. 1189/92.

787 Up until the early 1980s, the drinking water and sewage services were provided by Argentina's federal government through the entity knowns as *Obras Sanitarias de la Nacion* ("OSN"). With the 1980s crisis, the funding from the federal budget became subject to severe restrictions and the services provided by OSN went into great difficulties. To face the crisis, the federal government decentralized the furniture of the water services to the provinces, some of which, in turn, transferred the services to the municipalities. The transfer was not accompanied by an increase in the public funding, with the effect that no adequate solution was given to the need for service improvement and expansion of water and sewage networks. In July 1996, the water infrastructure was extremely poor, the quality of the water provision services decreased considerably, treatment plants were underburned, which contributed to a significant aggravation of the environmental pollution problem.

788 The Law recognized that Argentina's state-run public services were in state of emergency.

789 As part of its marketing efforts, Argentina distributed an Information Memorandum in foreign markets, including the United States and Europe. The Information Memorandum summarized the legal framework governing the privatization, the terms and conditions for the bidding, the bidding process and the legal and the regulatory

Attracted by the favorable investment conditions and the prospect of profits many investors were encouraged to purchase shares in the newly formed privatized energy and water company.[790]

Moreover, to provide enhanced legal protection to investors attracted by Argentina's favorable investment conditions, Argentina also entered into approximately 59 BITs. Several of the Argentine BITs, including the one entered with the United States, Germany, and the Belgian Luxemburg Economic Union (BLEU), included non-precluded measures provisions, which limited the applicability of the investors' protections in exceptional circumstances.[791]

The Plan and related measures were applauded by the whole international community, including by the international financial institutions such as the International Monetary Fund ("IMF").

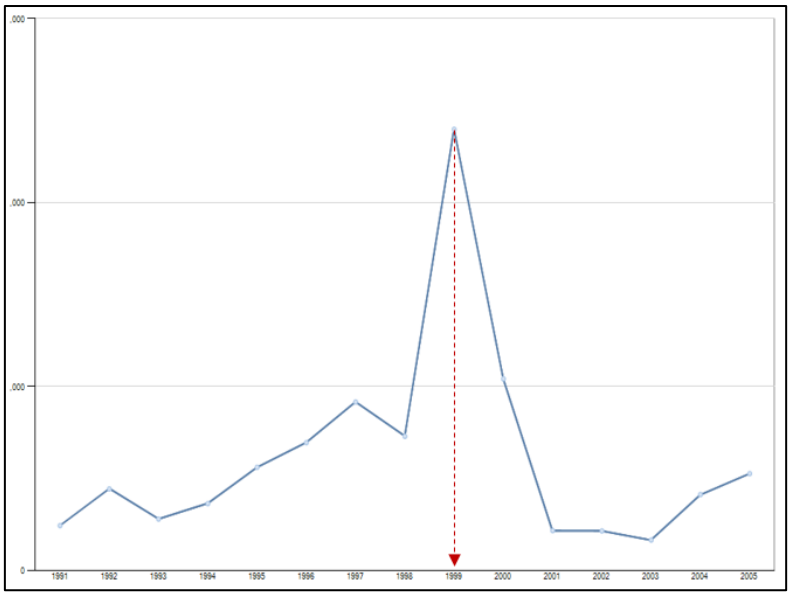
According to leading legal scholars, the Plan contributed to a significant increase of FDIs flows in Argentina.[792] However, what is interesting to note is that, as the figure below shows, the most significant increase in FDI's flow to Argentina was registered in 1999s. At the time, the first signs of the Argentina Crisis were already appearing.

framework that would apply to the new industry after privatization. The information memorandum also discouraged investors from relying solely on the information therein.

790 *See*, e.g., J. F. ACOSTA, *Los Tratados Bilaterales de Inversión y el Arbitraje Internacional. La* Experiencia *Argentina Reciente*, Advocatus, Cordoba, 2016.

791 *Id*.

792 See, e.g., G. BÜCHELER, *Proportionality in Investor-State Arbitration*, Oxford University Press, 2015, at 20



5.1.2. The 2001-2002 Argentine Crisis

In the last weeks of 2001, Argentina entered into an economic and financial crisis that almost lead to its collapse.[793] As a consequence of the crisis, all major economic indicators reached catastrophic proportions and accelerated the deterioration of Argentina's GDP.

First, as a direct consequence of the crisis, by mid-2000, the unemployment rate had reached a level of around 25%[794] and, by late 2002, over half of the Argentine population was living below the poverty line.[795] During the crisis the income per person

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793 *LG&E v. The Argentine Republic*, ICSID Case No. Arb. 02/1, Decision on liability dated October 3, 2006. See also P. BLUSTEIN, *And the Money Kept Rolling In (and Out): Wall Street, the IMF and the Bankrupting of Argentina*, 2005; M. DAMILL, R. FRENKEL and M. RAPETTI, *The Argentinean Debt: History, Default and Restructuring*, August 2005 (unpublished CEDES working paper), available at: <http://www0.gsb.columbia.edu/ipd/pub/Frenkel_SDR_Eng.pdf>.

794 IMF, *Lessons from the crisis in Argentina*, October 8, 2003, paras. 62, 66, available at: <https://www.imf.org/external/np/pdr/lessons/100803.htm>. See also *Special Report: Argentina's Collapse. A Decline without Parallel*, in *The Economist*, February 28, 2002; W. W BURKE-WHITE, *The Argentina Financial Crisis: State Liability under BITs and Legitimacy of the ICSID System*, University of Pennsylvania, Institute for Law and Economic Research Paper, 2008, available at: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1088837>.

795 The poverty level increased even up to 54.3% in the urban population. See Certificate Concerning the State of Necessity in Argentina, Guillermo Nielsen, Secretary of Finance of Argentina, Jan. 2003, para. 11. The certification was made by Argentina's

in dollar terms has shrunk from around $7,000 to just $ 3,500 (which was mainly caused by a decrease of the exchange rate between the peso and the U.S, dollar).[796]

Second, the entire healthcare system had collapsed, jeopardizing Argentine's right to minimum level of accessible healthcare. Prices of pharmaceuticals became unavailable for low-income people, which represented more than half of the Argentine population. Hospitals suffered a severe shortage of basic supplies. Investments in infrastructure and equipment for public hospitals declined. The conditions were so severe that led the by then government to declare the nationwide health emergency to ensure the population's access to basic health care goods and services.[797]

Third, at the time, one quarter of the population could not access adequate standard of living conditions, including minimum amount of food required to ensure their subsistence, to energy and water. Given the level of poverty and lack of access to healthcare and proper nutrition, disease followed. Facing increased pressure to provide social services and security to the masses of indigent and poor people, the government was forced to decrease its per capita spending on social services by 74%.[798]

Finally, the Merval Index (which measures the share value of the main companies of Argentina listed on the Buenos Aires Stock Exchange), experienced a dramatic decline of 60% by the end of December 2001. By that same timing, Argentina's country risk premium was the highest premium worldwide, rendering Argentina unable to borrow on the international markets.[799]

By December 2001, the crisis deepened. The government experienced increased difficulties in repaying its foreign debt. As poverty and unemployment

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government to the courts adjudicating the debt cases and the ICSID cases arising out of the economic crisis.

796 *See Special Report: Argentina's Collapse. A decline without Parallel*, in *The Economist*, February 28, 2002.

797 *Id*.

798 *Continental Casualty v. Argentina*, ICSID Case No. Arb/03/09.

799 *LG&E v. Argentina*, ICSID Case No. Arb. 02/1, decision on liability dated October 3, 2006.

soared, Argentines feared that the government would default on its debt and immobilized banks deposits. As a reaction, savings were massively withdrawn from bank accounts. In the fourth quarter of 2001, the Central Bank of Argentina lost 11 billion U.S. Dollars in liquid reserves; the banking system lost 25% of its total deposits; and the Argentinian peso lost 40% of its value in just one day. As the Argentine currency collapsed, a run to the banks followed.[800]

The economic and social chaos in Argentina spread to the political sphere. Widespread violent demonstrations, protests and riots were carried out in all the country bringing it to the verge of anarchy. The whole situation led to the resignation of the by then in charge President (Mr. Fernando de la Rua) and the collapse of the government. Over ten days, five presidents succeeded until Mr. Eduardo Duhalde took office on January 1, 2002, charged with the mandate to bring the country back to normal conditions.[801]

5.1.3. Argentine's Reaction to the Economic Crisis

When by the beginning of 2002, the crisis became unbearable,[802] Argentina adopted a number of measures to stabilize the economy and restore political confidence, including: (i) specific measures relating to public services; (ii) the termination of the convertibility system; (iii) the "pesification" of all financial obligations;[803] (iv) the effective freezing of all bank accounts through a series of measures (*corralito*);[804] and (v) the increase in its *per capita* spending on social services by 74% ("2001-2002 Measures").

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800 *Continental Casualty v. Argentina*, ICSID Case No. Arb/03/09.

801 *Id*.

802 *See*, e.g., *A Survey of Capitalism and Democracy: Liberty's Great Advance*, in *The Economist*, June 28, 2003, at 4, 6 ("Argentina has endured an economic collapse to match the Great Depression of the 1930s"). See Law No. 25561 dated January 7, 2002, available at: <http://infoleg.mecon.gov.ar/infolegInternet/verNorma.do?id=71477>.

803 *See* Law No. 25561 dated January 7, available at: <http://infoleg.mecon.gov.ar/infolegInternet/verNorma.do?id=71477>.

804 *See* Decree No. 1570 dated December 3, 2001, available at: <http://infoleg.mecon.gov.ar/infolegInternet/verNorma.do?id=70355>. See also,

First, the government modified the existing tariff adjustment regimes applicable to all public contracts (i.e., regime calculated in U.S. dollars and then converted in pesos), including those related to the management and distribution of the water and gas services. Due to the social and economic conditions existing in the country, this regime calculated in U.S. dollars and then converted in pesos was deemed to be no longer feasible as it would have led to an increase in the utility rates and therefore on the amounts to be paid by the final consumers, most of which were already living below the poverty line. As a result, the Argentine government first suspended and then revoked the tariff adjustment regime applicable to all public contracts.[805]

Second, on December 2, 2001, in response to the massive withdrawal of funds from the banks,[806] the Government issued Decree No. 1570/01 known as the *Corralito*. This law restricted bank withdrawals to no more than 250 U.S. Dollars, and prohibited any transfer of currency abroad.[807]

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e.g., C. LOPEZ, *Standard & Poor's, the Argentine Crisis: A Chronology of Evets after the Sovereign Default,* April 12, 2002.

805 As explained above, the regulatory framework had granted to investors investing in the gas and water management and distribution system a semi-annual right to a tariff review based on the US PPI. When the tariffs were due to be adjusted in January 2000, Argentina's deflationary period met with an inflationary period in the US. Under these circumstances, adjustment as envisioned by the Gas Law would have resulted in a large increase in the utility rates for consumers. The Argentine government, therefore, sought an agreement with the licenses to suspend the semi-annual tariff adjustment. The gas companies finally agreed to a postponement of the tariff adjustment in January 2000. The agreement stipulated that the costs of the postponement would be recovered from July 1, 2000 to April 30, 2001, and that resulting income losses would be indemnified. When the situation did not improve over the following six months, the government managed to convince the companies to agree to a second postponement for two years. The decree establishing this postponement envisaged a stabilization fund to recover the postponed amounts. Furthermore, the decree reaffirmed the government's commitments regarding the semi-annual PPI adjustment. After a national ombudsman had filed a lawsuit against the decree and provisional order enjoined its application, the regulatory authority declared at the end of 2001 that no PPI adjustment would be approved. See, e.g., G. BÜCHELER, *Proportionality in Investor-State Arbitration*, Oxford University Press, 2015, at 21.

806 The bank run started on November 28, 2001. This date is to be considered the starting point of the major crisis. Within three days, more than 60% of the total private sector deposits were withdrawn from Argentine banks. See, e.g., IMF, *Lessons from the crisis in Argentina*, October 8, 2003, paras. 62, 66, available at: <https://www.imf.org/external/np/pdr/lessons/100803.htm>.

807 *Id*.

Third, on January 6, 2002,[808] the Argentine Government enacted Law No. 25.561 ("Emergency Law"), which proclaimed a public emergency "with respect to social, economic, administrative, financial and exchange matters". The Emergency Law, among other things, terminated the convertibility regime that had pegged the peso to the U.S. dollar,[809] and provided for the switch into Argentine pesos of all debts owed to the banking system, including debts arising from management contracts governed by public law, and debts under private agreements. The law further provided for the renegotiation of private and public agreements so as to adapt them to the new exchange system. In furtherance of the Emergency Law, all public-service contracts were modified, and, in particular, all clauses calling for tariff adjustments in U.S. dollars or other foreign currencies were abolished.[810]

Fourth, on February 3, 2002, the Government enacted Presidential Decree No. 214, which adopted a currency conversion scheme under which all obligations payable in dollars existing on the date of enactment of the Emergency Law would be converted into pesos at the fixed one-to-one exchange rate (so-called pesification).[811]

Finally, faced with the increased pressure to provide social services and security to the masses of indigent and poor people, the Government was forced to decrease its per capita spending on social services by 74%, and to declare the nationwide health emergency to ensure the population's access to basic health care goods and services. The increase in social services expenditure limited the country budget.[812]

5.1.4. The ICSID Cases Generated by the Financial Crisis

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808 *See* Law No. 22561 dated January 6, 2002 (*Emergencia publica y reforma del Regimen Cambiario*), available at: <http://servicios.infoleg.gob.ar/infolegInternet/anexos/70000-74999/71477/texact.htm. Before proclaiming the Emergency Law, Argentina announced suspension of all payments on its external debt on December 24, 2001>.

809 *Id*.

810 See, e.g., G. BÜCHELER, *Proportionality in Investor-State Arbitration*, Oxford University Press, 2015, at 20.

811 *LG&E v. Argentina*, ICSID Case No. Arb. 02/1, decision on liability dated October 3, 2006.

812 *Id*.

The measures described above offered a long-term prospect to restore economic confidence and stability in Argentina. However, they also imposed immediate and painful costs on all participants in the Argentine economy, including foreign investors. While Argentine citizens had little legal recourse, many foreign investors who alleged to have been harmed by Argentina's response to the crisis sought legal protection under the BITs entered by Argentina in the early 1990s. Specifically, approximately Nos. 56 investment arbitrations were brought against Argentina by investors claiming that Argentina's regulatory reaction to the Argentina Crisis amounted to a breach of their legal protection under the relevant BITs.[813] Specifically, approximately Nos. 23 arbitrations were brought by investors which had

[813] Data available in the ICSID Database, available at https://icsid.worldbank.org/en/Pages/cases/AdvancedSearch.aspx

invested in Argentina's oil & gas and energy industries,[814] and approximately Nos. 9 arbitrations by investors which had invested in the privatized water service.[815]

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814 *Enron Corporation and Ponderosa Assets, L.P. v. The Argentine Republic*, ICSID Case No. ARB/01/3 (also known as: Enron Creditors Recovery Corp. and Ponderosa Assets, L.P. v. The Argentine Republic), Award dated May 22, 2007; *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8, Award dated May 12, 2005*; Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16, Award dated September 28, 2007; *AES Corporation v. The Argentine Republic*, ICSID Case No. ARB/02/17, Decision on Jurisdiction dated April 26, 2005; *Camuzzi International S.A. v. The Argentine Republic*, Decision on Jurisdiction dated May 25, 2005; *Gas Natural SDG, S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/10, Decision on Jurisdiction dated June 17, 2005; *Pan American Energy LLC and BP Argentina Exploration Company v. The Argentine Republic*, ICSID Case No. ARB/03/13, Decision on Jurisdiction dated July 27, 2006; *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award dated October 31, 2011; *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/23, award dated June 11, 2012; *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/23, Award dated June 11, 2012; *Total S.A. v. The Argentine Republic, ICSID Case No. ARB/04/01*, Decision on Liability dated December 27, 2010; *BP America Production Company, Pan American Sur SRL, Pan American Fueguina, SRL and Pan American Continental SRL v. The Argentine Republic*, ICSID Case No. ARB/04/8, Decision on Preliminary Objection dated July 27, 2006; *Wintershall Aktiengesellschaft* v. *The Argentine Republic*, ICSID Case No. ARB/04/14, Award dated December 8, 2008; *Mobil Exploration and Development Inc. Suc. Argentina and Mobil Argentina S.A. v. The Argentine Republic*, ICSID Case No. ARB/04/16, Award dated February 25, 2016; *CGE v. Argentina. Compañía General de Electricidad S.A. and CGE Argentina S.A.* v. *The Argentine Republic* ICSID Case No. ARB/05/2; *Houston Industries Energy, Inc. and others v. The Argentine Republic* ICSID Case No. ARB/98/1; *Mobil v. Argentina Mobil Exploration and Development Inc. Suc. Argentina and Mobil Argentina S.A.* v. *The Argentine Republic* ICSID Case No. ARB/04/16; *Empresa Nacional de Electricidad v. Argentina Empresa Nacional de Electricidad* S.A. *v. The Argentine Republic* ICSID Case No. ARB/99/4; *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. The Argentine Republic*, ICSID Case No. ARB/02/1, Award July 25, 2007; *Pioneer Natural Resources Company, Pioneer Natural Resources (Argentina) S.A. and Pioneer Natural Resources (Tierra del Fuego) S.A. v. The Argentine Republic* ICSID Case No. ARB/03/12; *Repsol, S.A. and Repsol Butano, S.A.* v. *The Argentine Republic*, ICSID Case No. ARB/12/38; and *Orazul International España Holdings S.L. v. The Argentine Republic* ICSID Case No. ARB/19/25.

815 *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Award dated July 14, 2006; *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19, Award dated April 9, 2015; *SAUR International SA v. Republic of Argentina*, ICSID Case No. ARB/04/4, Award dated May 22, 2014; *Impregilo S.p.A. v. The Argentine Republic*, ICSID Case No. ARB/07/17, Award dated June 21, 2011; *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. The Argentine Republic*, ICSID Case No. ARB/97/3 (formerly Compañía de Aguas del Aconquija, S.A. and Compagnie Générale des Eaux v. Argentine Republic), Award dated August 20, 2007; *Aguas Cordobesas S.A., Suez, and Sociedad*

Most of the claimants argued, *inter alia*, that Argentina's regulatory measures had breached their legitimate expectations that the regulatory framework existing at the time the respective investments were made would have remained the same. In reply, Argentina denied all the allegations and claimed that the regulatory measures represented an exercise of its regulatory powers to purse legitimate goals (also in light of the special social needs arising from the Argentine Crisis). In all the cases, Argentina also invoked the necessity defense under customary international law or the non-precluded measures (when foreseen by the relevant treaty).

Notwithstanding Argentina is signatory to the Socio-Economic Covenant on August 8, 1986,[816] and was therefore under the human rights obligations to guarantee to its population, at the very least, the minimum essentials levels of socio-economic rights (also in light of the emergency situation), Argentina was reluctant to raise human rights defenses in the proceedings. Although the party's briefs are not available, based on the text of the relevant awards it would appear that Argentina raised human rights arguments only in No. 6 (out of 56) arbitration proceedings. These include the following cases: (i) *CMS*;[817] (ii) *Siemens*;[818] (iii) *Azurix*;[819] (iv) *Continental*;[820] (v) *Saur*;[821] (vi) *Urbaser*.[822]

Each of these cases will be shortly analyzed below.

General de Aguas de Barcelona S.A. v. The Argentine Republic, ICSID Case No. ARB/03/18 (settled); and *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa* v. *The Argentine Republic*, ICSID Case No. ARB/07/26, Award dated December 8, 2016.

816 Argentina has ratified the Socio-Economic Covenant on August 8, 1986. See United Nations Treaty Collection, available at: <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&clang=_en>.

817 *CMS Gas Transmission Company* v. *The Republic of Argentina*, ICSID Case No. ARB/01/8.

818 *Siemens* A.G. *v. The Argentine Republic*, ICSID Case No. ARB/02/8.

819 *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12.

820 *Continental Casualty Company v. The Argentine Republic*, ICSID Case No. ARB/03/9.

821 *SAUR International SA v. Republic of Argentina*, ICSID Case No. ARB/04/4.

822 *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26.

In *CMS*, Argentina argued, among others, as follows. *First*, Argentina argued that, under the Argentinian Constitutional law, which applied to the dispute basic human rights treaties (unlike investment treaties) have constitutional rang, and therefore should prevail over ordinary treaties such as investment treaties. As the 2001 economic and social crisis threatened the basic human rights of the Argentine population, no investment treaty could have prevailed as this would have been contrary to constitutionally recognized rights. *Second*, Argentina argued that the Argentine government could not have made vis-à-vis the investors any commitment to maintain a certain economic order or exchange rate policy because this would have been contrary to Argentinian public law according to which: (i) the government was under an obligation to ensure the efficient and continuous operation of a national public service;[823] and (ii) the regulation of property rights may be justified in cases of emergence situation related to a social need (as it was the case in Argentina). Claimant could not have ignored the public law of Argentina nor the "risks involved in investing in that country".[824] *Finally*, Argentina invoked the necessity defense under Article XXI of the US-Argentina BIT as a ground for exemption of liability under international law and the BIT.

In solving the conflict between Argentina's investment and human rights obligations, the arbitral tribunal stated that "[w]hile treaties in theory could collide with the constitution, in practice this is not very likely as treaties will be scrutinized in detail by both the Government and the Congress". In any event, "the Tribunal [did] not find any collision [between the two sets of rules]. First because the Constitution carefully protects the right to property, just as the treaties on human rights do, and secondly because there is *no question of affecting fundamental human rights* when considering the issues disputed by the parties".[825]

With respect to the FET standard, the arbitral tribunal held that "one of the principal objectives of the protection envisaged" by this standard "is that fair and

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823 *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8, Award *dated* May 12, 2005, para. 93.

824 *Id.*, para. 94.

