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The Interrelations Between Developments in Corporate Social Responsibility and the New Generation of International Investment Agreements: Can Investment Arbitration Become a Tool for Promoting Social Responsibility?

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Abstract

Taking into account the recent developments in corporate social responsibility (CSR) development, and CSR's incorporation into recent international investment agreements, the question has been raised: can these CSR provisions fulfill the task of promoting CSR through investment law? In the first chapter of this dissertation, the developments in CSR and the functions it can fulfil as soft law in investment arbitration are discussed. The second chapter presents an overview of the evolution of bilateral investment treaties (BITs), a prominent aspect of investment law, from the classical notion of safeguarding investor protection, to the era of asymmetry in investment and dissonance in international human rights law, leading to the need for rebalancing the investor-host state relationship in BITs, *inter alia* by promoting corporate social responsibility as demonstrated in the *Urbaser v. Argentina* ward. In Chapter III, the integration of CSRs in IIAs in the last five years is summarised. Finally, in Chapter IV, the future implications of CSR integration in IIAs on investment tribunals' decisions are discussed, in an attempt to answer the question: can investment law be a tool for promoting CSR?

The Interrelations Between Developments in Corporate Social Responsibility and the New Generation of International Investment Agreements: Can Investment Arbitration