825 *Id.*, paras. 121-122.

equitable treatment is desirable 'to maintain a stable framework for investments and maximum affective use of economic resources'. There can be no doubt, therefore, that a stable legal and business environment is an essential element of fair and equitable treatment".[826] According to the tribunal, the Argentina 2001-2002 Measures breached the protection guaranteed by the FET standard as they had entirely transformed and altered the legal and business environment under which the investment was decided and made, and which was therefore deemed crucial for the investment decision.[827] The tribunal did not give relevance to the reasons underlying the governmental measures. According to the tribunals the "objective" nature of BIT's protection mechanism is "unrelated to whether the Respondent has had any deliberate intention or bad faith in adopting the measures in questions".[828]

In *Siemens*, Argentina raised arguments similar to the one raised in *CMS*, including the argument that the Argentine Constitution applied to the case and that "human rights so incorporated in the Constitution would be disregarded by recognizing the property rights asserted by the Claimant given the social and economic conditions of Argentina".[829] The arbitral tribunal first denied the relevance of Argentine domestic law to the case and held that the "Tribunal's inquiry [was] governed by the [ICSID] Convention, by the Treaty and by the applicable international law. Argentine's domestic law constitute[d] evidence of the measures taken by Argentina and Argentina's conduct in relation to its commitments under the Treaty".[830] The arbitral tribunal further held that Argentina had failed to develop "the reference made by Argentina to international human rights law ranking at the level of Constitution after the 1994 constitutional reform and implying that property rights claimed in this arbitration, if upheld, would constitute a breach of international human rights law". According to the tribunal without the benefit of further elaboration or substantiation

826 *Id.*, para. 274.

827 *Id.*, para. 275.

828 *Id.*, para. 280.

829 *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award dated January 17, 2007, para. 75.

830 *Id.*, 79.

by the parties, the human rights argument was an argument that, *prima facie*, had no relationship to the merits of this case.[831]

In *Azurix*, Argentina seems to have raised the "issue of a conflict between the BIT and human rights treaties that protect consumers' rights". Specifically, according to Argentina's expert, a conflict between a BIT and human rights treaties must be resolved in favor of human rights because the consumer's public interest must prevail over the private interest of service provider".[832] As in the case of *Siemens*, the arbitral tribunal declared that "the issue of the compatibility of the BIT with human rights treaties […] has not been fully argued and the Tribunal fail[ed] to understand the incompatibility in the specifics of the instant case".[833]

In *Continental*, it would appear that respondent did not raise a specific human rights argument within the defense of the FET Claim. Argentina simply argued that "fair and equitable treatment standard (as well as other treatment standards mentioned in the same paragraphs), must be applied considering especially the circumstances under which such measures were adopted, namely the 'dramatic economic situation' that Argentina was experiencing when the challenged measures were enacted".[834] The arbitral tribunal in evaluating the investor's legitimate expectation, among others, held that "general legislative statements engender reduced expectations, especially with competent major international investors in a context where the political risk is high. Their enactments is by nature subject to subsequent modification, and possibly to withdrawal and cancellation, within the limits of respect of fundamental human rights and *jus cogens*".[835] Moreover, the arbitral tribunal gave

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831 *Id.*

832 *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Award dated July 14, 2006, para. 254.

833 *Id.*, 261.

834 *Continental Casualty Company v. The Argentine Republic*, ICSID Case No. ARB/03/9, Award dated September 5, 2008.

835 *Id.*, para. 261(ii).

also relevance to the imprudent conduct of the investor who had to "maintain a reduced trust" in the system.[836]

In *Saur*, Argentina argued that the legal protection granted by BITs does not affect the obligations undertaken by Argentina under international human rights treaties, including those related to the right to water, against which investment obligations should be interpreted.[837] Argentina further argued that the measures allegedly contrary to FET were enacted in furtherance of basic human rights obligations relating to the right to water. A measure having such an end cannot be considered unfair nor expropriatory, but rather a necessary exercise of police and regulatory power.[838] Interestingly, the arbitral tribunal recognized in theory that "human rights, in general, and the right to water, in particular, are different sources of law that should be taken into consideration by an arbitral tribunal when deciding the dispute insofar as they form part of both the Argentine judicial system and the principles of international public law. Access to drinking water constitutes, from the State's point of view, a public service of first necessity, and from the perspective of the citizen a right fundamental. Therefore, in this matter the legal system can and should be reserve to public authorities legitimate functions of planning, supervision, police, sanction, intervention and even termination, in protection of the general interest".[839] Notwithstanding this recognition, the arbitral tribunal concluded that the state's human rights "prerogatives are compatible with the right of the investors under the BIT insofar as these rights and the fundamental right to water operate on different levels".[840]

In *Suez v. Argentina* arbitrations, Argentina argued in both disputes that the tribunal's determination of breach of any treaty provisions should be contextualized and informed by the right to water.[841] These arguments were supported in one of the

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836 *Id.*, para. 262(ii).

837 *SAUR International SA v. Republic of Argentina*, ICSID Case No. ARB/04/4, Decision on Jurisdiction and Admissibility dated June 6, 2012.

838 *Id.*, para. 330.

839 *Id.*

840 *Id*.

841 *See Suez, Sociedad General de Aguas de Barcelona S.A. v. Argentina*, ICSID Case No. ARB/03/17, Decision on Liability dated July 30, 2010, para. 232; *Suez, Sociedad*

arbitrations by amici curiae who argued that the right to water was linked to other human rights, such as the right to human health, and that human rights obligations required Argentina to take measures "to ensure access to water by the population, including physical and economic access."[842] Despite these arguments, the tribunal concluded that Argentina's human rights obligations neither superseded its investment treaty obligations nor gave it the authority to take actions in contravention of its investment treaty obligations. Instead, it held that Argentina was subject to both its human rights and investment treaty obligations, that these obligations were "not inconsistent, contradictory, or mutually exclusive" and that Argentina should have respected both sets of obligations.[843] Thus, although the tribunal recognized Argentina's human rights obligations, it did not use this recognition to integrate these rights into its analysis.

Finally, in *Urbaser*, Argentina argued that the claimant's legitimate expectations had to be evaluated against Argentina's regulatory powers for reason of public order and in light of the circumstances of the case,[844] including the economic and social situation prevailing in the country in the late 1999s.

Moreover, Argentina advanced a counterclaim based on human rights arguments. Specifically, Argentina argued, *inter alia*, that under the relevant water concession agreement, claimant had: (i) assumed specific human rights investment obligations, which had given "raise to *bona fide* expectations that those investments would indeed be made and would make it possible to guarantee, in the area in question, the basic human right to water and sanitation"; (ii) breached this obligation by failing to make the investment necessary to guarantee the minimum essential levels

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General de Aguas de Barcelona S.A. & Interagua Servicios Integrales de Agua S.A. v. Argentina, ICSID Case No. ARB/03/19, Decision on Liability dated July 30, 2010 para. 252.

842 *Suez, Sociedad General de Aguas de Barcelona S.A. & Interagua Servicios Integrales de Agua S.A. v. Argentina*, ICSID Case No. ARB/03/19, Decision on Liability dated July 30, 2010 para. 256.

843 *Id.*, para. 256.

844 *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26, Award dated December 8, 2016, para. 592.

of the human rights to water. According to Argentina, this failure (i) violated both the principles of good faith and *pacta sunt servanda*, which are recognized both by Argentina law and by international law; and (ii) had an effect on both the contractual provisions as well as the basic human rights of the Argentine population (including the right to health, adequate standard of living conditions and housing, and water) which was already living below the poverty line; and (iii) entitled Argentina to seek damages arising from claimant's unlawful conduct.[845]

In constructing the human rights arguments, Argentina invoked:

- The Universal Declaration which is "part of customary international law" and which provides specific human rights obligations that do not lie exclusively on the host states but also on private actors, including multinational corporations;[846]

- The Socio-Economic Covenant to which Argentina is a signatory and which expressly recognizes the right of everyone to an adequate standard of living conditions, including adequate food, closing and housing;[847] and

- The human rights responsibilities imposed on multinational corporations by numerous instruments, including the Global Compact, the Tripartite Declaration, Draft Code of Conduct on Transnational Corporations, the General Comments of the Socio-Economic Committee.[848]

In Reply, claimant denied entirely Argentina's allegations and argued, among others, that the Spain-Argentina BIT (which was at the hearth of the dispute), did not provide any protection to states for damages arising out of a breach of domestic law,

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845 *Id*.

846 Specifically, it was made reference to the preamble (which expressly sets forth that the duties would lie on both institutions and individuals), Article 1 (which states that provision apply to individuals even in private relationships), Article 29 (that sets forth that everyone has duties to the community), and Article 30 (which declares that nothing in the Declaration may be interpreted as implying for any State group of person any right to engage in any activity or to perform any act aimed at the destruction of the rights and freedoms set forth herein). *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26, Award dated December 8, 2016, para. 1159. *See* Chapter II above.

847 *Id*., para. 1160.

848 *Id*., paras. 1161-1164.

international law (including human rights law), or out of the investment in a capacity not covered by the original claim. According to claimant, the BIT in question adopted the *classical asymmetric model that exclusively regulates State obligations*, according to which the BIT does not impose obligations upon the investor nor does it guarantee rights to the host state.[849]

With specific regard to legitimate expectations claim, the arbitral tribunal did not find a breach of the FET standard and concluded that this standard should "encompass the entire legal, social and economic framework".[850] Specifically:

> "[t]he investor's expectations, and their importance in the particular case, are usually measured on the basis of the contractual commitments undertaken. However, these contractual rights should not be considered in isolation. They are placed in a legal framework embracing the *rights and obligations of the host State and of its authorities*, subject to the protections provided in the BIT.
>
> Moreover, the host State is bound by obligations under international and constitutional laws. Therefore, the *host State is legitimately expected to act in furtherance of rules of law of a fundamental character*. The scope of such rules is broad. They cover the *State's undertaking to promote and secure foreign investments*. They also encompass fundamental principles like due process and acting in good faith. Such principles, and a number of others of a similar kind, are generally considered as part of the fair and equitable treatment protection. They are, in other words, comprised in the range of rules that the investor can legitimately expect as being protected as part of the fair and equitable treatment standard."

The arbitral tribunal further clarified that:

> "This means that the investor's interests are not to be identified as separate and distinct from the legal framework into which they have been placed upon entering into the investment. This includes, other

849 *Id.*, para. 1167. *See* Chapter II above.

850 *Id.*

> *obligations of the host State* [that] must prevail over the Contract and are therefore also part of the law applicable to the investment, […]. In the instant case, this obligation relates to the Government's responsibilities under the *Federal Constitution to ensure the population's health and access to water and to take all measures required to that effect*. This was an *important objective* of the privatization of the water and sewage services, including the investment in this particular case. When measures had been taken that have as their *purpose and effect to implement such fundamental rights protected under the Constitution, they cannot hurt the fair and equitable treatment standard* because their occurrence must have been deemed to be accepted by the investor when entering into the investment and the Concession Contract. In short, they were expected to be part of the investment's legal framework".[851]

As with respect to Argentina's counterclaim, the arbitral tribunal proceeded by analyzing: (a) the applicable law under the treaty and the claimant's alleged asymmetric nature of the treaty; (b) the applicability of human rights law to the case and, in particular, the BIT's relation to international law and human rights, and (c) the relationship between the rights to water and the claimant's obligations arising under the water concession agreement.

First, the arbitral tribunal excluded that BITs (and in particular the Spain-Argentina BIT) do not provide for any rights of the host state.[852] The conclusion was based: (i) on the wording of the relevant treaty, which recognized, among others, the right of the host state to bring a counterclaim *vis*-à-*vis* the investor; and (ii) the applicable law, which according to the BIT included also "general principles of international law". With specific regard to this last point, the arbitral tribunal stated that, if one were to accept the position "that the BIT is to be construed as an isolated

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851 *Id.*, para 622.

852 Specifically, the arbitral tribunal framed the issue as follows: "[t]he question is then whether any host State's rights under the BIT shall be denied because of the very nature of BITs deemed to constitute investment law in isolation, fully independent from other sources of international law that might provide for rights the host State would be entitled to invoke and to claim before an international arbitral tribunal". *Id.*, para 1186.

set of rules of international law for the sole purpose of protecting investments through rights exclusively granted to investors" (as proposed by claimant),[853] the concept of "general principles of international law" would be "meaningless" and the BIT ineffective. The principle of *effectiveness* of a treaty provides that "when considering the purpose either of the BIT as a whole or of a particular provision, the Tribunal has to give such purpose an understanding that comports with the equally important principle of effectiveness".[854]

As with respect to (ii), above on the human rights obligations of investors the tribunal held that the principle according two which corporations are by nature not able to be subjects of international law (and therefore not capable of holding obligations governed by international law) "has lost its impact and relevance". If investors are ontologically capable of holding rights under international treaty law (including the procedural rights to start investment arbitration proceedings),[855] this "reject[s] by necessity any idea" that "a foreign investor company could not be subject to international law obligations".[856] With this respect, the arbitral tribunal added the following:

> "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 concluded in countries other than the country of their seat or incorporation. In light of this more recent development, it can no longer be admitted that

853 *Id.*, 1190.

854 *Id.*, 1191.

855 The arbitral tribunal referred to the investor's right encompassed in Article VI of the BIT, according to which "[w]here a matter is governed by this Agreement and also by another international agreement to which both Parties are a party *or by general international law*, the Parties and their investors shall be subject to whichever terms are more favorable". *Id.*, para 1194.

856 *Id.*, para 1194.

> companies operating internationally are immune from becoming subjects of international law".[857]

Notwithstanding this recognition the arbitral tribunal went further in claiming that "even though several initiatives undertaken at the international scene are seriously targeting corporations human rights conduct, they are not, on their own, sufficient to oblige corporations to put their policies in line with human rights law. The focus must be, therefore, 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".[858] The arbitral tribunal went on in analyzing whether the international human rights treaties impose specific human rights obligations on corporation similar to the one imposed on host states. To this end, the arbitral tribunal analyzed "any relevant rules of international law applicable in the relations between the parties" (as set forth by Article 31.3.c of the Vienna Convention), including the Universal Declaration, the Socio-Economic Covenant (as interpreted by the General Comments of the Socio-Economic Committee), and the Tripartite Declaration.[859] In the tribunal's view, the BIT could not be "interpreted and applied in a vacuum" and although the "Tribunal [had] certainly be mindful of the BIT's special purpose as a Treaty promoting foreign investments, [it could not] do so without taking the relevant rules of international law into account. The BIT has to be construed in harmony with other rules of international law of which it forms part, including those relating to human rights".[860]

The arbitral tribunal found that neither the mentioned treaties nor the Spain-Argentine BIT had as an effect "the extending or transferring to the Concessionaire an obligation to perform services complying with the resident's human right to access to

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857 *Id.*, para 1195.

858 *Id.*, para 1195.

859 *Id.*, paras 1195-1198.

860 *Id.*, para 1200. See also note 437, citing to *Tulip Real Estate and Development Netherlands B.V.* v. *Republic of Turkey*, ICSID/ARB/11/28, Decision on Annulment of December 30, 2015, paras. 86-92, where the *ad hoc* Committee refers to the "principle of systemic integration," stating that resort to authorities stemming from the field of human rights is a "legitimate method of treaty interpretation".

water and sewage services".[861] Indeed, "for such an obligation to exist and to become relevant in the framework of the BIT, it should either be part of another treaty (not applicable here) or it should represent a general principle of international law. In the affirmative, such obligation would be applicable as part of the legal framework of international law in which the investment is integrated in the particular case, either cumulatively or alternatively".[862] The solution ("necessary step") according the arbitral tribunal is that a host state accepting investments in the domain of the provision of water relies on the BIT to have the investor participating to its obligation under international law, by including it in the relevant investment agreement. This "includes the possibility to consider matters related to the human right to water in the dispute resolution mechanisms provided for in such agreements".[863]

The arbitral tribunal also concluded that the concession agreement did not impose on claimant specific human rights obligations. In the tribunal's view "the acceptance of the Bid and the Concession Contract could not have as an effect that

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861 *Id.*, paras 1207, and 1208. The existing obligations (i.e., the human right to water) entails an obligation of compliance on the part of the State, but it does not contain an obligation for performance on part of any company providing the contractually required services. Such obligation would have to be distinct from the State's responsibility to serve its population with drinking water and sewage services".

862 *Id.*

863 *Id.*, paras. 1209, 2010. The tribunal further confirmed that "the investor's obligation to ensure the population's access to water is not based on international law. This obligation is framed by the legal and regulatory environment under which the investor is admitted to operate on the basis of the BIT and the host State's laws". Interestingly, the arbitral tribunal operated a distinction between the "obligation to perform" a human rights obligation and the "obligation to abstain from committing acts violating human rights". In the tribunal's view "enforcement of the human right to water represents an obligation to perform. Such obligation is imposed upon States. It cannot be imposed on any company knowledgeable in the field of provision of water and sanitation services. In order to have such an obligation to perform applicable to a particular investor, a contract or similar legal relationship of civil and commercial law is required. In such a case, the investor's obligation to perform has as its source domestic law; it does not find its legal ground in general international law. The situation would be different in case of an obligation to abstain, like a prohibition to commit acts violating human rights would be at stake. Such an obligation can be of immediate application, not only upon States, but equally to individuals and other private parties. This is not a matter for concern in the instant case".

the obligations arising out under this Contract became, in addition or in parallel, obligations based on international law".[864]

The contradictory and sometimes erroneous conclusions reached by arbitral tribunal in relation to the Argentine ICSID cases may lead to question the adequacy of the investment settlement mechanism to deal with public law issues and policy aspects of governmental regulation of investment practices.

First, the model does not seem to fit easily with disputes that wholly or in part deal with the alleged negative externalities on society at large or on significant disadvantaged groups within society, as it is inevitably the case with human rights issues. More often than not, the proponents of human rights interests have no direct standing to represent their perspective, and at most have to rely on the host state to act as proxy. As the Argentine experience shows this rarely happens.

Second, private adjudicators generally lack jurisdiction *ratione materiae* to hear human-rights related issues.[865] Indeed, the consent of states expressed in the dispute settlement clause is generally given for claims arising directly out of the investment.[866] Only a broadly formulated clause that covers all the dispute related to the investment may be able to open the possibility for an arbitral tribunal to hear a human rights claim, as shown by *Urbaser v. Argentina*.

Third, when arbitrators have to decide whether certain measures by a host state give rise to compensable damages, they are asked to consider, among others, questions as to the reasonableness of certain public policies (and their proportionality to the area of concern), many of which inevitably impact on human rights. In this context, the arbitral tribunal may be called to consider human rights issues as

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864 *Id.*, para. 1212.

865 U. KRIEBAUM, *Human Rights and International Investment Law*, in RADI (ed.), *Research Handbook on Human Rights and Investment*, Cheltenham, 2018, at 14-15. See also REINER and SCHREUER, *Human Rights in International Investment Arbitration*, in DUPUY et al (ed.), *Human Rights in International Investment Law and Arbitration*, New York, 2010, pp. 83-84.

866 In this respect, Article 25 of the ICSID Convention limits the jurisdiction of the Center "to any legal dispute arising directly out of an investment".

applicable law.[867] However, as BITs do not provide for human rights standards nor conflict of laws clauses, arbitral tribunals have been reluctant to solve normative conflicts or to apply human rights law, as suggested also by the Argentine case law. Moreover, arbitral tribunal have been reluctant to engage in human rights-related arguments even in disputes in which both states and amici curiae had extensively elaborated on the right on human rights-related issues.[868]

867 M. FERIA-TINTA, *Like Oil and Water? Human Rights in Investment Arbitration in the Wake of Philip Morris v. Uruguay*, in *Journal of International Arbitration*, 2017, at 605-606.

868 *See* B. CHOUDHURY, International Investment Law and Noneconomic Issues, in Vanderbilt Journal of Transnational Law, 2020, at 3.

In the future, human rights will be increasingly a universal criterion for designing ethical systems.

- Mahnaz Afkhami -

"There were many initiatives, public and private, which touched on business and human rights. But none had *reached sufficient scale to truly move markets*; they existed as separate fragments that did not add up to a coherent or complementary system. One major reason has been the *lack of an authoritative focal point* around which the expectations and actions of relevant stakeholders could converge."

- John Gerard Ruggie -

V. INCORPORATING HUMAN RIGHTS IN INVESTMENT LAW

This chapter will analyze: (i) the contract theory approach and its applicability to BITS; (ii) certain risks and costs associated with BITs that may, in certain cases, have negative impact on the regulatory powers of host states (and, in turn, on the fulfilment of human rights); and (iii) the provisions that might be used in order to effectively insert human rights considerations into BITs (also in light of the consideration and case law analyzed in the previous sections). The final aim is to show, among others, that the effective integration of human rights in BITs might render these treaties more efficient in their double aim of attracting and protecting FDIs.

To cite jointly Ms. Afkhami and Mr. Ruggie, in the future, "human rights will be increasingly a universal criterion for designing ethical systems". However, this will only be possible when human rights reach "sufficient scales to truly move markets".

1. Contract Theory Approach and the Cost of Human Rights

1.1. Elements of Economic Contract Theory

Economic literature assumes that contracts are mechanisms for achieving compliance with certain goals allegedly beneficial to all parties contractually involved ("surplus") and whose interests may diverge later at a given time.[869] Contract theory instead is primarily about contract design.[870] Its analytical approach aims at: (i) explaining why parties enter into contracts in the first place and write the contracts they do, in light of the existing case law; and (ii) solving the issues relating to optimal contracting, i.e., a contract that minimizes the costs and maximize the benefits for all

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869 *See* R. E. SCOTT and G. G. TRIANTIS, *Incomplete Contracts and the Theory of Contract Design*, in *Case Western Law Review*, Vol. 56, Issue 1, 2005, at. 188. *See also* A. V. AAKEN, *International Investment Law between Commitment and Flexibility: A Contract Theory Analysis*, in *Journal of International Economic Law*, 2009, at 515.

870 *See* A. S. EDLIN, *Breach Remedies*, in *The New Palgrave Dictionary of Economics and the Law*, Peter Newman (ed.), 1998, at 174-79; A. SCHWARTZ and R. E. SCOTT, *Contract Theory and the Limits of Contract Law*, in *The Yale Law Journal Company*, 2003, at 541.

involved parties.[871] The theory is based on information economics and the distribution of risks in a given contract.[872]

Contracts protect and, thereby, encourage what economists call specific investments. Specific investments occur when the resources constituting each party's investment generate more value if they are deployed in a given relationship than if they are used for other purposes. Economists identify the optimal level of specific investment as *ex ante* efficient. This is the investment that, at the time is made, appears capable of producing the wanted surplus for all parties involved. At the same time, contractual commitments that motivate efficient investment *ex ante* can upset the efficiency of exchanges *ex post* by compelling an exchange when there is no surplus to be gained. This, in turn, may lead to situations in which the value of the contract performance to the promisee is less than the promisor's cost of performance.[873]

This scenario usually occur because the parties negotiate under several uncertainties, including those arising from: (i) future unforeseeable events (i.e., unforeseeable events that could render the contract extensively burdensome for one of the parties involved); (ii) future actions of the parties to the contractual relationship arising from contractual asymmetries (i.e., the risk that each party has information that the other does not have, and this might give rise to opportunistic behaviors); and (iii) excessively vague contractual provisions, including the risk that the adjudicators may interpret inconsistently textual provisions drafted in vague and ambiguous terms.[874]

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871 *Id*.

872 Information economics or the economics of information is a branch of microeconomic theory that studies how information and information systems affect an economy and economic decisions. Information has special characteristics: it is easy to create but hard to trust. It is easy to spread, but hard to control. It influences many decisions. These special characteristics (as compared with other types of goods) complicate many standard economic theories.

873 *See* R. E. SCOTT and G. G. TRIANTIS, *Incomplete Contracts and the Theory of Contract Design*, in *Case Western Law Review*, 2005, at 189.

874 R. E. SCOTT and P. B. STEPHAN, *The Limits of Leviathan. Contract Theory and the Enforcement of International Law*, Cambridge University Press, 2006, at 71-72. *See*

Parties entering into a contract will want to carefully evaluate all the above-mentioned uncertainties/risks and distribute them between the parties to the transaction so as to render the contract both *ex ante* and *ex post* efficient.[875] Under contract theory, the contract that allows this outcome 100% of the times is the so-called Pareto efficient complete contingent contract. This is the perfect contract that the parties would draft if there were no contracting uncertainties as well as no transaction and/or enforcement costs.[876] The context of the contract would be free of market imperfections, unforeseeable risks and/or opportunistic behaviors arising from information asymmetries.[877]

Unfortunately, the perfect contract is almost impossible to draft and even an attempt to come close to such an agreement would create high negotiation costs that no party would accept to bear.[878] Absent the perfect contract, parties attempt to draft contracts that provide credible commitments. In contract theory, credible commitments are created by attempting to: (i) identify ex ante both the *foreseeable* and *unforeseeable* risks related to a contractual relationship; and (ii) allocate those risks through hard and precise terms.[879] These types of terms inform the parties on how they should behave if one of these risks materializes and what may be the costs of non-performance.

Hard terms have several positive effects, as they enhance predictability and diminish the risk of uncertainties relating to the meaning and scope of the contractual

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also A. V. AAKEN, *International Investment Law between Commitment and Flexibility*, at 516.

875 *Id*. Specifically, from an *ex ante* perspective, the contract will encourage the parties at the time of its conclusion to invest in the contractual relationship in order to maximize the anticipated joint benefit. From an *ex post* perspective, the contract will maximize the joint benefits even after the uncertainties have occurred during the performance of the agreement.

876 *See* A. V. AAKEN, *International Investment Law between Commitment and Flexibility*, at 515; S. SHAVELL, *Damage for Breach of Contract*, in *Bell Journal of Economics*, 1980, at 466-476.

877 *Id*.

878 *Id*.

879 *Id*. *See* R. E. SCOTT and P. B. STEPHAN, *The Limits of Leviathan. Contract Theory and the Enforcement of International Law*, Cambridge University Press, 2006, at 77.

provisions (lowering in turn the risk of unpredictable and/or erroneous decisions by adjudicating authorities).[880] However, hard terms also have downsides. Since contracting parties might not be capable of fully and accurately anticipating all uncertainties that could arise at the time of the performance of the contract, a contract containing only hard terms will always turn out to be sub-optimal once the future events occur.[881] For instance, a contract with hard terms may lead to outcomes that are less desirable than those that a party would have agreed to, had it known the uncertainties in advance. Anticipating this, the parties would then want flexibility to adjust the terms of the contract, whenever future circumstances make it no longer profitable (for one or either sides). On the other side, more flexibility leads to the weakening of the credibility of the commitment *ex ante*.[882]

In contracting therefore two things are important. *First*, there should be an attentive analysis of the possible risks and related costs (both the foreseeable and the non-foreseeable ones) that might arise in relation to a contractual relationship. The analysis should be performed taking into account the characteristic and peculiarities of the parties involved. *Second*, the trade-off between the credibility of a commitment *ex ante* and the desire of flexibility *ex post* should be carefully constructed. A balance needs to be found between commitment and flexibility with the following goals: (i) securing a high level of cooperation *ex ante*; (ii) distinguishing between foreseeable and unforeseeable uncertainties (i.e., risks) in light of the specific circumstance of the parties;[883] and (iii) attaching flexibility to the occurrence of unforeseeable circumstances and hard commitments to the unforeseeable ones.

1.2. Economic Contract Theory Applied to BITs

Although contract theory was developed mainly for private contracting, in the last decades it has also been applied to international law,[884] as well as to investment

880 *Id*.

881 *Id*.

882 *Id*.

883 These circumstances would include also an evaluation of the type of parties involved in the transaction and required levels of due diligence.

884 *See* S. SCHROPP, *Trade Policy Flexibility and Enforcement in the WTO. A Law and Economic Analysis*, Cambridge University Press, Cambridge, 2009; and J. DUNOFF and

treaties.[885] Indeed, most of the considerations made above in the previous section may apply to BITs.

First, similar to the contracting parties to a contract, states that are parties to a BIT enter into these agreements to achieve certain goals allegedly beneficial to all parties involved (surplus). Furthermore, the interests of the parties involved (including those of investors, which may be considered third beneficiaries) may diverge later at a given time. Legally speaking, BITs are contracts in favor of third parties insofar as the beneficiaries of the BIT's legal protection are different from one of the contracting party (i.e., the state home to the investor).[886] In this tripartite relationship, it is the interest of the investor and that of the host state (other contracting party) that may (and usually do) become divergent at a later point in time.[887]

Although states enter into BITs to reciprocally promote the flow of investments in each other's markets so as to foster the respective economies, this goal is of particular interest to developing countries. Developing countries sign BITs with the aim to attract FDIs that would provide them with the financial and technical resources necessary to guarantee the progressive full realization of their population's socio-economic rights (and, in turn, their economic and sustainable development).[888] Developed countries instead enter into BITs primarily to guarantee that their investors

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J. P. TRACHTMAN, *Economic Analysis of International Law*, in *Yale Journal of International Law*, 1999.

885 *See* A. V. AAKEN, *International Investment Law between Commitment and Flexibility*, at 519-520.

886 *Id*.

887 Concluding and maintaining treaties require a bargain from which both parties believe they will derive benefits. As leading scholars have mentioned, a BIT between a developed and a developing country is found on the "grand bargain" of the promise of protection of capital in return for the prospect of more capital in the future. J.W. SALACUSE and N. P. SULLIVAN, *Do BITs Really Work? An Evaluation of Bilateral Investment Treaties and their Grand Bargain*, in *Harvard International Law Journal*, 2005, at 67-130.

888 *See* Chapter III above, Section 2.3. *See also* T. H. MORAN et al., *Introduction and Overview*, in *Does Foreign Direct Investment Promote Development?* Theodore H. Moran et al. eds., 2005; J. WILLIAMSON, *What Washington Means by Policy Reform*, in *Latin America Adjustment: How Much has Happened?*, 1990, at 7-8.

(the third beneficiary of the BIT) will safely and securely invest for the longest possible time in the country.[889]

Second, similarly to normal contracts, it is necessary to guarantee in BITs a fair balance between *ex ante* and *ex post* efficiency by carefully anticipating, evaluating and distributing the risks and costs arising from: (i) potential unforeseeable future events that could render the contract extensively burdensome for one or all of the parties involved; (ii) information asymmetries and possible opportunistic behavior by one or all the parties involved (including investors); and (iii) the scope of the investment standard provisions. Failure to carefully consider all these elements may in certain cases lead to situations in which the cost of the BIT's performance may outweigh its value (and/or surplus), at least for the developing country. This may happen, for instance, when the host state promises certain advantages to investors (limiting its regulatory powers), without receiving anything from the investor in terms of fulfilled human rights and/or spillovers and/or sustainable development.[890]

Third, similarly to contracts, as the parties are not able to draft Pareto efficient complete contingent BITs, they attempt to draft credible commitments by: (i) identifying the relevant risks; and (ii) allocating those risks through the use of hard and precise terms.[891]

However, most of old generation BITs might have failed in this aim, as they do not provide an attentive analysis of the possible risks and related costs that may arise from the tripartite relationship, including the economic and financial risks (which as shown above are separate from the political risk). Moreover, most traditional BITs have failed to strike a fair balance between the credibility of a commitment *ex ante* and the desire of flexibility *ex post*, leaving to the arbitral tribunal at the litigation stage the task to strike this balance. Indeed, it would appear that traditional BITs have failed to: (i) secure a high level of cooperation *ex ante* (as discussed above BITs do not seem

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889 *See* J. PAULSSON, *The Power of States to Make Meaningful Promises to Foreigners*, in *Journal of International Dispute Settlement*, 2010, at 341.

890 *See* Chapter III above, Section 2.1.

891 *See* A. V. AAKEN, *International Investment Law between Commitment and Flexibility*, at 519-520.

to attract FDIs *per se*);[892] (ii) strike a clear distinction between foreseeable and unforeseeable risks (as mentioned above, the relevant risk is the significant and unexpected risk) in light of the specific circumstances of the contracting parties involved (i.e., specific historic, political and economic situations);[893] and (iii) attach sufficient flexibility to the occurrence of unforeseeable risks (such as an unforeseeable economic crisis) and hard commitments to foreseeable risks.

These failures may have sometimes led to situations in which the cost of a BIT's performance may have substantially outweighed its value (and/or surplus) for all the parties involved.[894]

1.3. The Human Rights Uncertainties and Related Costs

This section analyzes some of the uncertainties and risks and related human rights costs that traditional BITs may have "missed".

1.3.1. Human Rights Uncertainties and Costs

1.3.1.1. Uncertainties Relating to Future Foreseeable and Unforeseeable Events

BITs do not appear to take into consideration the risk of unforeseeable financial and economic crisis, which may have a devastating impact on the host state and its population. This risk may materialize in certain countries, especially those characterized by unstable economies (such as some countries in Latin America).

The only provisions that come close to considering such risk are the non-precluded measures included in certain BITs. As discussed above, these measures exclude from the BIT's investment protection coverage measures undertaken by the host state "for the maintenance of public order" or for the "protection of the host State's own essential security interest".[895] However, as the Argentinian saga showed, these precluded measures are often hard to apply.

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892 *See* Chapter III above, Section 4.3.

893 *See* Chapter III above, Section 3.3.

894 *See* Chapter IV above, Section 5.1.3.

895 *See* Chapter IV above, Section 2.2.2.

Moreover, BITs do not seem to operate a difference between the diverse elements of the country risks (including the political, the financial, the economic and the human rights obligation risks), as they treat them in the same manner under the *chapeau* of the political risk. However, as mentioned above, the facts underlying those risks are quite different one from the other. The economic risk arises from "*unexpected* changes in the economic context of an investment project (including long-run slowdown of economic growth, a sustained deterioration in the level of GDP per capita, deficit in current account of the balance of payments, persistent depreciation of the exchange rate, high inflation rates, significant increase in the interest rates, currency fluctuations, diminished ability to borrow abroad, infrastructure deficiencies and bureaucratic delays).[896] The political risk, arises from "*unexpected* actions of national governments which may interfere with or prevent business transactions, or change the terms of agreements, or cause the confiscation of wholly or partially owned business property.[897] Finally, the human rights obligation risk arises from presumably *foreseeable* actions that the host state will have to undertake (in certain areas) to guarantee, at the very least, the minimum essential levels of socio-economic rights.[898] The more foreseeable nature of this last risk arises from the fact that the host states in certain cases have the obligation (more than a right) to respect, protect and fulfill human rights.

Notwithstanding the clear differences, most BITs treat all the above-mentioned risks in the same manner, by allowing investors to start arbitration proceedings whenever the host state enacts measures aimed at facing the economic and human rights obligation risks.

Finally, BITs do not seem to operate a clear distinction between foreseeable and non-foreseeable risks, thus failing to attach flexibility to the occurrence of

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896 *See* C. WHITE and MIAO FAN, *Risk and Foreign Direct Investment*, 2006, at 158-161.

897 *See also* Chapter III, Section 3.3.1.

Political risk is particularly high in host countries characterized by unstable political and financial environment, where the rule of law is only weakly established and domestic courts can often not be relied upon to enforce whatever contract the foreign investor might have with the host State. *See* S. KOBRIN, *Political Risk: A Review and Reconsideration*, in *Journal of International Business Studies*, 1979, at 67.

898 *See* Chapter III above, Section 3.3.5.

unforeseeable risks and hard commitments to the occurrence of foreseeable risks. As noted above, "risk" is typically defined as "the probability that an event will happen, where the event will have adverse consequences (costs) for the relevant party".[899] As further noted above, only a *significant* and *unexpected* change may be considered to be a source of relevant risk.[900] In most developing countries some of the element of the country risk are quite easily foreseeable. For instance, in a country like Argentina that has been entering and exiting circularly (almost every decade) a financial crisis, the risk that this might occur again in the future is quite foreseeable (at least for a diligent investor). Equally foreseeable is the human rights obligation risk, i.e., the risk that the host state will change its legislation to guarantee the progressive full realization of the population's socio-economic rights and/or the minimum essential levels of these rights, at least in times of economic crisis.[901]

Accordingly, BITs should attach hard terms to these events by considering them as the "normal alea" of the investment, to import a term from the relevant provision of the Italian civil Code.[902]

1.3.1.2. Uncertainties Relating to Asymmetries in the Information

BITs do not seem to consider the uncertainties regarding the future actions of all parties involved in the transaction arising from asymmetric information. The relevant scenarios for the host states and the investors will be treated separately.

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899 R. A. POSNER, *Behavioral Finance Before Kahneman*, in *Loyola University Chicago Law Journal*, 2003, at 1341, 1345-46.

900 While expected changes can never be a source of risk, such a change, although contextual can increase the vulnerability to particular kinds of risk, while not itself constituting a risk-generating event. *See* C. WHITE and MIAO FAN, *Risk and Foreign Direct Investment*, 2006, at 158-161.

901 *See* Chapter II above, Section 2.3.2.

902 The relevant provision is Article 1467 of the Italian Civil Code ("nei contratti a esecuzione continuata o periodica, ovvero a esecuzione differita, se la prestazione di una delle parti è divenuta eccessivamente onerosa per il verificarsi di avvenimenti straordinari e imprevedibili, la parte che deve tale prestazione può domandare la risoluzione del contratto, con gli effetti stabiliti dall'articolo 1458. *La risoluzione non può essere domandata se la sopravvenuta onerosità rientra nell'alea normale del contratto*). This rule provides the necessary flexible device in relation to long-terms contracts.

1.3.1.2.1. The Uncertainties related to the Political Risk

This uncertainty/risk has been discussed under chapter III above, as political risk or time-inconsistency problem.[903] The narrative is that, once the investor has invested, the host state might opportunistically renege its commitment and expropriate the investment. As noted above, from an economic prospective: (i) the political risk will not materialize (and the host state will not expropriate) if the investment yields a higher pay-off to the host state when in the hands of the MNC; and (ii) the political risk may materialize (and the host state will expropriate), if the investment yields a higher pay-off to the host state when in its hands.[904] To mitigate the political risk, BITs may sometimes impose on host states a high cost for non-compliance with their commitments.

The problem with this mechanism is that BITs do not take into account the human rights obligation risks, namely that the host state may need to expropriate to guarantee the progressive full realization of socio-economic rights or essential levels of socio-economic rights or to put an end to an unlawful behavior of an investor. In all these scenarios, the investment might yield a higher pay-off to the host state when in its hands. The mitigation risk mechanism of the BIT however operates also against that risk, by requiring the host state to refrain from the exercise of legitimate regulatory actions. This might expose the host state to certain human rights costs (including costs in terms of failure to fulfil human rights as well as litigation costs).[905]

1.3.1.2.2. The Risk of the Reverse-Time Inconsistency Problem

BITs do not take into account the uncertainties deriving from asymmetric information in possession of the beneficiary of the BIT (e.g., reverse time inconsistency problem). Specifically, BITs grant protection to investors without taking into consideration that a diligent and informed investor will most likely invest in a country whenever the chances of profit (either on a long or short-term) are high and regardless of the existence of investment incentives or political risk. This is particularly true for

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903 *See* Chapter III above, Sections 3.3.1, and 3.3.4.

904 *Id*.

905 *See* Chapter V, Section 1.4, below.

certain types of FDIs, such as resource seeking FDIs and short-term profit seeking FDIs.

First, as noted above, the investors' decision to invest is framed as a cost-benefit analysis (which also take into account transaction costs).[906] Accordingly, profitability should at least be a theoretical possibility. In the interest of profit and depending also on the type of investor (resource seeker, market seeker and efficiency seeker FDI), the decision to invest is determined in part by the presence of natural resources and/or specific advantages (access to market) and in part by the potential costs associated with investing in that country (OLI paradigm).[907] As noted above, host states may attempt to influence the investment decision by rendering the location more attractive through: (i) investment incentives (normally regulatory measures that lower the cost of investing in a given country, generally to the detriment of human rights standards); (ii) agreements particularly advantageous to the investor (such as very favorable concession agreements, which often are not sufficiently attentive to human rights standards); and (iii) the guarantee of almost unlimited legal protection (to the detriment of regulatory powers that can be necessary to fulfil human rights).[908] However, none of these tools is *per se* capable of attracting FDIs. Indeed, the effectiveness of a measure will depend on what is being offered, to what type of FDIs (resource-seeking FDI, market-seeking FDIs, or efficiency-seeking FDIs), and by what location.[909]

As a matter of fact, these types of incentives cannot fully compensate for the absence of certain advantages, such as the existence of natural resources, existence of a market, availability of adequate human resources, working and effective public institution and judiciary.[910] For instance, some investments do not seem to be readily influenced by investment incentives when making investment decisions. The same is true for BITs, which according to the UNCTAD are unlikely *per se* to attract significant

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906 *See* Chapter III above, Section 3.1.

907 *Id*.

908 *See* Chapter III above, Section 4.

909 *Id*.

910 *Id*.

FDI inflows.[911] Most investors only get interested in the existence of a BIT when a conflict arises (i.e., the moment when the BIT is no longer beneficial to all parties involved, whose interests become divergent), and not also at the investment decision phase (i.e., the stage relevant for the attraction of FDIs).[912]

Some FDIs however seem to be less attracted by investment incentives than others. This is the case of natural seeking FDIs, which will always invest in the country at any price. These are also the FDIs that are more inclined to human rights abuses and breach of environmental standards, also due to the type of activity involved.

Second, BITs do not consider the so-called short-term profit seeking FDIs (and ore speculative investors). As noted above, these are inventors who know and/or foresee that one of the elements of the country risk will most likely materialize, but decide to invest regardless of this risk because they estimate that the profit up to the materialization of the risk would be high enough to make the FDI profitable.[913] This was the example of most FDIs to Argentina in the late 90s, as investors were aware that the country risk would materialize or invested right before the materialization of such risk.[914]

Third, the risk that the investor who invests in the country (attracted by either long-short or short-term profit) structures the investment in a given manner solely for the purposes of benefiting (or better said abusing) from legal protection granted by the BITs.

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911 *See* UNCTAD, *The Role of International Investment Agreements in Attracting Foreign Direct Investment to Developing Countries*, 2009, available at: <https://unctad.org/en/Docs/diaeia20095_en.pdf>.

912 *See* L. POULSEN, *The Importance of BITs for Foreign Direct Investment and Political Risk Insurance: Revisiting the Evidence*, in *Yearbook on International Investment Law & Policy*, 2009/2010, Oxford University Press, available at: <http://discovery.ucl.ac.uk/1471858/1/Poulsen_bits%20pri%20yearbook.pdf, at 5>.

913 *See* P. VANHAM, *When a Country is Facing Political and Human Rights Issues, Should Businesses Leave or Stay?*, December 2018 available at: <https://hbr.org/2018/12/when-a-country-is-facing-political-and-human-rights-issues-should-businesses-leave-or-stay>.

914 *See* Chapter III above, Section 4.3.

The ultimate risk for all these scenarios is that the investment does not "reflect[] the objective of establishing a lasting interest by a resident enterprise in one economy ('direct investor') in an enterprise ('direct investment enterprise') that is resident in an economy other than that of the direct investor"[915] with the aim to serve domestic markets.[916] A definition that is related to FDIs which effectively promote the human rights and economic development of the host State, and are the primary reason why developing countries enter into BITs.

1.3.1.3. The Uncertainties Relating the Vague Scope of BITs' Provisions

The extremely broad and vague scope of BITs' provisions might lead to the risk of: (i) unpredictability of the law; (ii) injustice; and (iii) opportunistic behaviors at the litigation stage.

First, the extremely broad and vague scope of BITs' provisions may lead to the uncertainty and unpredictability of the law.[917] Certainty and predictability of the law help reducing transaction costs by giving clear and therefore trusty and credible commitments/signals to all interested parties, including host states and investors.[918] The lack of clarity and predictability may render it extremely difficult for host states to assess the likelihood that their conduct might conflict with certain treaty standards.[919] By the same token, the lack of clarity and predictability may send unclear signal to investor as to the likelihood that their investment may be lost after its establishment in the host state.[920]

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915 OECD Benchmark Definition of Foreign Direct Investment, Fourth Edition, 2008, para. 117.

916 *See* Chapter III above, Section I.

917 REINER and SCHREUER, Human Rights in International Investment Arbitration, in DUPUY et al (ed.), *Human Rights in International Investment Law and Arbitration*, New York, 2010.

918 *Id.*

919 *See* Chapter III above, Section 4.3.1.3.

920 *See* R. DOLZER and M. STEVENS, *Bilateral Investment Treaties*, Martinus Nijhoff Publishers, 1995, at 99. See also, Columbia Center on Sustainable Investment, United Nations Human Rights Special Procedures, *Working Group on the Issue of Human Rights and Transnational Corporations and other Business Enterprises*, September 2018, at 13, available at:

Second, the extremely broad and vague scope of BITs' provisions may give rise to unjust decisions. The decision of the arbitral tribunal depends on several variables, including the capability of the parties to successfully prove their cases, the clarity of the underlying legal rules as well as the attitude of the arbitral tribunal towards the matters involved. The interplay of these variables may sometimes lead to unjust decisions (i.e.., the investor is awarded damages even if there was no defective behavior by the host state).[921]

Third, the extremely broad and vague scope of BITs' provisions may also lead to opportunistic behaviors, including the opportunistic use of the BIT's settlement mechanism by investors. In this respect, it has been noted that foreign investors may sometimes resort to arbitration in order to inhibit or discourage a state from legitimately exercising its regulatory powers to pursue a legitimate goal (so-called chilling effect).[922] The deterrent effect may derive from the risk of the high costs a host state may be called to bear should it face arbitration proceedings and, eventually, an unfavorable award.[923]

Investors may be particularly keen to an opportunistic use of the settlement mechanism whenever the costs they may face to defend a claim (e.g., legal and arbitration costs) appear low or considerably lower than the expected value of the potential compensation award. In this scenario the investor might be tempted to

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<https://www.ohchr.org/Documents/Issues/Business/CCSI_UNWGBHR_InternationalInvestmentRegime.pdf>.

921 *See* J. S. GOLDSTEIN, *Bringing BITs Back from the Brink*, in *Denver Journal of International Law and Policy*, 2017, at 379.

922 Human Rights Council, Working Group on the Right to Development, Nineteenth Session, *International Investment Agreements and Industrialization: Realizing the Right to Development and the Sustainable Development Goals*, April 23-27, 2018, at 15, available at: <https://www.ohchr.org/Documents/Issues/Development/Session19/A_HRC_WG.2_19_CRP.5.pdf>.

923 *Id*. L. JOHSON, L. SACHS, B. GÜVEN and J. COLEMAN, *Costs and Benefits of Investment Treaties. Practical Considerations for States*. Policy Paper, March 2018, at 14. *See also* J. BONNITCHA, *Substantive Protection under Investment Treaties*, at 127, note 710; K. TIENHARRA, *Regulatory Chill and the Threat of Arbitration: A View from Political Science* in *Evolution in Investment Treaty Law and Arbitration,* Cambridge University Press, 2011, at 606 and 615.

initiate arbitration proceedings against a host state even when there was no defective behavior by the host state in the first place.[924]

1.4. Human Rights Costs

All the above-mentioned uncertainties and risks may give rise to certain costs that may have a potential negative impact on the protection of the human rights of the host state's population.[925]

Some of these costs will be analyzed in the following sections.

1.4.1. Human Rights Costs for the Host State

The host state's costs that may have a potential negative impact on the protection of the human rights of the host state's population may include the: (i) human rights cost of arbitration proceedings; and (ii) cost related to the reduced human rights space.

Each cost will be succinctly analyzed in the following sub-sections.

1.4.1.1. Human Rights Costs of Arbitration Proceedings

The human rights costs of arbitration proceedings may include the costs arising from: (i) legal costs; and (ii) liability costs.

First, defense costs may impact on the host state's resources necessary to fulfill its human rights obligations. The legal costs necessary to defend a BIT claim may sometimes be significant.[926] These costs include both the costs of the legal fees and those of the arbitral tribunal. According to certain studies, defense costs may reach

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924 *Id.*, 90.

925 United Nations Human Rights, *Realizing Human Rights through Government Budgets*, 2017, at 7. Most of these costs fall on host states and their budget. The host state's budget is the government's most important economic policy document. A carefully developed, implemented and evaluated budget is central to the realization of most socio-economic human rights. For instance, decent sanitation as well as access to water and adequate standard of living conditions are necessary if people are to live in dignity and enjoy their right to health and the right to adequate standard of living conditions (as guaranteed under the Socio-Economic Covenant).

926 *See* L. JOHSON, L. SACHS, B. GÜVEN and J. COLEMAN, *Costs and Benefits of Investment Treaties*, at 11, note 956.

on average USD 5 million per disputing party.[927] Although these costs are sometimes exaggerated by the literature, in some cases, they have vastly exceeded the average threshold.[928] The amount necessary for the host state to face these legal costs maybe be diverted from the state's budgetary resources necessary to guarantee the population's socio-economic rights.[929]

Second, liability costs may also impact on the host state's resources necessary to fulfill its human rights obligations. In certain cases, liability costs may be particularly high. Based on the publicly available information, the average amount claimed by investors as of the end of 2016 was USD 1.4 billion, and the average amount awarded was USD 545 million, plus interest. Although most awards are under USD 100 million, in several instances awards have been rendered for multiple billions of dollars (including the Yukos case where the award reached 50 billion USD).[930] Similarly to the

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927 *See also* M. HODGSON, *Costs in Investment Treaty Arbitration: The Case for Reform*, in J. E. KALICKI and A. JOUBIN-BRET (eds.), *Reshaping the Investor-State Dispute Settlement* System, Brill, 2014, at 748, 756. *See also* OECD, Investor-State Dispute Settlement, 2012, available at: <http://www.oecd.org/investment/internationalinvestmentagreements/50291642.pdf, at 18>.

928 *See Hulley Enterprises Limited (Cyprus) v. The Russian Federation*, UNCITRAL, PCA Case No AA 226, Final Award dated July 18, 2014; *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, UNCITRAL, PCA Case No AA 227, Final Award dated July 18, 2014); *Veteran Petroleum Limited (Cyprus) v. The Russian Federation*, UNCITRAL, PCA Case No AA 228, Final Award dated July 18, 2014.

929 *See* M. KRAJEWSKI, *Ensuring the Primacy of Human Rights in Trade and Investment Policies: Model Clauses for a UN Treaty on Transnational Corporations, other Businesses and Human Rights*, 2017.

930 Several studies have shown that in recent years award amounts have been rising due to several reasons. First, arbitral tribunals are increasingly willing to accept investor's income-based claims which capture also "future profits or returns", i.e., not only the sunk costs but also what the investor was expecting to receive from the investment. Second, arbitral tribunals have been increasingly willing to award compound interests, a practice which can significantly increase the amount the host state is ordered to pay. According to that same publicly available information, in cases decided before 2000, tribunals have awarded compound interests in roughly 40% of the cases. In cases decided between 2011 and 2015 instead, that number had risen to 86%. *See* UNCTAD, Investor-State Dispute Settlement: Review of Developments in 2016, available at: <http://unctad.org/en/PublicationsLibrary/diaepcb2017d1_en.pdf>; and PricewaterhouseCoopers, *International Arbitration Damages Research*, 2015 Arbitral Awards in Focus, at 3, available at: <https://www.pwc.com/sg/en/publications/assets/internationalarbitation- damages-research-2015.pdf>.

defense costs, liability costs may be diverted from the host state's budgetary resources necessary to guarantee the fulfilment of the host state's human rights obligations.[931]

1.4.1.2. Costs Related to the Reduced Human Rights Policy Space

The possibility for investors to start investment arbitration proceedings against the host state may give rise to a "chilling effect", consisting in the inhibition or discouragement of the legitimate exercise of a right by the threat of legal sanction.[932] Regulatory chill may also result in several costs for the host state.

First, regulatory chill it may impose a constrain on the exercise of the host state's regulatory powers that may be necessary to enact, implement, revise, refine, and enforce all measures deemed appropriate by the same (including, legislative and administrative measures) to fulfil its human rights obligations.[933] A constrain on the

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931 With this respect, certain studies have compared the quantum of award compensation to the annual public expenditure of certain developing countries, in critical social sectors such as health and education. *See* M. KRAJEWSKI, *Ensuring the Primacy of Human Rights in Trade and Investment Policies: Model Clauses for a UN Treaty on Transnational Corporations, other Businesses and Human Rights*, 2017.

932 *See* J. BONNITCHA, *Substantive Protection under Investment Treaties*, note 710 (citing to K. TIENHARRA, *Regulatory Chill and the Threat of Arbitration: A View from Political Science*, in *Evolution in Investment Treaty Law and* Arbitration, Cambridge University Press, 201,at 606, 615; J G. BROWN, *International Investment Agreements: Regulatory Chill in the Face of Litigious Heat?*, in *Western Journal of Legal Studies*, 2013; C. CÔTÉ, *A Chilling Effect? The Impact of International Investment Agreements on National Regulatory Autonomy in the Areas of Health, Safety and the Environment.*, PhD thesis, The London School of Economics and Political Science (LSE), 2014. *See also* UNGA, *Report of The Special Rapporteur of The Human Rights Council on The Rights of Indigenous Peoples on the Impact of International Investment and Free Trade on the Human Rights of Indigenous Peoples* dated August 7, 2015, A/70/301, para. 46. For example, in Guatemala internal government documents obtained through the country's Freedom of Information Act show how the risk of one of these cases weighed heavily on one state's decision not to challenge a controversial gold mine, despite protests from its citizens and a recommendation from the Inter-American Commission on Human Rights to this effect. *See* L. GOLD, *The impact on and opportunities in relation to the Transatlantic, Trade and Investment Partnership (TTIP) - Presentation to the Joint Committee on Jobs, Enterprise and Innovation*, 2016, at 5, available at: <https://www.trocaire.org/sites/trocaire/files/resources/policy/trocaire-attacsubmission-to-jobs-committee-jan-2016.pdf>.

933 Due to the fear of high costs, states may be discouraged in certain situations from adopting and/or enforcing:

host state's regulatory powers may lead to unfulfilled socio-economic rights and forgone economic growth which *per se* may amount to a cost (i.e., the cost of unfulfilled human rights). A cost that although difficult to calculate should be taken into account.

Second, the chilling effect may induce host states to breach their obligations under human rights law, including the Socio-Economic Covenant. States that limit their regulatory powers to meet their investment obligations do not relinquish their international obligations under human rights treaties and remain, therefore, liable for any breach that could result therein.[934] Accordingly, if a state, by honoring an investment obligation, breaches a human rights obligation, it may be held internationally liable for that breach (and it may be called to compensate the resulting damages).[935] The costs relating to the damages arising from the breach by a state of a human rights obligation are difficult to be assessed and calculated mainly due to the lack of an efficient settlement mechanism.[936]

Third, the chilling effect may also lead host states to face reputational damages associated with being labeled as human rights abusers. This might also impact on the FDIs flows to their markets, in particular certain FDIs.

1.5. The Costs of the Investor of Devaluating Human Rights

- Laws aimed at guaranteeing, at the very least, the core minimum essential levels of socio-economic rights (including the right to water, work, adequate standard of living conditions, and health);
- Corrective measures to previous legislation that might be not compliant with human rights standards;
- Criminal or administrative sanctions and penalties, as appropriate, where business activities result in abuses of the Socio-Economic Covenant or where a *failure to act with due diligence* to mitigate risks allows such infringements to occur; and
- Regulatory measures aimed at revoking business licenses and subsidies, if and to the extent necessary.

934 *See* Chapter IV, Section 4.3.1.

935 ECommHR, Decision No. 235/56 dated June 10, 1958, at 300.

936 Despite the high number of human rights treaties and instruments, the victims of human rights abuses are often unable to obtain a redress due to the lack of effective enforcement mechanisms at international level.

Investors are also increasingly being exposed to human rights costs, including costs arising from: (i) human rights litigation; (ii) the inefficiency and unpredictability of the law; and (iii) arbitration costs.

Each cost will be succinctly analyzed in the following sub-sections.

1.5.1. The Human Rights Litigation Cost

Certain empirical studies have shown that MNCs are increasingly facing a risk of human rights lawsuits which mat expose them to high litigation costs.[937] Although the available data refer mainly to litigation rather than arbitration, it seems reasonable to assume (also in light of the recent development) that investors will increasingly be faced with human rights-related counterclaims and related costs.[938]

1.5.2. The Financial Costs

MNCs violating human rights may also face costs in terms of access to certain markets, areas, finance opportunities as well as reputation. In the exercise of their regulatory powers, host states are increasing developing mechanisms banning MNCs that do not respect certain human rights standards from access to certain markets or

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937 For instance, a sample of 151 cases profiled between 1994 and 2018 shows, among others that: (i) more than half of the claims for human rights violations against MNCs were brought starting from 2007 onwards; (ii) the number of cases brought between 1994 and 2003 show an increase of 10.6 % compared to the previous period between 1994 and 1998; (iii) the number of proceedings filed between 2004 and 2008 rose by 5.95% compared to the previous five years (i.e., 1999-2003); (iv) the number of lawsuits filed between 2009 and 2013 increased by 3.97% compared to the period between 2004 and 2008; and (v) looking onward, 35 out of the 151 proceedings reviewed (that is about 23.17%) were brought between 2014 and 2018. *See*, e.g., J. ZERK, *Corporate Liability for Gross Human Rights Abuses Towards a Fairer and More Effective System of Domestic Law Remedies*, A Report Prepared for the OHCHR, 2014, at 31; J. SCHREMPF, STIRLING and F. WETTSTEIN, *Beyond Guilty Verdicts: Human Rights Litigation and its Impact on Corporations Human Rights Policies*, in *Journal of Business Ethics*, 2017, at 545-562; E. SCHRAGE, *Emerging Threat: Human Rights Claims, Memorandum*, in *Harvard Business*, 2003, available at: <https://hbr.org/2003/08/emerging-threat-human-rights-claims>. *See also* DR. B. BAĞLAYAN, I. LANDAU, M. MCVEY and K. WODAJO, *Good Business*, at 24, note 356 available at: <http://corporatejustice.org/2018_good-business-report.pdf>.

938 *See* S. STEININGER, *What's Human Rights Got to Do with it? An Empirical Analysis of Human Rights References in Investment Arbitration*, in *Leiden Journal of International Law*, 2018, at 33–58. See also *See Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26, Award dated December 8, 2016, para. 1159.

areas.[939] For instance, the European Union has passed several directives interdicting companies that do not respect certain human rights standard from participating to procurement opportunities.[940]

Moreover, MNCs that are involved (or may potentially be involved) in human rights-related litigation may face certain difficulties in accessing financial instruments and guarantees. Indeed, the potential risk of being a judgment debtor in a human rights-related claim may be seen negatively by credit agencies.[941]

1.5.3. The Reputational Cost

A MNC's overall reputation is a function of its goodwill among stakeholders such as consumers, investors, employees, regulators, creditors, and the community in which the MNC operates. According to certain studies, a significant part of what makes a company valuable depends on its reputation.[942] Litigation (especially human rights litigation) may significantly damage the MNC's reputation. The negative publicity that accompanies a lawsuit can damage a corporation's reputation independent of whether it wins, loses, or settles.[943]

2. Rendering BITs More Efficient by Incorporating Human Rights – the Pareto Efficient BIT

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939 *See* D. HANSOM, *Mandatory Exclusions: A New Tool To Protect Human Rights In EU Public Procurement?* in *International Learning Lab on Public Procurement and Human Rights Blog*, 2016, available at http://www.hrprocurementlab.org/blog/mandatory-exclusions-a-new-tool-toprotect- human-rights-in-eu-public-procurement/.

940 For instance, Article 57 of the EU Directive 2014/24/EU on Public Procurement, lists various grounds for exclusion of bidders from public procurement. One of these includes the conviction for having uses child labor or other forms of human trafficking. The exclusion extends beyond the tendering phase and is reinforced by a requirement to terminate contracts awarded to companies which are subsequently convicted for the same offenses. *See* O. M. ORTEGA, R. STUMBERG and M. ANDRECKA, *Public Procurement and Human Rights: A Survey of Twenty Jurisdictions*, in C. METHVEN O'BRIE et all (ed.), *Public Procurement and Human Rights: A Survey of Twenty Jurisdictions*, 2016, at 53.

941 *See* DR. B. BAĞLAYAN, I. LANDAU, M. MCVEY and K. WODAJO, *Good Business*, at 51.

942 In the past thirty years the percentage of companies' value emanating from tangible assets has declined from 90% to 25%, while intangible assets like reputation account for 40-60% of corporations' market capitalization.

943 *Id.*, at 52. On top of this, damage to reputation is not just a onetime harm; its effect lives across a longer time horizon.

As shown above breaching human rights may be costly for both states and investors. Noncompliance with human rights standard can hurt the economic bottom line of both MNCs as well as the economic development of host states. Accordingly, human rights considerations (and related costs) are starting to be seriously taken into account by: (i) host states when enacting measures aimed at attracting FDIs (including, investment incentives, investment contracts and BITs); and (ii) investors in their cost benefit analysis relating to the decision whether to invest.

With specific regard to BITs (which are the focus on the next section), several adjustments to BITs' content may be used to impact on the above-mentioned costs. More specifically, BITs may include clauses that: (i) guarantee protection only to FDIs that meet certain standards or requirements (*e.g.*, contributing to the economic development of the host State and complying with human rights standards); (ii) preserve the ability of host states to exercise their regulatory powers to pursue human rights-related goals or impose obligations to this effect (e.g., clauses that restate human rights obligations and right to regulate clauses); and (iii) include a human right element in the dispute settlement mechanism.

The relevant treaty language may be included either in the preamble or in the body text of the agreement. Moreover, the clauses concerned may directly identify the extent and scope of the relevant human rights obligation or make reference to existing treaties (of a binding or non-binding nature).

A BIT that includes all of these clauses may be considered a Pareto efficient BIT.

These aspects are discussed in the following subparagraphs.

2.1. Limiting Protection to FDIs that Meet Certain Requirements

FDIs play a key role in the promotion of human rights and economic development.[944] However, these positive impact does not occur automatically (also because the commercial interests of MNCs do not coincide with the state's development goals). BIT contracting parties may choose to guarantee protection only

944 *See* Chapter III, Section 2.1.

to those FDIs that meet certain standards or requirements. Specifically, BITs may require that the investment: (i) contributes to the economic development of the host state (and, as a result, to the progressive full realization of its population's human rights); and (ii) complies with certain standards, including human rights, both prior and after the establishment of the investment.

These clauses may help to better identify and delimit the scope of BITs' protection mechanism, insofar as they may provide guidelines to: (i) the host states' government as to the types of foreign investments that may contribute to their economic development and, therefore, are worthy of being allowed in their jurisdictions; (ii) investors as to the requirement they should meet both prior and after the establishment of their investment; and (iii) arbitral tribunals when called to decide certain issues at the dispute stage, including whether they have jurisdiction *ratione personae* over investor's claims.

This would, in turn, may help eliminating some of the risks and costs mentioned above.

2.1.1. Contribution of the FDI to the Economic Development of the Host State

There are different possible ways to require that FDIs contribute to the economic development of the host state, with different degrees of binding force.

Each of which will be analyzed in the following subsections.

2.1.1.1. Contribution to the Economic Development in the Preamble

First, BIT may include in the preamble language requiring that the FDI contributes to the economic development of the host state. In principle, the preamble language does not add any substantive obligation beyond and above the ones provided by the actual text of the treaty.[945] However, it may help to identify the general tone and purpose of the treaty.[946] For instance, in order to underscore the relevance of the

945 TUDOR, *The International Law of Foreign Investment*, New York, 2008, p. 28.

946 *Id*.

aim of promoting the progressive full realization of human rights, the preamble may refer to sustainable economic development (which is directly related to that purpose).

Similar language was included in the preamble of the Netherlands Model BIT, which refers to the states' intent to create "conditions with a view to attract and promote responsible foreign investment of the Contracting Parties in their respective territories that contribute to sustainable economic development". Similar language was also included in the three recently negotiated Argentina BITs, namely the Argentina-Japan BIT,[947] the Argentina-United Arab Emirates BIT,[948] and the Argentina-Qatar BIT.[949]

2.1.1.2. The Definition of Investment and the Salini Test

The BIT may limit protection to investments that contribute to the economic development of the host state. The definition of investment is essential as it determines the type of capital flows covered by the legal protection.[950] Several approaches appear to have been followed so far in treaty practice to define the notion of investment, including the following: (i) a general definition of investment ("every

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947 *See* Agreement between the Argentine Republic and Japan for the Promotion and Protection of Investment ("Argentina-Japan BIT") dated December 1, 2018, still not into force, available at: <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5799/download>. Specifically, the preamble refers to the "aim of encouraging sustainable development of the Contracting Parties".

948 *See* Agreement for the Reciprocal Promotion and Protection of Investments between the Argentine Republic and the United Arab Emirates Argentina ("Argentina-United Arab Emirates BIT") dated April 16, 2018, still not into force, available at: <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5761/download>. Specifically, the preamble refers to the "aim of encouraging the sustainable development of the Parties and promoting and protecting investments made by investors of each Party in the territory of the other Party".

949 *See* The Reciprocal Promotion and Protection of Investments between the Argentine Republic and the State of Qatar ("Argentina-Qatar BIT"), November 6, 2016, still not into force, available at: <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5383/download>. Specifically, the preamble refers to the need of "[e]ncouraging the sustainable development of the Contracting Parties".

950 *See* S. SCHACHERER and R. T. HOFFMANN, *International Investment Law and Sustainable Development*, in *Research Handbook on Foreign Direct Investment*, at 570. *See also* SADC Model Bilateral Investment Treaty Template with Commentary, 2012, at 12 available at: <https://www.iisd.org/itn/wp-content/uploads/2012/10/sadc-model-bit-template-final.pdf>.

kind of asset owned or controlled directly or indirectly by an investor of the other contracting party"), followed by a non-exhaustive list of assets falling within this definition; (ii) an exhaustive list of assets that qualify as an investment, followed by a specific list of exclusions in relation to portfolio investments and other intangible rights (such as intellectual property rights); (iii) a special definition of investment covering exclusively the establishment or acquisition of an enterprise (so-called enterprise-based approach);[951] and (iv) a definition of investment expressly requiring that it contributes to the economic development of the host state (so-called Salini test).[952] These definition is in line with the investments that have long-term horizons (and are not made for speculative purposes) and could promote the progressive full realization of human rights by serving domestic and international markets.[953]

Thus, the only approach that specifically requires a contribution to the economic development of the host State is the last one.[954] However, the Salini test has been criticized for the difficulties raised by the need to measure or, in any case, verify the actual contribution of an investment to the host State's economic development.[955] This is probably the reason why the Netherlands Model BIT did not adopt such an approach, but instead provided for a broad definition of investment, followed by an open list of assets that fall within such definition.[956]

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951 *Id*.

952 *Id*. *See also* OECD, *Benchmark Definition of Foreign Direct Investment*, Fourth Edition, 2008, para 117. See SCHACHERER and HOFFMANN, "*International Investment Law and Sustainable Development*", in KRAJEWSKI and HOFFMANN (ed.), *Research Handbook of Foreign Direct Investment*, Cheltenham, 2019, at 570.

953 *See* Chapter III above, Section I.

954 As noted by certain scholars, apart from the Salini requirement, only the second and the third of the above-mentioned approaches allow host states to better target FDIs that are beneficial for their economic and sustainable development. See SCHACHERER and HOFFMANN, "*International Investment Law and Sustainable Development*", in KRAJEWSKI and HOFFMANN (ed.), *Research Handbook of Foreign Direct Investment*, Cheltenham, 2019, at 571.

955 *See*, e.g., *Pantechniki S.A. Contractors & Engineers (Greece) v. The Republic of Albania*, ICSID Case No. ARB/07/21, Award of 30 July 2009, para 36. See also *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Jurisdiction of 27 September 2012, paras 211-237.

956 See Art. 1(a), Netherlands Model BIT. The Salini test (or version of the same) has been incorporated in several of the most recent Model BITs, including the Indian Model

Among the newly negotiated Argentina BITs, the Argentina-United Arab Emirates BIT is the only one that incorporates the Salini test.[957]

2.1.1.3. Express Performance Requirements

In alternative to the Salini test, the BIT may impose to investors specific performance requirements. Performance requirements are regulatory conditions that a host state may impose on investors and "requiring them to meet certain specified goals with respect to the establishment or operation of their investment".[958] Performance requirements may vary and can be categorized according to several criteria. A first distinction is between mandatory and non-mandatory requirements. Here it should be noted that performance requirements are legally binding in nature, even when they are not mandatory (in which case, the investor can only access the advantages offered if it complies with the performance requirement). A second distinction is between performance requirements imposed before and after the investment is made. A third distinction is between performance requirements that are provided by national legislation and/or investment contracts between the state and an investor.[959]

BIT (*see* Indian Model BIT (2015), Article 1.2(1)) as well as the Pan-African Investment Code ("PAIC"). Specifically, under Article 4.4. of the PAIC "in order to qualify as an investment under […] Code, the investment must have the following characteristics […] the substantial business activity according to Paragraph 1, commitment of capital or other resources, the exception of gain or profit, the assumption of risk, and a *significant contribution to the host State's economic development*."

957 Specifically, pursuant to Article 1 of the Argentina-United Arab Emirates BIT, the investment must have "characteristics such as: assumption of business risk, introduction of capital or other resources into the territory of the host Party and contribution to the economic development of that Party". Several other BITs negotiated in the 2019 provide for an articulated definition of investment which includes references to the Salini test (see, e.g., the 2019 Australia-Hong Kong Investment Agreement as well as the Australia-Indonesia Comprehensive Economic Partnership Agreement).

958 *See* UNCTAD, *Foreign Direct Investment and Performance Requirements: New Evidence from Selected Countries*, 2003, at 3. *See also* S. H. NIKIÈMA, *Performance Requirements in Investment Treaties*, Best Practices Series, December 2014, available at: <https://www.iisd.org/sites/default/files/publications/best-practices-performance-requirements-investment-treaties-en.pdf>.

959 For instance, the BIT may impose the following performance requirements.

First, they may impose on investment to export certain percentages of the total sales or total production. This requirement might help increasing export capacity in cases

where national trade deficits may cause reductions in imports. This overall have the effect of limiting the economic risk.

Second, the BIT may provide for performance requirements that impose on investors to enter into joint venture arrangements with domestic business partners or that require a minimum level of domestic equity participation so that foreign investors provide domestic investors a minimum percentage of their enterprise. This requirement is intended to ensure that certain sectors that are key to local economies do not fall under foreign control (which is one of the main concerns of host States). Moreover, these requirements might help boosting the growth and sustainability of domestic businesses toward building a diversified and dynamic domestic economy, while also contributing to the creation of decent work, the sharing of production and product knowledge, skills, technology and know-how spillover to local companies.

Third, the BIT may require a certain amount of inputs (e.g., products and services) to be locally sourced (also known as local content requirement). These requirements may consist of measures directly imposing a percentage or quota to be achieved or requiring the priority use of local goods and services over foreign goods and services of equal quality. These requirements are intended to create economic linkages upstream and downstream of the investment activity in order to drive the creation and diversification of related economic activities. They are particularly crucial in the extractive industries sector, which is often an economic enclave in host countries.

Fourth, the BIT may provide for performance requirements that impose on investors the requirement to achieve specific levels of local jobs. These measures may also take the form of a quota to be filled or to be subject to the condition that jobs be made available in equal quality and quantity over the territory and in compliance with certain human rights standards. They may relate to both skilled and unskilled posts, and aim to increase and diversify the number of jobs created by the investments and contribute to reduce unemployment.

Fifth, when it comes to public procurement contracts for the management and supply of public services, the BIT may impose performance requirements that guarantee that these public goods are rendered so as to guarantee the fulfilment of the minimum essential levels of socio-economic rights should be imposed (i.e., the right to water, health, and adequate standard of living conditions).

Sixth, the BIT may impose to the investor to devote a certain percentage of the profit to the promotion of the right to education, the right to adequate housing, the right to health. These requirements might help improving the environmental and social conditions in the communities where the investment is located.

Finally, the BIT may also provide for an implicit performance requirement. An example is included in the Southern African Development Community Model BIT ("SADC Model BIT"), according to which "notwithstanding any other provision of this Agreement, a State Party may grant preferential treatment in accordance with their domestic legislation to any enterprise so qualifying under the domestic law in order to achieve national or sub-national regional development goals".

See, e.g., UNCTAD, Foreign Direct Investment and Performance Requirements: New Evidence from Selected Countries, New York, 2003. The BIT may also provide for an implicit performance requirement.

It should be noted that traditional BITs as well as the WTO Agreement on Trade-Related Investment Measures (TRIMs) prohibit performance requirements. This is because according to the Washington consensus these measures are ineffective and have a distorting effect on international trade and investments. However, some empirical investigations seem to rebuff these criticisms and reveal many cases of countries that have used performance requirements extensively at a certain time in their history, while attracting a high and growing level of FDIs (such as Japan, Korea, Singapore, Taiwan and China).[960]

Neither the Netherlands Model BIT nor the newly drafted Argentina BITs provide for performance requirements.

2.1.1.4. Implicit Performance Requirements

BITs may also incorporate provisions that enable governments to require performance requirements, without expressly including them in the relevant treaty text. An example may be provided by Article 21 of the Southern African Development Community Model BIT ("SADC Model"), according to which "notwithstanding any other provision of this Agreement, a State Party may grant preferential treatment in accordance with their domestic legislation to any enterprise so qualifying under the domestic law in order to achieve national or sub-national regional development goals".[961] These types of provisions do not impose any direct performance requirement. However, they allow host states to require them in the future without fear of potential claims for alleged breaches of the relevant BIT.

2.1.1.5. The Definition of Investor

BITs may delimit the definition of investor by excluding pure mailbox companies (also known as shell companies). These companies do not generally contribute to the economic development of the host state. Quite to the contrary, they are normally incepted with the specific aim of benefiting from treaty protection.

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960 *See* also NIKIÈMA, Performance Requirements in Investment Treaties, Best Practices Series, 2014, p. 3, available at: <https://www.iisd.org/sites/default/files/publications/best-practices-performance-requirements-investment-treaties-en.pdf>.

961 Article 21.1, SADC Model.

The Netherlands Model BIT provides for such a definition. Specifically, under Article 1(b) of the Netherlands Model BIT, protected investors include legal persons "constituted under the law of that Contracting Party and having substantial business activities in the territory of that Contracting Party".[962] The model BIT further clarifies that, in order to meet the substantial business requirement, the legal person should have, in the territory of the home country (i) a registered office and/or administration, (ii) a headquarter and/or management, (iii) a number of employees and qualifications, (iv) a turnover, and (v) an office, a production facility and/or a research laboratory.[963] A similar definition is also included in Article 1 of the Argentina-United Arab Emirates BIT, which defines investors, among others, as legal persons "constituted under the legislation of one of the Parties which have their principal place of business in the territory of such Party".

2.1.1.6. "Legality Requirement" and "Denial of Benefit" Clauses

BITs may also incorporate "legality requirement" and "denial of benefits" clauses. Through legality requirement clauses, BITs may require the investment to be compliant "with the laws and regulations of the host", including specific human rights laws and standards. This formulation may allow host states to maintain a certain control over the types of foreign investments that might receive protection under the relevant BIT. Moreover, these clauses may send a clear message to investors who will eventually bear the risk of investments that are not compliant with said legislation.[964]

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962 Art. 1(b)(ii), Netherlands Model BIT. The provision in its entirety reads as follows: "'investor' means with regard to either Contracting Party: (i) any natural person having the nationality of that Contracting Party under its applicable law; (ii) any legal person constituted under the law of that Contracting Party and having substantial business activities in the territory of that Contracting Party; or (iii) any legal person that is constituted under the law of that Contracting Party and is directly or indirectly owned or controlled by a natural person as defined in (i) or by a legal person as defined in (ii)".

963 Art. 1(c), Netherlands Model BIT.

964 S. SCHACHERER and R. T. HOFFMANN, *International Investment Law and Sustainable Development*, in *Research Handbook on Foreign Direct Investment*, at 572. *See also* J. HEPBURN, *In Accordance with Which Host State Laws? Restoring the 'Defence' of Investor Illegality in Investment Arbitration*, in *Journal of International Dispute* Settlement, 2014, at 531.

BITs may also include so-called "denial of benefits" clauses, which allow host states to deny treaty protection to a given investor if it does not meet certain requirements or acts contrary to agreed human rights standards.[965] Similar provisions were included in the Netherlands Model BIT as well in certain of the newly signed Argentine BITs.

2.1.2. Compliance with Human Rights, Sustainable Development and Corporate Social Responsibility Standards

BIT contracting parties may also choose to guarantee protection only to those FDIs that comply with certain human rights, sustainability and corporate social responsibility standards. To this end, the BIT may: (i) impose human rights obligations and standards on the investor by including language to this effect in the treaty or referring to other instruments; and (ii) include corporate social responsibility provisions ("CSR").

This would lower or eliminate the risk that FDIs target countries which abuse human rights standards or that commit human rights abuses.[966]

2.1.2.1. Human Rights in the Preamble

965 An example of denial benefits clause is provided by Article 16(3) of the Netherlands Model BIT, according to which the arbitral tribunal shall decline jurisdiction, among others, whenever the "investor […] has changed its corporate structure with a main purpose to gain the protection of this Agreement at a point in time where a dispute had arisen or was foreseeable". See, e.g., A. D. MITCHELL, M. SORNARAJAH and T. VOON, *Good Faith and International Economic Law*, Oxford University Press, 2015, at 573.

966 Moreover, as highlighted by the 2019 UNCTAD Investment Report, from the 29 treaties signed in 2018 for which texts are available, at least 18 refer to the achievement of sustainable development objectives (which, as seen above, are directly related to the promotion of human rights). At least four of these treaties refer to one or more specific global standards related to the promotion of sustainable development. The UN Charter and the Universal Declaration of Human Rights were both mentioned three times. The UN Global Compact, obligations tied to membership in the International Labor Organization (ILO) and the OECD Guidelines for Multinational Enterprises were all mentioned in two treaties. The EFTA–Indonesia EPA (2018) specifically refers to the UN 2030 Agenda for Sustainable Development (the second treaty to do so, after the Canada–EU CETA (2016)) as well as to the United Nations Charter and the Universal Declaration of Human Rights.

BITs may provide preamble language expressly requiring investors to respect certain specifically listed human rights standards or international (binding or non-binding) human rights instruments, including the Covenant and the UNGP. Although these instruments do not impose direct human rights obligations on MNCs, they do recognize the key role that such entities play in the promotion, protection and progressive full realization of these rights.[967]

References to certain soft instruments such as the UNGP may be particular useful. These principles have received ample support from both the public (including all UN bodies) and the private sectors, and continue to be implemented by investors. Moreover, they provide clear and concise guidelines as to what should be the conduct of investors in respect of human rights.[968]

2.1.2.2. Direct Human Rights Obligations on Investors

BITs may also directly impose specific human rights obligations on investors.[969] For instance, taking an example from the language of the UNGP, the BIT might impose the obligation of the MNCs to: (i) pass statements and code of conduct declaring their commitment to respect human rights standards set forth by the international bill of rights; (ii) perform human rights due diligence aimed at identifying, preventing and/or mitigation human rights violations; and (iii) enact mechanisms to enable remediation of any adverse human rights impacts they might cause or to which they contributed.[970]

This approach is more effective, but still faces significant resistance and, thus, is rarely adopted. Indeed, all the attempts to include direct human rights obligations on MNCs (including those advanced by the UN) have been unsuccessful so far.[971] Even the revised Draft on Business and Human rights dated July 16, 2019 does not impose

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967 Chapter II above, Section 2.4.

968 *Id*.

969 *See* T. LAHEY, *Using Bilateral Investment Treaties to Promote Corporate Social Responsibility and Stimulate Sustainable Development*, Rutgers Business Law Review, at 134. Recent model BITs that include investors' human rights obligations include the SADC Model BIT, the COMESA, the PAIC.

970 *See* Chapter II, above, Section 2.4.4.

971 See Chapter III above, Section 2.4.

direct human rights obligations on host states. The document simply restates the primary responsibility on state members to enact mechanisms aimed at preventing and attaching legal liability for human rights violations and abuses in the context of business activities.[972]

As with respect to BITs, several attempts have been made so far to incorporate human rights into BITs. The first attempt was made by the Multinational Agreement on Investment ("MAI") which was proposed by the OECD. The draft of the MAI contained provisions which were based on the association between the treaty and the OECD Guidelines. More recent approaches to include investors' human rights obligations in Model BITs include the SADC Model, the PAIC, the IISD Model as well as the 2019 Netherlands Model BIT.

The SADC Model establishes the obligation for "investors and their investments […] 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".[973] A more specific provision in relation to labor standards is included in Article 15.3, which requires investors not to operate their investment "in a manner inconsistent with international environmental labour".[974] The recently negotiated PAIC provides, among others, with a set of principles that "should govern compliance by investors with business ethics and human rights".[975] The IISD Model repeats the PAIC's language and adds that "investors and

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[972] The closest that it comes in doing so is in the preamble, where it states that "all business enterprises, regardless of their size, sector, operational context, ownership and structure have the responsibility to respect all human rights, including by avoiding causing or contributing to adverse human rights impacts through their own activities and addressing such impacts when they occur, as well as by preventing or mitigating adverse human rights impacts that are directly linked to their operations, products or services by their business relationship". *See* Revised Draft, Preamble. *See* Revised Zero Draft dated July 16, 2019, available at: <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/OEIGWG_RevisedDraft_LBI.pdf>.

[973] Article 15, SADC Model BIT.

[974] *Id*.

[975] Draft-Pan African Investment Code, Article 24 (Business Ethics and Human Rights). Specifically, these principles include: (i) support and protection of internationally recognized human rights standards; (ii) insurance that they are not complicit in human

Investments shall not manage or operate […] in a manner that circumvents international environmental, labor and human rights obligations to which the host State and/or the home state are Parties".[976] Finally, Article 7(1) of the Netherlands Model BIT imposes on investors the obligation to "comply with domestic laws and regulations of the host state, including laws and regulations on human rights, environmental protection and labor laws".

2.1.2.3. Corporate Social Responsibility Clause

A less effective – but more frequent – alternative is to incorporate in BITs provisions stressing the importance of corporate social responsibility ("CSR"). Unlike performance requirements, CSR are set by MNCs and not by companies. Accordingly, they are fundamentally voluntary.[977] CSR provisions however can provide useful guidelines to arbitral tribunals when evaluation the investor's conduct both prior and after the establishment of the investment.

A very comprehensive CSR provision was included in Article 7(3) of the Netherlands Model BIT, which "reaffirms[s] the importance of each Contracting Party to encourage investors operating within its territory or subject to its jurisdiction to voluntarily incorporate into their internal policies those internationally recognized standards, guidelines and principles of corporate social responsibility that have been endorsed or are supported by that Party, such as the OECD Guidelines for Multinational Enterprises, the United Nations Guiding Principles on Business and Human Rights, and the Recommendation CM/REC(2016) of the Committee of Ministers to Member States on human rights and business". The provision also reaffirms the "importance of investors conducting a due diligence process to identify, prevent, mitigate and account for environmental and social risks and impacts of its investment". Similar provisions were also incorporated in the newly drafted Argentina BITs, which provide for

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rights abuses; and (iii) guarantees that no form of forced and compulsory labour are performed and/or allowed.

976 Article 14, IISD Model International Agreement on Investment for Sustainable Development (post-establishment obligations), April 2005, available at: <https://www.iisd.org/pdf/2005/investment_model_int_agreement.pdf>.

977 *See* S. H. NIKIÈMA, *Performance Requirements in Investment Treaties*, note 1006.

recommendations to comply with CSR standards, addressed to investors directly or through the contracting states.[978]

2.1.3. Preserving the Host State's Regulatory Powers and Restating Human Rights Obligations

A second instrument that may be used to prevent possible negative effects on human rights standards is to ensure the possibility for host states to exercise their regulatory powers to protect the interests of their population.

To this end, BITs may provide clauses that preserve the ability of host states to exercise their regulatory powers to pursue human rights-related goals, or directly impose obligations to this effect. In particular, BITs might include clauses that: (i) impose direct human rights obligations on host states either in the preamble or in the body text of the treaty; (ii) guarantee the supremacy of the host state human rights law obligations over investment obligations; and (iii) provide for human rights limitations to investment protection standards and/or human-rights exclusions.

These clauses may help to better identify and delimit the scope of BITs' protection mechanisms. In particular, they may provide guidelines to: (i) host states in relation to the possibility to exercise regulatory powers in connection with their legitimate purposes (both in case on normal and emergency times); (ii) investors on the treatment that they may reasonably expect; and (iii) arbitral tribunals when called to decide certain issues at the dispute stage, including on the applicability of human rights law as the applicable law.

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978 For instance, pursuant to Article 12 of the Argentina-Qatar BIT, "[i]nvestors operating in the territory of the host Contracting Party should make efforts to voluntarily incorporate internationally recognized standards of corporate social responsibility into their business policies and practices". A more detailed provision was included in Article 17 of the Argentina-United Arab Emirates BIT, according to which "[t]he Parties, being mindful of internationally-recognized corporate social responsibility standards, guidelines and principles, including the Organization for Economic Cooperation and Development (OECD) Guidelines for Multinational Enterprises, shall endeavor to encourage enterprises doing business in its territory or subject to its jurisdiction to voluntarily include said standards, guidelines and principles".

The provision of the above-mentioned clauses may significantly limit the risk of excessively burdensome constraints on host states' regulatory powers as well as the possible chilling effects discussed above (and related costs).

The clauses concerned are discussed in more detail in the following subparagraphs.

2.1.3.1. Direct Human Rights in the Preamble

Reference to human rights standard (including, human rights treaties) in the preamble may help maintaining domestic regulatory space by providing interpretation guidelines to arbitral tribunals. As noted above, preambular language is not binding as it does not add any substantive obligation beyond and above the one that are provided by the actual text of the treaty.[979] However, this language may serve to identify the general tone and purpose of the treaty as well as to provide guidelines to arbitral tribunal in the interpretation process.[980] Accordingly, reference to human rights standards in the preamble may lead arbitrators to place more weight on human rights related concerns as well as on the state's human rights obligations rather than on the investment ones.[981]

In some cases, BITs may contain a general reference to the contracting states' commitment to protect the socio-economic rights of their population.[982] This formulation underlines that the host state may pursue goals that go beyond the affirmative action to protect foreign investors.

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979 *See* I. TUDOR, *International Law of Foreign Investment*, Oxford University Press, 2008, at 28.

980 For instance, in the Argentine Saga, several arbitral tribunals gave particular relevance to the preambular language of the Argentina BIT to conclude that regulatory stability was a prerequisite of FET.

981 See Chapter III above.

982 For instance, the preamble of the Netherlands Model BIT reaffirms the parties' commitment to sustainable development and the need to promote investment "without compromising the right of the Contracting Parties to regulate within their territories through measures 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 reason".

Moreover, BITs's preambles may refer to other treaties imposing human rights obligations on host states, such as the Covenant or the ILO Treaties. For instance, Article 6.5 of the Netherlands Model BIT reaffirms the obligations that the contracting parries might have under "multilateral agreements in the field of environmental protection, labor standards and the protection of human rights". Another example is provided by the 2012 US Model Law, according to which "the Parties reaffirm their respective obligations as members of the International Labor Organization ('ILO') and their commitments under the *ILO Declaration on Fundamental Principles and Rights and its Follow-Up*".[983]

2.1.3.2. Direct Human Rights Obligations in the Text of the Treaty

BITs may also provide for express human rights obligations in the body text of the treaty.[984] For instance, the Netherlands Model BIT made the promotion of sustainable development a prominent obligation.[985] The text of the Netherlands Model BIT also gives relevance to women's rights and the state's obligation to promote gender equality.[986]

BITs may also require from host states not to derogate from existing human rights standards (either under domestic or international law) to attract FDIs. These

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983 Article 13, United States 2012 Model BIT.

984 For instance, Article 5 of the Netherlands Model BIT requires, among others, "[e]ach Contracting Party […] to ensure […] investors to have access to effective mechanisms of dispute resolution and enforcement, such as judicial, quasi-judicial or administrative tribunals or procedures for the purpose of prompt review, which mechanisms should be fair, impartial, independent, transparent and based on the rule of law".

985 In particular, pursuant to Article 3 the parties should: (i) "encourage the creation of favorable conditions for responsible investment in its territory that contribute to sustainable economic development"; and (ii) "strive to strengthen the promotion and facilitation of investments that contribute to sustainable development". Moreover, pursuant to Article 6, "[e]ach Contracting Party shall ensure that its investment laws and policies provide for and encourage high levels of environmental and labor protection and shall strive to continue to improve those laws and policies and their underlying levels of protection".

986 Specifically, pursuant to Article 6.3, the "Contracting Parties commit to promote equal opportunities and participation for women and men in the economy. Where beneficial, the Contracting Parties shall carry out cooperation activities to improve the participation of women in the economy, including in international investment".

provisions highlight the host state's obligation under international human rights law not to enter into treaties or arrangements that are contrary to human rights standards or that might lead to effects contrary to human rights standards.[987]

Several Model BITs include provisions to this effect. For instance, the SADC Model BIT first provides that "it is inappropriate to encourage investment by relaxing domestic environmental and labour legislation. Accordingly, [the host state] shall not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such legislation as an encouragement for the establishment, maintenance or expansion in its territory of an Investment".[988]

Similar provisions were included in the 2012 US Model BIT,[989] the Netherlands Model BIT[990] as well as the newly drafted Argentina BITs.[991]

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987 *See*, e.g., *Inter-American Court of Human Rights*, *Sawhoyamaxa Indigenous Community v. Paraguay* (Judgment dated March 29, 2006, Series C No. 146), para. 140; and *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26, Award dated December 8, 2016, para 1209. *See also* Chapter IV, below. See also Chapter II above, Section 2.3.1.1.

988 *Id.*, Article 22.2.

989 *See* United States 2012 Model BIT, Article 13, which refers specifically to labor standards ("[t]he Parties recognize that it is inappropriate to encourage investment by weakening or reducing the protections afforded in domestic labor laws. Accordingly, each Party shall ensure that it does not waive or otherwise derogate from or offer to waive or otherwise derogate from its labor laws where the waiver or derogation would be inconsistent with the labor rights referred to in subparagraphs (a) through (e) of paragraph 3, or fail to effectively enforce its labor laws through a sustained or recurring course of action or inaction, as an encouragement for the establishment, acquisition, expansion, or retention of an investment in its territory").

990 Specifically, pursuant to Article 6.4 of the Netherlands Model BIT, "Contracting Parties recognize that it is inappropriate to lower the levels of protection afforded by domestic environmental or labor laws in order to encourage investment". This provision should be read along with the preamble, according to which the BITs' "objectives can be achieved without compromising the right of the Contracting Parties to regulate within their territories through measures 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".

991 For instance, under Article 22 of the Argentina-Japan BIT, "[e]ach Contracting Party recognizes that it is inappropriate to encourage investment by investors of the other Contracting Party and of a non-Contracting Party by relaxing its health, safety or environmental measures, or by lowering its labor standards. To this effect, each Contracting Party should not waive or otherwise derogate from such measures or standards as an encouragement for the establishment, acquisition or expansion of

2.1.3.3. Human Rights Supremacy Clauses

BIT contracting parties may also consider the insertion of clauses that explicitly establish the supremacy of human rights obligations over investment obligations.[992] As noted above, due to the formal equality of all sources of international law, a key challenge normally relates to the relationship between human rights treaties and BITs. The problem might be avoided by providing a clause that explicitly establishes the supremacy of human rights obligations over investment ones. For instance, this clause might provide that "in case of conflict between this treaty and a human rights treaty, the latter shall prevail. For the sake of clarity, human rights treaties include [the Socio-Economic Covenant, etc.]".[993]

It should be noted that a supremacy clause would only be legally effective if there is a clear case of conflict between the two obligations, the notion of which is heavily discussed in international practice.[994] Due to the foregoing, it might be useful to also define the notion of conflict.[995]

2.1.4. Limiting the Scope of the FET and Legitimate Expectations Standards

BITs may also guarantee to host states human rights regulatory space by limiting the scope of some of the BITs' investment protection obligations, including the FET standard and, more specifically, the legitimate expectations obligation. The host state's obligation to respect the investor's legitimate expectation is the most invoked as well as the most difficult element of the FET to define.[996] Indeed, investment tribunals have not treated it in a uniform manner.

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investments in its Area by investors of the other Contracting Party and of a non-Contracting Party". See also Article 12 of the Argentina-United Arab Emirates BIT.

992 For instance, this clause might provide that "in case of conflict between this treaty and a human rights treaty, the latter shall prevail".

993 M. KRAJEWSKI, *Ensuring the Primacy of Human Rights in Trade and Investment Policies: Model Clauses for a UN Treaty on Transnational Corporations, other Businesses and Human Rights*, 2017.

994 *Id*.

995 *Id*.

996 *See* UNCTAD, *Fair and Equitable Treatment*, UNCTAD Series on Issues in International Investment Agreements II, UNCT AD/DIAE/IA/2011/5, 2012. *See*, e.g., M. POTESTÀ,

To limit the scope of this standard, it may be useful to determine: (i) whether FET is an autonomous standard or whether it coincides with "international law" or "customary international law"; (ii) which state's obligation fall therein; and (iii) the exact extent of the legitimate expectations obligation. Finally, some (iv) recent treaties and models have avoided the inclusion of the FET standard at all.

2.1.4.1. FET's Qualifier

To limit the scope of this standard, it may be useful to determine: (i) whether FET is an autonomous standard or whether it coincides with "international law" or "customary international law" (so-called FET qualifier). Among the most common qualifier of the FET is language explaining that the "treatment" should be guaranteed in accordance with "international law" or "customary international law".[997] However, this language requires arbitral tribunal to first identify what does it fall under "international law" or "customary international law" and whether FET is an autonomous and independent standard from customary international law.[998]

With this respect the commentary to the US Model clarifies that FET prescribes "the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments" and does not

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"Legitimate Expectations in Investment Treaty Law: Understanding the Roots and Limits of a Controversial Concep*t*, ICSID Review", 2013, at 88-122.

997 A broad concept of conflict relates to a situation in which one treaty prohibits a certain activity while the other encourages a treaty party to pursue this goal through the activity prohibited by the former treaty. In this case, there is no formal conflict between two opposing norms, but a conflict could arise due to different goals and objectives because otherwise the two sets of obligations could be applied jointly. The following formulation have been proposed "for the purpose of this article, a conflict constitutes a situation in which a provision of one treaty poses an obstacle to the implementation of another 'treaty'. This includes, but is not limited to as a) a provision of one treaty cannot be fulfilled without violating another treaty or b) a provision of one treaty enables or encourages a Party to an activity or measure which is prohibited by the other treaty". *See*, e.g., 2012 U.S. Model Bilateral Investment Treaty, available at: <https://www.state.gov/documents/organization/188371.pdf>. See also J. S. GOLDSTEIN, *Bringing BITs Back from the Brink*, in *Denver Journal of International Law and Policy Denver Journal of International Law and Policy*, 2017, at 388.

998 *Id*. *See also* J. BONNITCHA, *IISD Report: Myanmar's Investment Treaties: A Review of Legal Issues in Light of Recent Trend*s, in *Int'l Inst. for Sustainable Dev. ed*., 2014, at 1. See also chapter IV, above.

"require treatment in addition to or beyond that which is required by the standard, and do not create additional substantive rights."[999] This formulation may be seen as a response to these situations in which unqualified FET standard have been interpreted by arbitrators as covering a broader spectrum of state conduct. Indeed, this formulation indicates that the level of protection that will be guaranteed to investors should coincide with the "customary international law minimum standard".[1000]

Similar language was included in the IISD Model, which further clarified that "[t]he concepts of 'fair and equitable treatment' and 'full protection and security' are included within this standard, and do not create additional substantive rights".[1001] This is also the solution applied by certain of the newly negotiated Argentina BITs. For instance, pursuant to Article 5 of the Argentina-United Arabs BIT, FET does not require "treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens".

2.1.4.2. List of FET Obligations

To limit the scope of the FET standard, the BIT may list the state's obligations that fall therein. For instance, the US Model BIT states that the FET requirement "includes […] the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world".[1002] A similar approach can also be found in the Common Market for Eastern and Southern Africa Investment Agreement as well as in the Indian Model BIT.[1003]

The most innovative approach has been undertaken by the European Union, which in recent years has opted for a FET formulation that lists in an exhaustive

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999 2012 U.S. Model Bilateral Investment Treaty.

1000 Y. LEVASHOVA, *The Right of States to Regulate in International Investment Law: The Search for Balance Between Public Interest and Fair and Equitable Treatment*, Kluwer Arbitration, 2019, at 241-242.

1001 Article 7, IISD Model.

1002 Article 5.2(a), 2012 U.S. Model BIT.

1003 *See* Common Market for Eastern and Southern Africa (COMESA) Investment Agreement, Article 14. See also 2015 Indian Model BIT, Article 3.

manner the obligations of the host state under FET. For instance, the CETA clarifies that a party is in breach of the FET if measures or series of measures constitute: (i) a denial of justice in criminal, civil or administrative proceedings; (ii) a fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings; (iii) a *manifest* arbitrariness; (iv) targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief; or (v) an abusive treatment of investors, such as coercion, duress and harassment. A similar provision is also included in the 2019 Netherlands Model Investment BIT.[1004]

Prima facie, these approaches seem to further help safeguarding human rights regulatory space by avoiding far reaching interpretations of FET by arbitral tribunals. However, some caution seems to be justified with regard to some of the listed obligations, which may more likely give rise to regulatory disputes. This is the case of measures constituting "manifest arbitrariness".[1005] Indeed, both the notion of "manifest" and "arbitrariness" are extremely vague and may require further interpretation by arbitral tribunals. However, it might be difficult to argue that non-discriminatory public welfare measures similar to the ones adopted by Argentina in response to the 2000-2001 crisis might be qualified as manifestly arbitrary.[1006]

2.1.4.3. Clarifying the Scope of the Legitimate Expectation Obligation

To further guarantee regulatory space, the scope of the legitimate expectation obligation may be limited and defined. As explained above, the obligation to respect the investor's legitimate expectation is the most invoked as well as the most difficult element of the FET. To limit its scope, the relevant provision may require the following elements for the legitimate expectation obligation to be activated: (1) a specific

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1004 Article 9 (Treatment of Investors and covered investments). The provision further includes a revision mechanism according to which "the Contracting Parties shall, upon request of a Contracting Party, review the content of the obligation to provide fair and equitable treatment and may complement this list through a joint interpretative declaration within the meaning of Article 31, paragraph 3, sub a, of the Vienna Convention on the Law of Treaties".

1005 *See* S. SCHACHERER and R. T. HOFFMANN, *International Investment Law and Sustainable Development*, in *Research Handbook on Foreign Direct Investment*, at 570.

1006 *Id*.

promise (or representation) made by the host state to the investor to induce an investment; (2) the fact that the promise is capable of generating a reasonable legitimate expectation, also in light of the specific circumstances of the case (including, the economic, political and social situation in the host state, the degree of professionalism and diligence of the investor as well as its conduct both prior and before the establishment of the investment); and (3) the fact that the investor relied upon the promise or representation in deciding to make or maintain the investment.[1007] This type of formulation may require the arbitral tribunal to take into considerations the reasons underlying the host state's decision to intervene as well as the conduct of the investor.

The recent EU approach consists in clarifying the circumstances in which legitimate expectations can arise. Specifically, Article 8.10(4) of the CETA provides that "when applying the above fair and equitable treatment obligation, 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".

Similar provisions were included in the Netherlands Model BIT[1008] as well in the newly drafted Argentine BITs. For instance, Article 5 of the 2018 Argentina-United Arab Emirates BIT explicitly redirects arbitral tribunals when interpreting the FET to take into account "the circumstances of the case".

2.1.4.4. No FET Standard in BITs

The BIT may also exclude the FET standard. This approach has been proposed by the SADC Model, which recommends the inclusion of a "fair administrative

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1007 *Continental Casualty Company v. The Argentine Republic*, ICSID Case No. ARB/03/9, Award of 5 September 2008, para. 261.

1008 Article 9.4 of the Netherlands Model BIT, according to which, when evaluating whether the FET standard was breached, a "[t]ribunal may take into account whether a Contracting Party made a specific representation to an investor to induce an investment that created a legitimate expectation, and upon which the investor relied in deciding to make or maintain that investment, but that the Contracting Party subsequently frustrated". However, the provision does not refer to the specific circumstances of the case, including the conduct of the investor.

treatment' instead of the FET. Specifically, this treatment requires "taking into account the level of development, 'administrative, legislative, and judicial processes do not operate in a manner that is arbitrary or that denies justice".[1009] Brazil among other countries have followed this approach.[1010]

2.1.5. "Right to Regulate" Clauses

BITs may also provide for right to regulate clauses aimed at preserving the regulatory space of the host state. As noted by scholars, these clauses do not impose legally enforceable rights or obligations nor do they create regulatory space. Rather they send a clear message to investors that state regulatory interests will be taken into account and that the investors' protection obligations are not absolute.[1011]

An example of a right to regulate provision is Article 2 of the Netherlands Model BIT.[1012] Right to regulate provisions were also included in the recently concluded Argentina BITs.[1013]

1009 *See* SADC Model BIT, Commentary to Article 22. *See also* S. SCHACHERER – R. T. HOFFMANN, *International Investment Law and Sustainable Development*, in *Research Handbook on Foreign Direct Investment*, at 576.

1010 *See* Brazil-Malawi BIT CIIFA.

1011 *See* V. KORZUN, *The Right to Regulate in Investor-State Arbitration: Slicing and Dicing Regulatory Carve-Outs*, in Vanderbilt Journal of Transnational Law, 2017, at 374. *See also* B. CHOUDHURY, *International Investment Law and Noneconomic Issues", Vanderbilt Journal of Transnational Law*, 2020, at 44.

1012 Specifically, the text clarifies 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. The mere fact that a Contracting Party regulates, including through a modification to its laws, in a manner which negatively affects an investment or interferes with an investor's expectations, including its expectation of profits, is not a breach of an obligation under this Agreement".

1013 For instance, under Article 10 of the Argentina-Qatar BIT "[n]one of the provisions of this Agreement shall affect the inherent right of the Contracting Parties to regulate within their territories through measures necessary to achieve legitimate policy objectives, such as the protection of public health, safety, the environment, public morals, social and consumer protection". By the same token Article 11 of the Argentina-United Arab Emirates BIT provides that "for the purpose of this Agreement, the Parties recognize their right to regulate in their territories in order to achieve legitimate public policy objectives, such as national security, the protection of public

2.1.6. Human Rights Exceptions and Carve-Outs

BITs might also carve-out from the investment protection certain public services such as health, education and supply of water survives and/or any other area that have sustainable development implications. These can be done through the exceptions or non-precluded measures clauses.

Such provisions may allow to better distribute the risk of unforeseeable events.[1014] The newly negotiated Argentina BITs provide for these kinds of exception clauses. For instance, Article 18 of the 2018 Argentina-United Arab Emirates BIT provides that "[n]othing in this Agreement shall prevent the implementation by either Party of measures it deems necessary in order to: […] protect human, animal and plant life or health […] protect and preserve the environment, including living and non-living natural resources".[1015]

2.2. Human righti*zing* Arbitral Tribunals

As noted in the introduction, it may be useful to render arbitration proceedings more human rights-oriented by introducing specific rules in relation to the composition of the arbitral tribunal. For instance, according to the Netherlands Model BIT, the appointing authority shall make every effort to ensure that the members of the Tribunal, either individually or together, possess the necessary expertise in public international law, "which includes environmental and human rights law, international investment law as well as in the resolution of disputes arising".[1016]

2.3. Human Rightiz*ing* Arbitral Awards

BITs might may also provisions that limit the amount of the compensation in the awards so as to render them less burdensome.

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health, safety, the environment, public morals, social and consumer protection, or the promotion and protection of cultural diversity".

1014 J. S. GOLDSTEIN, *Bringing BITs Back from the Brink*, in *Denver Journal of International Law and Policy Denver Journal of International Law and Policy*, 2017, at 390.

1015 Article 18, Argentina-United Arab Emirates BIT.

1016 Article 20.5, Netherlands Model BIT.

First, in determining the amount of compensation, relevance should be given to the behavior of the investor both prior and during the establishment of the investment. In this regard, the Netherlands Model BIT provides that "without prejudice to national or criminal procedures, a Tribunal, in deciding on the amount of compensation [is] expected to take into account noncompliance by the investor with its commitments under the UN Guiding Principles on Business and Human Rights, and the OECD Guidelines for Multinational Enterprise".

Second, the BIT might provide for certain rules that limit the amount of compensation and arbitration costs. For instance, the Netherlands Model BIT provides that "[t]he Tribunal shall not award punitive damages. Monetary damages shall not be greater than the loss suffered by the investor, reduced by any prior damages or compensation already provided in relation to the same factual dispute. For the calculation of monetary damages, the Tribunal shall also reduce the damages to take into account any restitution of property or repeal or modification of the measure".[1017]

Moreover, with specific regard to the costs of the defense, the Netherlands Model BIT requires "[t]he Tribunal [to] order that reasonable costs incurred by the successful disputing party shall be borne by the unsuccessful disputing party, unless the Tribunal determines that such allocation is *unreasonable* in the circumstances of the case".[1018]

1017 Article 22.4, Netherlands Model BIT.

1018 Article 22.5, Netherlands Model BIT. The provision further clarifies that "[s]uch a determination may take into account whether the successful disputing party has acted improperly, for example by raising manifestly frivolous objections or improperly invoking preliminary objections, and whether the unsuccessful disputing party is a small or medium sized enterprise. If only some parts of the claims have been successful the costs shall be adjusted, proportionately, to the number or extent of the successful parts of the claims".

VI. CONCLUDING REMARKS

Foreign direct investments are considered the largest source of external finance to emerging and developing markets as well as a key driver of their economic and sustainable development. They play an important role in guaranteeing the progressive full realization of socio-economic human rights of the host states' population (including the rights to work, adequate standard of living conditions, health and water), and may contribute to achieve the Sustainable Development Goals set forth in the 2030 Agenda for sustainable development.

Through FDIs host states mobilize the economic and technical resources necessary to fulfil their obligations under human rights treaties, including the obligation to respect, protect and fulfil, at the very least, the minimum essential levels of the human rights of their population.

Due to the relevance for their economic and social development, states (in particular developing ones) have framed several tools aimed at attracting FDIs to their markets, including investment incentives and BITs.

Investment incentives attract FDIs by reducing the entry costs of the investment (e.g., the costs of setting up a production in a foreign country) or by altering the risks attached to them through inducements that are not available to comparable domestic investors.

On the other hand, BITs are deemed to attract FDIs by mitigating the so-called political risk related to the investment, i.e., the risk of *unexpected* action by the state that may have a negative impact on the investment after its establishment. Specifically, BITs mitigate the political risk by imposing on host states strong investment protection/treatment obligations, which are enforceable by investors through binding arbitration (so-called credible commitment).

Traditionally BITs were drafted on the basis, among others, of the assumptions that: (i) when the host state intervenes in investment, the reasons underlying such intervention are generally opportunistic; and (ii) investors are in a disadvantaged and weak positions vi-à-vis states. Due to these assumptions, in order to strengthen the

commitment, BITs' protectionist mechanism traditionally operates irrespective of the reasons underlying the host state's intervention in the investment. Accordingly, the mechanism is triggered even in cases of reasonable exercise of regulatory powers to: (i) pursue legitimate goals, such as the promotion and protection of human rights; (ii) amend previous legislation not compliant with human rights standards; and (iii) put an end to an unlawful conduct by the investor.

The exclusive focus on the prevention of the political risk may lead BITs to disregard other significant risks. In particular, BITs may result in an excessive limitation in the exercise of the host state's regulatory power to protect the fundamental rights of its population, which may be further strengthened by the chilling effect caused by the threat of significant arbitration-related costs. Moreover, the investor may technically start investment arbitration even if it acted unlawfully either prior and/or during the establishment of the investment (e.g., by breaching human rights standards), or has failed to contribute to the economic development of the host state, including the progressive realization of the fundamental rights of the host state's population. The materialization of these risks may impose on host state considerable costs, including the costs of reduced human rights policy space, unfulfilled human rights and unpredictable or erroneous decisions.

Such limitations and costs have raised the question of whether, from a cost-benefit perspective, BITs are indeed convenient to developing countries. As a result, several states have opted to exit from the investment system or have questioned its legitimacy and effectiveness.

However, the criticisms toward BITs should not lean too far in the opposite direction, as this could lead to a rupture of a system that has proven to be efficient in many of its elements, including the settlement dispute mechanism. There is indeed little doubt that investment arbitration remains, in many cases, the most effective way of solving investment disputes.

Several options are available at an international level to try to improve the effectiveness of the system. A possible solution may derive from the contract theory approach. Contract theory is primarily about contract design, and is based on

information economics and the distribution of risks in a given contract. Its analytical approach enables to: (i) explain why parties enter into contracts in the first place and write the contracts in a certain way, taking into account existing case law; and (ii) solve the issues relating to optimal contracting and finding the pareto efficient contract, i.e., a contract that maximizes the overall benefits for the parties involved.

Although contract theory was developed mainly for private contracting, in the last decades it has also been applied to international law, including investment treaties. The contract theory approach applied to BITs may allow contracting parties to draft credible commitments by: (i) identifying all the risks arising from the tripartite BIT relationship (home state, host state, and investors), including the human rights-related risks described above; and (ii) carefully allocating these risks through the use of hard and precise terms that would guide parties and arbitral tribunals at a later stage. This solution would also allow to take into consideration the specificities of the state parties (including their specific economic, social and cultural situation), and adapt the relevant BIT's protection mechanism accordingly.

Human rights language in BITs may help to better identify and delimit the scope of BITs' protection mechanism to the benefit of all parties concerned, insofar as it may provide guidelines to: (i) the host states' government as to the types of foreign investments that may contribute to their economic development as well as the types of actions that the States can undertake without breaching investors' rights; (ii) investors as to the requirement they should meet both prior and after the establishment of their investment; and (iii) arbitral tribunals when called to decide certain issues at the dispute stage, including whether they have jurisdiction *ratione personae* or *ratione materiae* over investors' claims and incorporating human rights standards in the applicable law.

This in turn could enhance the consistency, coherence, predictability and correctness of the investment system as well as help reduce transaction costs by giving clear signals to prospective investors and governments. Ultimately, incorporating human rights language in BITs could contribute to promoting FDIs and increase their efficiency.

Notwithstanding the foregoing, there are several concerns relating to the incorporation of human rights standards in international investment treaties. The main concern is probably that this incorporation could generate more confusion than clarity because treaty-based human rights (and related host state obligations) are too vague, in particular in the context of investment disputes. This risk might arise in some cases, but it should not be overestimated. The alleged vagueness of human rights standards seems to be significantly reduced by the high number of international instruments (binding and not) that identify and clarify the scope and extent of the host States' human rights obligations (e.g., the Covenant) as well as the investors' ones (e.g., the UNGP).

Accordingly, the risk of a possible increase in legal uncertainty does not seem to overcome the potential benefits that would be generated by the incorporation of human rights standard and criteria into BITs.

AAKEN A. V., *International Investment Law between Commitment and Flexibility: A Contract Theory Analysis*, in *Journal of International Economic Law*, 2009

AAKEN A. V., *Fragmentation of International Law: The Case of International Investment Protection*, University of St. Gallen Law School, Law and Economic Research Paper Series Working Paper, 2008

ABLINE G., *Les observations générales, une technique d'élargissement des droits de l'homme,* in Revenue trimestrielle des droits de l'homme, 2008

ACOSTA J. F., *Los Tratados Bilaterales de Inversión y el Arbitraje Internacional. La Experiencia Argentina Reciente*, Advocatus, Cordoba, 2016

ADDO M. K., *The Corporation as a Victim of Human Rights Violations*, in *Human Rights Standards and the Responsibility of Transnational Corporations*, Kluwer Law International, 1999

ALFARO L. – CHEN M., *Surviving the Global Financial Crisis: Foreign Direct Investment and Establishment Performance*, June 2010

ALLEE, TODD - CLINT PEINHARD C., *Evaluating Three Explanations for the Design of Bilateral Investment Treaties*, in World Politics

ALLEE, TODD - PEINHARD C., *Delegation Differences: Bilateral Investment Treaties, and Bargaining over Dispute Resolution Provisions*, in *International Studies Quarterly*

ALLEE T. - PEINHARDT C., *Contingent Credibility: The Impact of Investment Treaty Violations on Foreign Direct Investment*, in *International Organization*

ALTWICKER S. – ALTWICKER T. – PETERS A., *Measuring Violations of Human Rights An Empirical Analysis of Awards in Respect of Non-Pecuniary Damage under the European Convention on Human Rights*

ALVAREZ J. E. - KHAMSI K., *The Argentines Crisis and Foreign Investors: A Glimpse into the Hearth of Investment Regime*, in *Yearbook on Investment Law and Policy* (ed.), K. P. Sauvant, 2008-2009

ALVAREZ J. E., *The Public International Law Regime Governing International Investment*, in *Hague Academy of International Law*, 2011

ANDERSON J. C., *Respecting Human Rights: Multinational Corporations Strike Out*, 2 U. PA. J. LAB. & EMP. L., 2000

APODACA C., *Child Hunger and Human Rights. International Governance*, Routledge research in Human Rights, 2010

ASIEDU E. - LIEN D., *Capital Control and Foreign Direct Investment*, in *World Developments*, Vol. 32

AYOUB L., *Nike Just Does It and Why the United States Shouldn't: The United States' International Obligation to Hold MNCs Accountable for Their Labor Rights Violations Abroad*, in DEPAUL Bus. L.J. 395,400-11, 1999

BAAS D., *Approaches and Challenges to Political Risk Assessment: The View from Export Development Canada*, in *Risk Management*, at 137, 2010

BAETENS F., *Discrimination on the Basis of Nationality: Determining Likeness in Human Rights and Investment Law*, in Stephan Schill (ed), *International Investment Law and Comparative Public Law*, Oxford University Press, 2010

BAĞLAYAN DR. B. - LANDAU I. - MCVEY M. – WODAJO K., *Good Business*, available at http://corporatejustice.org/2018_good-business-report.pdf

BALCERZAK F., *Investor - State Arbitration and Human Rights*, in *International Studies in Human Rights*, Brill Nijhoff, Boston, 2018

BARRAL V., *Sustainable Development in International Law: Nature and Operation of an Evolutive Legal Norm*, in *European Journal of International Law*, 2012, at 385-388.

BEITER K.D., *Establishing Conformity Between TRIPS and Human Rights: Hierarchy in International Law, Human Rights, Obligations of the WTO and Extraterritorial State Obligations Under the International Covenant*

BERGER A. – BUSSE M. – NUNNENKAMP P. – ROY M., *Do Trade and Investment Agreements Lead to More FDI? Accounting for Key Provisions inside the Black Box. International Economics and Economic Policy*

BETTWY D. S., *The Human Rights and Wrongs of Foreign Direct Investment: Addressing the Need for An Analytical Framework*, 2002

BISHOP R. D. – CRAWFORD J. – REISMAN W. M., *Foreign Investment Disputes. Cases, Materials and Commentary*, 2005

BJORKLUND A. K., *Economic Security Defenses in International Investment Law*, in Yearbook on Investment Law and Policy (eds.), K. P. Sauvant, 2008-2009

BJORKLUND A. K., *National Treatment in August Reinisch* (ed), *Standards of Investment Protection*, Oxford University Press, 2008

BLANCHARD O. J. – FISCHER S., *Lectures on Macroeconomics*, 1989

BLANTON R. G. – BLANTON S. L., *Rights, Institutions, and Foreign Direct Investment: An Empirical Assessment*, in *Foreign Policy Analysis*, October 2012

BLANTON S. L. – BLANTON R. G., *A Sectoral Analysis of Human Rights and FDI: Does Industry Type Matter?*, in *International Studies Quarterly*, 2009

BLANTON S. L. – BLANTON R. G., *What Attracts Foreign Investors? An Examination of Human Rights and Foreign Direct Investment*, in *Journal of Politics*, 2007

BLUSTEIN P., *And the Money Kept Rolling In (and Out): Wall Street, the IMF and the Bankrupting of Argentina*, 2005

BONNITCHA J., *Substantive Protection Under Investment Treaties*, Cambridge University Press 2014

BONNITCHA J., *IISD Report: Myanmar's Investment Treaties: A Review of Legal Issues in Light of Recent Trends*, in Int'l Inst. for Sustainable Dev. ed., 1, 2014

BORN G., *International Arbitration: Cases and Materials*, Wolters Kluwer

BRADLEY C. A., *The Costs of International Human Rights Litigation*, in *Chicago Journal of International Law*, 2001

BROWN, *International Investment Agreements: Regulatory Chill in the Face of Litigious Heat?*, in *Western Journal of Legal Studies*, 2013

BROWNLIE I., *Principles of Public International Law*, Oxford, 2003

BÜCHELER G., *Proportionality in Investor-State Arbitration*, Oxford University Press, 2015

BUCKLEY A., *An International Capital Budgeting*, in Practice Hall, Hemel Hempstead, 1996

BURKE R. - KIRBY J., *The Universal Declaration of Human Rights: Politics and Provisions (1945–1948)*, in *Oberleitner G. (eds.) International Human Rights Institutions, Tribunals, and Courts. International Human Rights*, Springer, Singapore, 2018

BURKE-WHITE W., *The Argentine Financial Crisis: State Liability under BITs and the Legitimacy of the ICSID System*, in *Asian Journal of WTO & International Health Law and Policy*, 2008

BUSSE M. – KÖNIGER J. – NUNNENKAMP P., *FDI Promotion through Bilateral Investment Treaties: More than a BIT?*, in *Rev. World and Economics*, 2010

BUSSE M. and GROIZARD J. L., *Foreign Direct Investment, Regulations and Growth*, in *The World Economy,* 2007

BYUNG-YEON K., *Unveiling the North Korean Economy: Collapse and Transition*, CUP 2017

CALAMITA N. J., *International Human Rights and the Interpretation of International Investment Treaties: Constitutional Considerations*" in Freya Baetens,

Investment Law within International Law. Integrationist Perspectives, Cambridge University Press, 2013

CAMPBELL B. K., (eds.), *Regulating Mining in Africa: For Whose Benefit?*, in *Nordica African Institute*, 2004

CAMPBELL C., *House of Cards: the Relevance of Legitimacy Expectations under Fair and Equitable Treatment Provisions in Investment Treaty Law*, in *Journal of International Arbitration*, 2013

CARDOSO F. – FALETTO E., *Dependency and Development in Latina America*, Berkeley, University of California Press

CARINO J., *Indigenous Peoples' Right to Free, Prior, Informed Consent: Reflections on Concepts and Practice*, in *Arizona Journal of International and Comparative Law*, 2005

CAVES R. E., *International Corporations: The Industrial Economics of Foreign Investments*, in *Economia,* 1971

CESCR, Concluding Observations: India, E/C.12/IND/CO/5 dated August 5, 2008

CHEN J-R., *Foreign Direct Investment, International Financial Flows and Geography*, in *Foreign Direct Investment*, 2000

CHOATE P., *Agents of Influence*, New York, Knopf, 1990

CHOUDHURY B., *Business Law Forum: Balancing Investor Protections, the Environment, and Human Rights. International Investment Law as a Global Public Good*, in *Lewis & Clark L. Rev.*, Vol. 481, 2013

CHOUDHURY B., *Evolution or Devolution? – Defining Fair and Equitable Treatment in International Investment Law*, JWIT, 2005

B. CHOUDHURY, *International Investment Law and Noneconomic Issues", Vanderbilt Journal of Transnational Law*, 2020

CLARK E.– MAROIS B., *Managing Risk in International Business: Techniques and Applications*, 1996

COASE R., *The Nature of the Firm*, Economica, 1937; O. E. WILLIAMSON, *The Economic Institutions of Capitalism: Firms, Markets, Relational Contracting*, NY, 1985

COHEN S. D., *Multinational Corporations and Foreign Direct Investment: Avoiding Simplicity, Embracing Complexity*, in *Multinational Corporations and Foreign Direct Investment*, Oxford University Press, 2007

COOMANS F., *The International Covenant On Economic, Social And Cultural Rights – From Stepchild To Full Member Of The Human Rights Family*, in Gómez Isa F. and De Feyter K (eds) *International Human Rights Law In A Global Context*, University of Deusto, Bilbao

CÔTÉ C., *A Chilling Effect? The Impact of International Investment Agreements on National Regulatory Autonomy in the Areas of Health, Safety and the Environment. PhD thesis*, The London School of Economics and Political Science (LSE), 2014

COTULA L., *Human Rights and Investor Obligations in Investor-State Arbitration*, in *Journal of World Investment and Trade*, 2016

COTULA L., *Land, Property and Sovereignty in International Law*, *Cardozo Journal of International and Comparative Law*, 2017

COTULA L., *The New Enclosures*? *Polanyi, International Investment Law and the Global Land Rush*, Vol. 34, Issue 9, in *Third World Quarterly*, 2013

CRAVEN M., *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development*, Clarendon Press, Oxford, 1995

CRAVEN M., *Some Thoughts on the Emergent Right to Water*, in Eibe Riedel and Peter Rothen (eds.), *The Human Right to Water*, Berliner Wissenschafts Verlang, Berlin, 2006

DAMILL M., FRENKEL R. and RAPETTI M., *The Argentinean Debt: History, Default and Restructuring*, August 2005 (unpublished CEDES working paper), available at http://www0.gsb.columbia.edu/ipd/pub/Frenkel_SDR_Eng.pdf

DANI R., *Labor Standard in International Trade: Do they Matter And What Do We Do About Them?*, in *Emerging Agenda for Global Trade*, eds. R. Lawrence et al. Washington, DC: Overseas Development Council, 1996

DE BRABANDERE E., *Human Rights and International Investment Law*, in *Research Handbook on Foreign Direct Investment*, 2019, at 639, 1998

DE BRABANDERE E., *'States' Reassertion of Control over International Investment Law (Re)Defining 'Fair and Equitable Treatment and Indirect Expropriation* in Andres Kulick, *Reassertion of Control over the Investment Treaty Regime,* Cambridge University Press, 2017

DE BRABANDERE E., *Human Rights and International Investment Law*, Working Paper Series No. 2018/075 – HRL – March 26, 2018

DE CHAZOURNES L. B. – MAZUYER E., *Le Pacte mondial des Nations Unies 10 ans après*, Bruxelles, Bruylant, 2011

DE GREGORIO J., *The Role of Foreign Direct Investment and Natural Resources in Economic Development*, in: E. M. Graham, ed., Multinational and Foreign Investment in Economic Development (Palgrave Macmillan, 2005)

DE QUENAUDON R., *Droit de la responsabilité sociétale des organisations. Introduction*, Bruxelles, Larcier, 2014

DECAUX E. V., *Les formes contemporaines de l'esclavage*, in *Recueil des cours*, Vol. 336, 2008

DECAUX E., *La responsabilité des sociétés transnationales en matière de droits de l'homme*, RSC, 2005

DESIERTO D., *Public Policy in International Economic Law. The ICESCR in Trade, Finance, and Investment*, Oxford University Press, 2015

DEVA S., *UN's Human Rights Norms for Transnational Corporations and other Business Enterprises: an Imperfect Step in the Right direction?*

DHUE H., *Rights in Light of Duties* in P. BROWN & D. MACLEAN, eds., *Human Rights and U.S. Foreign Policy*, Massachusetts, Lexington Books, 1979

DIEHL A., *The Core Standard of International Investment Protection. Fair and Equitable Treatment*, Kluwer Law International, 2012

DIMOPOULUS A., *EC Free Trade Agreements: An Alternative Model for Addressing Human Rights in Foreign Investment Regulation and Dispute Settlement?,* in *Human Rights in International Investment Law and Arbitration*, in Pierre-Marie Dupuy, Francesco Francioni, and Ernst-Ulrich Petersmann, 2009

DIXON J. - HASLAM P. A., *Does the Quality of Investment Protection Affect FDI Flows to Developing Countries? Evidence from Latin America*, in *The World Economy*

DIXON M. - MCCORQUODALE R., *Cases an Materials on International Law*, OXFORD, 2003

DOLZER R. – SCHREUER C., *Principles of International Investment Law*, Oxford University Press, 2008

DOLZER R. - SCHREURER C.*, Principle of International Investment Law*, Oxford University Press, 2012

DOLZER R. – STEVENS M., *Bilateral Investment Treaties*, Kluwer Law International, 1995

DOLZER R., *Indirect Expropriation of Alien Property*, in ICSID Review, 1986

DOLZER R., *Fair and Equitable Treatment: A Key Standard in Investment Treaties*, in *International Law*, 2005

DONNELL J., *Universal Human Rights in Theory and Practice*, Cornell University Press, 2003

DOUGLAS Z., *The International Law of Investment Claims*, Cambridge University Press, 2009

DOUGLAS Z., *The MFN Clause in Investment Arbitration: Treaty Interpretation Off the Rails*, in *Journal of International Dispute Settlement*, Vol. 2, Issue 1, 2011

DOWELL-JONES M., *Contextualizing the International Covenant on Economic, Social and Cultural Rights: Assessing the Economic Deficit*, in International Studies in Human Rights, Martinus Nijhoff Publishers, 2004

DUNNING J. H. - LUNDAN S.M., *Institutions and the OLI paradigm of the multinational* enterprise, in *Asia Pacific Journal of Management* 25, 2008

DUNNING J. H. - LUNDAN S.M., *Multinational Enterprises and the Global Economy*, 2nd ed. Cheltenham: Edward Elgar, 2008

DUNNING J. H. - LUNDAN S.M., *The Institutional Origins of Dynamic Capabilities in Multinational Enterprises, Industrial and Corporate Change* 19, 2008

DUNNING J. H., *An Evolving Paradigm of the Economic Determinants of International Business Activity*, in *Managing Multinationals in a Knowledge Economy: Economics, Culture, and Human Resources*, vol. 15, ed. J.L.C. CHENG and M.A. HITT. Amsterdam: Elsevier

DUNNING J. H.*, Explaining Changing Patterns of International Production: In Defense of the Eclectic Theory. Oxford Bulletin of Economics & Statistic*s 41

DUNNING J. H., *Location and the Multinational Enterprise: A Neglected Factor?*, in *Journal of International Business Studies* 29, 1996

DUNNING J. H., *Reappraising the Eclectic Paradigm in the Age of Alliance Capitalism*, in *Journal of International Business Studies* 26, 1995

DUNNING J. H., *The Contribution of Edith Penrose to International Business Scholarship* in *Management International Review* 43, 2003

DUNNING J. H., *The eclectic (OLI) paradigm of international production: Past, Present and Future* in *International Journal of the Economics of Business* 8

DUNNING J. H., *The Eclectic Paradigm of International Production: A Personal Perspective. In the Nature of the Transnational Firm*, 2nd ed, ed. C.N. PITELIS and R. SUGDEN, London: Routledge, 2000

DUNNING J. H., *Trade, Location of Economic Activity and the MNE: A Search for an Eclectic Approach. In the International Allocation of Economic Activity: Proceedings of a Nobel Symposium Held at Stockholm*, ed. B. OHLIN, P.O. HESSELBORN, and P.M. WIJKMAN. London: Macmillan

DUNNING J.H., *Explaining International Production*, 135, Unwin Hyman Ltd. 1988. Dunning's theory was first introduced in 1977

DUNNING, J.H., - PITELIS C., *Stephen Hymer's Contribution to International Business Scholarship: An Assessment and Extension*, in *Journal of International Business Studies* 39, 2008

DUNOFF J. - TRACHTMAN J. P., *Economic Analysis of International Law*, in *Yale Journal of International Law*, 1999

DUPUY F., *La Protection de l'attente légitime des parties au contrat, étude de droit international des investissements à la lumière du droit comparé*, Humnboldt Universität/Université Paris II, 2007

DUPUY M. – VIÑUALES J. E., *Human Rights and Investment Disciplines* in Bungemberg – GRIEBEL- Hobe – Reinisch, *International Investment Law. A Handbook*, 2019

DUPUY P. – FRANCIONI F. – PETERSMANN E. U., *Human Rights in International Investment Law and Arbitration*, Oxford University Press, 2009

DUPUY P. M. – VIÑUALES J. E., *Human Rights and Investment Disciplines: Integration in Process*, in *International Investment Law. A Handbook*,

E/2015/59, Report of the United Nations High Commissioner for Human Rights dated July 21, 2015

EBERHARDT P. – OLIVET C., *Profiting from injustice: How Law Firms, Arbitrators and Financiers are Fueling an Investment Arbitration Boom*, Transnational Institute and Corporate Europe Observatory, Brussels and Amsterdam,

November 2012, available at: https://www.tni.org/files/download/profitingfrominjustice.pdf

EDLIN A. S., *Breach Remedies*, in *The New Palgrave Dictionary of Economics and the Law*, 174-79 (Peter Newman, ed., 1998)

FALK R., *Interpreting the Interaction of Global Markets and Hunan Rights*, in *Globalization and Human Rights*, ed. Alison Brysk. Berkeley

FARRUGIA B., *The Human Right to Water: Defenses to Investment Treaty Violations*, in Arbitr Int, 2015

FELLMETH A. X., *Wiwa v. Royal Dutch Petroleum Co.: A New Standard for the Enforcement of international Law in the U.S. Courts?*, 5 YALE HUM. RTS. & DEV. L.J. 241, 244-45, 2002

FIDE A., *The Rights of Food as Human Rights,* E/CN.4/Sub.2/1987/23

FONTANELLI F.*, Jurisdiction and Admissibility in Investment Arbitration. The Practice and Theory*, Brill, 2018

FOSTER G. K., *Foreign Investment and Indigenous People: Options For Promoting Equilibrium Between Economic Development And Indigenous Rights*, in *Michigan Journal of International Law*, Vol. 33, Issue 4, 2012

FOSTER G. K., *Investors, States, And Stakeholders: Power Asymmetries in International Investment and the Stabilizing Potential of Investment Treaties*, in *Lewis Clark Law Review*, Vol. 17, Issue 2, 2013

FRANCK S. D., *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, in *Fordham Law Review*, Vol. 73, at 1521, 2005

FRY J. D., *International Human Rights Law in Investment Arbitration: Evidence of International Law's Unity* in Duke Journal of Comparative & International Law, 2007

FU M. - LI T., *Human Capital as a Determinant of FDI Technological Spillovers and its Threshold Effect in China: An Analysis Based on Multiple Productivity Estimates*, 2009

GALLAGHER K. P. and BIRCH M. B. L., *Do Investment Agreement Attract Foreign Direct Investment? Evidence from Latin America*, in *Journal of World Investment and Trade*

GARCIA L. G., *The Role of Human Rights in International Investment Law*, in N. JANSEN CLAMITA, David Earnest, Markus Burgstaller, *The Future of ICSID and the Place of Investment Treaties in International Law*, British Institute of International and Comparative Law, 2013

GASTANGA V. M. – NUGENT J.B. – PASHAMOVA B., *Host Country Reforms and FDI Inflows: How Much Difference do They Make?*, in *World Development*, Vol. 26, Issue 7, 1999

GHERARI H., *Le profil juridique et politique du Pacte mondial*, in L. Boisson de Chazournes et E. Mazuyer (dir. publ.), *Le Pacte mondial des Nations Unies 10 ans après*, Bruylant, Bruxelles, 2011

GILBERT J., *Natural Resources and Human Rights: An Appraisal*, Oxford University Press

GIULIANI E. – MACCHI C., *Multinational Corporations' Economic and Human Rights Impacts on Developing Countries: a Review and Research Agenda*, in *Cambridge Journal of Economics*, 2013

GLICKMAN N. J. - WOODWARD D. P., *The New Competitors*, New York, Basic Books, 1989

GLICKMAN N. J. - WOODWARD D. P., *The New Competitors*, New York, Basic Books, 1989

GOLD L., *The impact on and opportunities in relation to The Transatlantic, Trade and Investment Partnership (TTIP) - Presentation to the Joint Committee on Jobs, Enterprise and Innovation*, 26th January, 2016, available at

https://www.trocaire.org/sites/trocaire/files/resources/policy/trocaire-attacsubmission-to-jobs-committee-jan-2016.pdf

GOLDSTEIN J. S., *Bringing BITs Back from the Brink*, in *Denver Journal of International Law and Policy Denver Journal of International Law and Policy,* 2017

GREENWOOD C., *State Contracts in International Law – The Libyan Oil Arbitrations*, 1982

GRIERSON T. - WEILER – LAIRD I., *Standards of Treatment* in Peter Muchlisnki, Federico Ortino and Christoph Schreuer (eds.), *The Oxford Handbook of International Investment Law*, Oxford University Press, 2008

GROSS S. G., *Inordinate Chill: Bits, non-NAFTA MITs and Host-State Regulatory Freedom-An Indonesian Case Study*, in Mich. J. Int'l L. 24: 893, 2002

GRUBEL H. G., *Internationally Diversified Portfolios: Welfare Gains and Capital* Flows in *The American Economic Review*, 1968

GUZMAN A., *Why LDC Sign Treaties that Hurt Them?: Explaining the Popularity of Investment Treaties*, in *Virginia Journal of International Law*, 1998

GÖRG H. - GREENWAY D., *Much Ado About Nothing? Do Domestic Firms Really Benefit from Foreign Direct Investment?*, 2003

HAERI H., *A Tale of two Standards: 'Fair and Equitable Treatment' and the Minimum Standard in International Law*, 2011

HALLWARD-DREIMEIER M., *Do Bilateral Investment Treaties Attract FDI? Only a Bit … and it might bite*, in *World Bank Policy Research Working Paper No. 3121*, Washington, D.C., World Bank, 2003

HANESSIAN G. - DUGGAL K., *The 2015 Indian Model BIT: Is this Change a World wishes to see?*, in ICSID Review , 2015

HAYNES J., *The Evolving Nature of Fair and Equitable Treatment (FET) Standard: Challenging its Increasing Pervasiveness in light of Developing*

Countries' Concerns – The Case of Regulatory Rebalancing, in *JWIT*, 2013

HANSOM D., *Mandatory exclusions: a new tool to protect human rights in EU public procurement?*, in *International Learning Lab on Public Procurement and Human Rights Blog*, November 28, 2016, http://www.hrprocurementlab.org/blog/mandatory-exclusions-a-new-tool-toprotect- human-rights-in-eu-public-procurement/ (accessed January 16, 2018)

HECKELS C., *Proportionality and Deference in Investor-State Arbitration: Balancing Investment Protection and Regulatory Autonomy*, Oxford, 2016

HEPBURN J., *In Accordance with Which Host State Laws? Restoring the 'Defence' of Investor Illegality in Investment Arbitration*, in *Journal of International Dispute* Settlement, 2014

HIGGINS, *The Taking of Property by the State*, in *III Recueil des Cours*, 1982

HIRSH M., *Between Fair and Equitable Treatment Standard and Stabilization Clause: Stable Legal Environment and Regulatory Change in International Investment Law*, JWIT, 2011

HODGSON M., *Costs in Investment Treaty Arbitration: The Case for Reform' in Jean E. Kalicki and Anna Joubin-Bret (eds) Reshaping the Investor-State Dispute Settlement System. Journeys for 21st Century* , Brill 2014

HOUNDE F. – PAGANI F., *Most-Favoured Nation Treatment in International Investment Law*, in OECD (ed), *International Investment Law: A Changing Landscape*, OECD, 2005

HOYOS J. C., *The Role of Bilateral Investment Treaties in Mitigating Project Finance's Risks: The Case of Colombia*

HYMER S., *The International Operations of National Firms: A Study of Foreign Direct Investment. MIT Press*, 1976

JACOB M. – SCHILL S., *Fair and Equitable Treatment: Content, Practice, Method*, in International Investment Law, 2019

JOHSON L., SACHS L., GÜVEN B. and COLEMAN J., *Costs and Benefits of Investment Treaties. Practical Considerations for States*. Policy Paper, March 2018

KARAMANIAN S. L., *The Place of Human Rights in Investor – State Arbitration*, 2013

KERNER A., *Why Should I Believe You? The Costs and Consequences of Bilateral Investment Treaties*, in *International Studies Quarterly*, Vol. 53, No. 1, 2009

KINDLEBERGER C. P., *The Theory of Direct Investment*. in: Kindleberger, C., Ed., American Business Abroad, Yale University Press, New Haven, 1969

KNOX J. H., *Horizontal Human Rights*, in *American Journal of International Law*, 2018

KOBRIN S., *Political Risk: A Review and Reconsideration*, in *Journal of International Business Studies*, 1979

KOSKENNIEMI M., Fragm*entation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission dated April 13, 2006

KRAJEWSKI M., *Ensuring the Primacy of Human Rights in Trade and Investment Policies: Model Clauses for a UN Treaty on Transnational Corporations, other Businesses and Human Rights*, 2017

KRIEBAUM U. – SCHREUER C., *The Concept of Property in Human Rights Law and International Investment Law*, in *Human Rights Democracy and the Rule of Law*, S. Breitenmoser (Eds.), Liber Amicorum Luzius Wildhaber, 2007

KRIEBAUM U., *Foreign Investment & Human Rights*, *The Actors and Their Different Roles*, 2013

KRIEBAUM U., *Human Rights of the Population of the Host State in International Investment Arbitration, 2009*

KRIEBAUM U., *Privatizing Human Rights. The Interface between International Investment Protection and Human Rights*, in: August Reinisch, Ursula

Kriebaum, *The Law of International Relations* – Liber Amicorum Hanspeter Neuhold *(*Eleven International Publishing, 2007)

KRIKORIAN M., *Derechos Humanos, políticas públicas y rol del FMI. Tensiones, errores no asumidos y replanteos*, Librería Editoria Plantese, 2010

KROMMENDIJK J. – MORIJN J., *Proportional by What Measure(s)? Balancing Investors' Interests and Human Rights by Way of Applying the Proportionality Principles in Investor-State Arbitration*, in *Human Rights in International Investment Law and Arbitration*, in Pierre-Marie Dupuy, Francesco Francioni, and Ernst-Ulrich Petersmann, 2009

KYDLAND F. E. – PRESCOTT E. C., *Rules Rather than Discretion: The inconsistency of Optimal Plans*, 85, in *Journal of Political Economy*, 1977

LALIVE P., *Ordre Public transnational (ou réellement international) et arbitrage international*, in *Revenue de l'arbitrage*, 1986

LALL S. – STREETEN P., *Foreign Investment, Transnationals and Developing Countries*, London: Macmillan, 1977

LARYEA E., *Contractual Arrangements for Rescue Investment*, in: Francis N. Botchway (ed.), *Natural Resource Investment and Africa's Development* (Edward Elgar, 2011)

LEADER S., *Human Rights, Risks, Risks, and New Strategies for Global Investment*, 2006

LEBEN C., *La liberté normative de l'Etat et la question de l'expropriation indirecte* in Charles Leben (ed.), *Le contentieux arbitral transnational relatif à l'investissement* (Anthemis 2006)

LEINHARDT S. B., *Some Thoughts on Foreign Investors Responsibilities to Respect Human Rights*, in Transnational Dispute Management, 2003

Lenin, V.I. [1919] Imperialism. The Highest Stage of Capitalism. New York. International Publisher

LEVASHOVA Y., *The Right of States to Regulate in International Investment Law: The Search for Balance Between Public Interest and Fair and Equitable Treatment*, Kluwer Arbitration, 2019

Limburg Principles on the Implementation of the ICESCR, E/CN.4/1987/17, dated January 8, 1987

LIN C. L. - HO J. - PAPARINSKIS M., *International Investment Law and Arbitration*, Cambridge University Press, 2018

LIPSEY R. E., *Home and Host Country Effects of FDI*, NBER Working Paper No. 9293, 2002

LONDON B. – ROSS R. J. S., *The Political Sociology of Foreign Direct Investment*, in *International Journal of Comparative Sociology*, 1995

LOPEZ C., *Standard & Poor's, the Argentine Crisis: A Chronology of Evets after the Sovereign Default*, April 12, 2002

LOWE, *Sustainable Development and Unsustainable Arguments*, in A. BOYLE and D. FREESTONE (eds.), *International Law and Sustainable Development: Past Achievements and Future Challenges*, 1999

MALECKI C., *Responsabilité sociale des entreprises. Perspectives de la gouvernance d'entreprise durable*, Paris, LGDJ, 2014

MANN H., *Reconceptualizing International Investment Law: Its Role in Sustainable Development*, in *Lewis & Clark L. Rev.*, 2013

MARELLA F., *On the Changing Structure of International Investment Law: The Human Rights to Water and ICSID Arbitration*, in *International Community Law Review*, 2010

MARTIN-ORTEGA O. – STUMBERG R. – ANDRECKA M., *Public Procurement and Human Rights: A Survey of Twenty Jurisdictions*, in *Public Procurement and Human Rights: A Survey of Twenty Jurisdictions*, Claire Methven O'Brie, Nicole Vander Meulen and Amol Mehra (International Learning Lab on Public Procurement and Human Rights, 2016

MARTINEZ M. O. *et al.*, *Impacts of Petroleum Activities for the Achuar People of the Peruvian Amazon: Summary of Existing Evidence and Research Gaps*, in Envtl. Res. Letters, Oct.-Dec. 2007

MAXFILELD S., *Understanding the Political Implications of Financial Internationalization in Emerging Market Countries*, in *World Development* 26, 7, 1201-19

MCLACHLAN C., *Investment Treaties and General International Law*, in *International and Comparative Law Quarterly*, 2008

MCLACHLAN C., *The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention*, 2005

MEYER K. E. - ESTRIN S., *Investment Strategies in Emerging Markets: An Introduction to the Research Project*, in *Investment Strategies in Emerging Markets*

MITCHELL A. D. - SORNARAJAH M. – VOON T., *Good Faith and International Economic Law*, Oxford University Press, 2015

MONSHIPOURI M. et al., *Multinational Corporations and the Ethics of Global Responsibility: Problems and Possibilities*, 25 HUM. RTS. Q. 965, 973-77, 2003

MORAN T. H. et al., *Introduction and Overview*, in *Does Foreign Direct Investment Promote Development?1, 2* (Theodore H. Moran et al. eds., 2005)

MUCHILINSKI P., *Caveat Investor? The Relevance of the Conduct of the Investor under the Fair and Equitable Treatment Standard*, 2006

MUCHLINSKI P., *Multinational Enterprises and The Law*, 593-96, Blackwell Publishers 1995

MUS J. B., *Conflict between Treaties in International Law*, in *Netherlands International Law Review*, 1998

NARULA R. – DRIFFIELD N., *Does FDI Cause Development? The Ambiguity of the Evidence and Why it Matters*, in *European Journal of Development Research*, Vol. 24

NEUMAYER E. - SPESS L., *Do Bilateral Investment Treaties Increase Direct Investment to Developing Countries*?, 2005

NEUMAYER E. – SPESS K., *Do Bilateral Investment Treaties Increase Foreign Investment to Developing Countries?*, in *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows*, 2009

NIKIÈMA S. H., *Performance Requirements in Investment Treaties*, Best Practices Series, December 2014, available at https://www.iisd.org/sites/default/files/publications/best-practices-performance-requirements-investment-treaties-en.pdf

OBENLAND W., *Taxes and Human Rights*, Global Policy Forum Europe, 2013

ORAKHELASHVILI A., *The Normative Basis of Fair and Equitable Treatment*, in AVR, 2008

ORTINO F., *From 'Non-Discrimination' to reasonableness': A Paradigm Shift in International Economic Law' Jean Monnet Working Paper*, 01/05, 2005

PÀEZ L., *Regional Trade Agreements and Foreign Direct Investment: Impact of Existing RTAs on FDI and Trade Flows in the Andean Community and Implication of an Hemispheric RTA in the Americas*, Aussenwirtschaft

PAHIS S., *Bilateral Investment Treaties and Human Rights Law: Harmonization through Interpretation*, in International Commission of Jurists, 2011

PAPARINSKIS M., *The International Minimum Standard and the Fair and Equitable Treatment*, Oxford University Press, 2013

PARKER S., *A BIT at a Time: the Proper Extension of the MFN Clause to Dispute Settlement Provisions in Bilateral Investment Treaties*, in *the Arbitration Brief*, 2012

PAULSON., LAUGE, SKOVGAARD N. and AISBETT E., *When the Claim Hits: Bilateral Investment Treaties and Bounded Rational Learning*, in World Politics

PAULSSON J., *The Power of States to Make Meaningful Promises to Foreigners*, in *J. Int'l Disp. Settlement*, at 341, 2010

PETERSON L. E. – GRAY K. R., *International Human Rights in Bilateral Investment Treaties and in Investment Treaty Arbitration*, in *International Institute for Sustainable Development*, 2003

PICA G. - RODRÌGUEZ MORA J.V., *FDI, Allocation of Talents and Differences in Regulation*, CEPR Discussion Paper, 5318

POSNER R. A., *Behavioral Finance Before Kahneman*, 44 Loy. U. CHI. LJ, 2003

POTESTÀ M., *Legitimate Expectations in Investment Treaty Law: Understanding the Roots and the Limits of a Controversial Concept*, 28 ICISD Review, *Foreign Investment Law Journal*, 2013

POULSEN L., *The Importance of BITs for Foreign Direct Investment and Political Risk Insurance: Revisiting the Evidence*, in *Yearbook on International Investment Law & Policy*, 2009/2010, New York: Oxford University Press, available at: http://discovery.ucl.ac.uk/1471858/1/Poulsen_bits%20pri%20yearbook.pdf

PUVIMANASINGHE S. F., *Foreign Human Rights and the Environment*, *A Perspective from South Asia on the Role of Public International Law for Development*, Martinuns Nijhoff Publishers, 2007

RADI Y., *The 'Human Nature' of International Investment Law*, in *Transnational Dispute Management*

RADI Y., *The Application of the Most-Favored-Nation Clause to the Dispute Settlement Provisions of Bilateral Investment Treaties: Domesticating the Trojan Horse*, 2007

RAMASASTRY A., *Corporate Complicity: From Nuremberg to Rangoon- An Examination of Forced Labor Cases and Their Impact on the Liability of Multinational Corporations*, 20 BERKELEY J. INT'L L. 91, 131-36, 2002

REINER C. – SCHREUER C., *Human Rights and International Investment Arbitration*, in *Human Rights in International Investment Law and Arbitration*, 2009

REINISCH A., *How Narrow are Narrow Dispute Settlement Clause in Investment Treaties?*, 2011

REINISCH A., *National Treatment*, in *International Investment Law. A Handbook*, 2018

RIVOLI P. – WADDOCK S., *'First They Ignore You …' The Time-Context Dynamic And Social Responsibility*, in *California Management Review*, Vol. 53, 2001

RUGGIE J., *Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts,* 2007

SACERDOTI G., *Bilateral Treaties and Multilateral Instruments on Investment Protection*, 1997

SACERDOTI G., *BIT Protections and Economic Crises: Limits to Their Coverage, the Impact of Multilateral Financial Regulation and the Defence of Necessity*, ICSID Review, 2013

SACERDOTI G., *Multilaterlasimo in crisi? L'organizzazione mondiale del commercio di fronte alla sfida di Trump*, in *Diritto Commerciale Internazionale*, Fasc. 2, 2018

SACERDOTI G., *The Application of BITs in time of Economic Crisis: Limits to their Coverage, Necessity, and the Relevance of the WTO Law*, in *General Interests of Host States in International Investment Law*, (ed), G. SACERDOTI, P. ACCONCI, M. VALENTI, and A. DE LUCA, Cambridge University Press, 2014

SACHAROFF A. K., *Multinationals in Host Countries: Can They be Held Liable Under the Alien Tort Claims Act for Human Rights Violations?* 23 BROOK. J. INT'L L. 927, 958-64, 1998

SALACUSE J., *The Law of Investment Treaties*, Oxford University Press, 2010

SALEILLES R., *L'école Historique et le droit naturel*, in *Revue Trimestrielle de droit civil*, 1902

SASSE J. P., *An Economic Analysis of Bilateral Investment* Treaties, Gabler, 2010

SAUL B., KINLEY D., and MOWBRAY J., *The International Covenant on Economic, Social and Cultural Rights. Commentary, Cases and Materials*, Oxford University Press, 2014

SAUVANT K. P., *Driving and Countervailing Forces: A Rebalancing of National FDI Policies*, in K. P. Sauvant (ed.), *Yearbook of International Investment Law & Policy*, New York, Oxford University Press, 2009

SAUVANT K. P., *The Rise of International Investment, Investment Agreements and Investment Disputes in K. P. Sauvant (ed.), Appeals Mechanism in International Investment Disputes*, New York, Oxford University Press, 2008

SCHACHERER S. – HOFFMANN R. T., *International Investment Law and Sustainable Development*, in Research Handbook on Foreign Direct Investment, 2019

SCHADENDORF S., *Human Rights Arguments in* Amicus Curiae *Submissions: Analysis of ICISD and NAFTA Investor-State Arbitrations*, in *Transnational Dispute Management*, 2013

SCHILL S. W. - TVEDE K., *Mainstreaming Investment Treaty Jurisprudence. The Contribution of Investment Treaty Tribunals to the Consolidation and Development of General International Law*, in *The Law & Practice of International Courts and Tribunals*, 2014

SCHILL S., *Illegal Investments in International Arbitration*, January 4, 2012

SCHILL S., *The Multilarization of International Investment Law*, Cambridge University Press, 2009

SCHRAGE, *Emerging Threat: Human Rights Claims, Memorandum*, in Harvard Business August 2003, https://hbr.org/2003/08/emerging-threat-human-rights-claims

SCHREMPF-STIRLING J. – WETTSTEIN F., *Beyond Guilty Verdicts: Human Rights Litigation and its Impact on Corporations Human Rights Policies*, Journal of Business Ethics 145, no. 3 (2017

SCHREUER C., *Fair and Equitable in Arbitral Practice*, 2005

SCHRIJVER N., *The Role of the United Nations in the Development of International Law*, in HARROD, J., N. SCHRIJVER, N. (eds.,), *The UN Under Attack, Gower*, Aldershot, 1998

SCHROPP S., *Trade Policy Flexibility and Enforcement in the WTO. A Law and Economic Analysis*, Cambridge University Press, Cambridge, 2009

SCHWARTZ A. – SCOTT R. E., *Contract Theory and the Limits of Contract Law*, in *Yale L.J.*

SCOTT R. E. – STEPHAN P. B., *The Limits of Leviathan. Contract Theory and the Enforcement of International Law*, Cambridge University Press, New York, 2006

SCOTT R. E. – TRIANTIS G. G., *Incomplete Contracts and the Theory of Contract Design*, in *Case Western Law Review*, Vol. 56, Issue 1, 2005

SENDLHOFER R. – WINNER H., *Marginal Effective Tax Rates on Foreign Direct Investment*, in *Foreign Direct Investment*, 2000

SHELTON D., *Normative Hierarchy*, in *International law*, AJIL, 2006

SHAVELL S., *Damage for Breach of Contract*, in *Bell Journal of Economics*, 1980

SHERMAN J. F. – LEHR A., *Human Rights Due Diligence: Is It too Risky?*, A Working Paper of the Corporate Social Responsibility Institute, No. 55 (Cambridge, Massachusetts, Harvard University, February), 2010, available at www.hks.harvard.edu/m-rcbg/CSRI/pub_main.html

SIMMA B. – KILL T., *Investment Protection and Human Rights* in *C. Binder, U. Kriebaum, A. Reinisch, S. Wittich International Investment Law for the 21st Century, Essays in Honour of Cristoph Schreuer*, Oxford University Press, 2009

SIMMA B. and KILL T., *Harmonization Investment Protection and International Human Rights: First Step toward a methodology*, in C. Binder et al. (eds.) *International Investment Law for the 21st Century: Essays in Honor of Christoph Schreurer (New York, Oxford University Press, 2009*

SMEKAL C. and SAUSGRUBER R., *Determinants of FDI in Europe*, in *Foreign Direct Investment*, 2000

SNODGRASS E., *Protecting Investors' Legitimate Expectations – Recognizing and Delimiting a General Principle*, 2006

SPAR D., *Attracting High Technology Investment: Intel's Costa Rica Plant*, PLAS Occasional Paper, Washington, DC, Foreign Investment Advisory Service, 1998

SPAR D., *Foreign Investment and Human Rights*, Challenge, 1999

STEININGER S., *What's Human Rights Got to Do with It? An Empirical Analysis of Human Rights References*, in *Leiden Journal of International Law*, 2018

STEPHENS B., *The Amorality of Profit: Transnational Corporations and Human Rights*, 20 BERKELEY J. INT'L L. 45, 51-53, 2002

TAVARES-LEHMANN T. – TOLEDANO P. – JOHNSON L., *Rethinking Investment Incentives*, Columbia University Press, 2016

TE VELDE D. W. - MORRISSEY O., *Do Workers in Africa Get a Wage Premium if Employed in Firms Owned By Foreigners*? in *Journal of African Economies*, Vol. 12, No. 1, 2003

TIENHARRA K., *Regulatory Chill and the Threat of Arbitration: A View from Political Science* in *Evolution in Investment Treaty Law and Arbitration,* Cambridge University Press 2011

TIETENBERG T. H. and LEWIS L., *Environmental and Natural Resources Economics,* 10th ed., *to Privatization*, Springer, 2012

TOBIN J. and ROSE ACKERMAN S., *Foreign Direct Investment and the Business Environment in Developing Countries: The Impact of Bilateral Investment Treaties*, Working Paper, 587, 2003

TOLCHIN M. - TOLCHIN S. J., *Selling Our Security: The Erosion of America's Assets*, New York, Knopf, 1992

TOMUSCHAT C., *Human Rights. Between Idealism and Realism*, Oxford, 2014; U. VILLANI, *Dalla Dichiarazione universale alla Convenzione europea dei diritti dell'uomo*, Bari, 2015

TUDOR I., *The Fair and Equitable Treatment Standard in the International Law of Foreign Investment*, Oxford University Press, 2008

TUMUSCHAT C., *HUMAN RIGHTS: BETWEEN IDEALISM AND REALISM*, OXFORD UNIVERSITY PRESS, 2003

TURYN A. – PEREZ AZNAR F., *Drawing the Limits of Free Transfer Provisions*, in *The Backlash against Investment Arbitration. Perceptions and Reality* (ed), Michael Waibel, Asha Kaushal, Kyo-Hwa Liz Chung, and Claire Balchin, Kluwer Law International, 2010

VADI V. S., *Reconciling Public Health and Investor Rights: the Case of Tobacco*, in *Human Rights in International Investment Law and Arbitration*, in Pierre-Marie Dupuy, Francesco Francioni, and Ernst-Ulrich Petersmann, 2009

VADI V. S., *When Cultures Collide: Foreign Direct Investment, Natural Resources, and Indigenous Heritage in International Investment Law*, in *Columbia Human Rights Law Review*, Vol. 42, Issue 3, 2010

VADI V., *Analogies in International Investment Law and Arbitration*, 2015

VAN AAKEN A., *Opportunities for a Limits to an Economic Analysis of International Economic Law*, 24, Working Paper No. 2010-09, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1635390

VAN HOOF G., *The Legal Nature of Economic, Social and Cultural Rights: A Rebuttal of some Traditional Views*, in *P. Alston & K. Tomasevski, eds., The Right to Food, Netherlands, Martinus Nijhoff*

VANDENVELVE K. J., *Bilateral Investment Treaties: History, Policy and Interpretation*, Oxford *University* Press, 2010

VANHAM P., *When a Country is Facing Political and Human Rights Issues, Should Businesses Leave or Stay?*, December 2018 available at https://hbr.org/2018/12/when-a-country-is-facing-political-and-human-rights-issues-should-businesses-leave-or-stay

VERSCHUUREN J., *The Growing Significance of the Principle of Sustainable Development as a Legal Norm*, in D. FISHER (ed.), *Research Handbook on Fundamental Concepts of Environmental* Law, 2016

WAINCYMER J., *Balancing Property Rights and Human Rights in Expropriation*, in *Human Rights in International Investment Law and Arbitration*, Oxford, 2009

WÄLDE T. W., SABAHI B., *Compensation, Damages and Valuation*, in Peter Muchlinski, Federico Ortino, Cristoph Screuer, The Oxford Handbook of International Investment Law, 2008

WALTER A., *The Political Economy of FDI Location: Why don't Political Checks and Balances and Treaty Constraint Matters?*, Working Paper 38, Singapore Institute of Defense and Strategic Studies

WCED, *Our Common Future*, OUP, New York, 1987

WEIL P., *Towards Relative Normativity in International* Law?, AJIL, 1983

WHITE C. and FAN M., *Risk and Foreign Direct Investment*, 2006

WIESSNE S., *The Cultural Rights of Indigenous Peoples: Achievements and Continuing Challenges*, in *European Journal of International Law*, Vol. 22, Issue 1, 2011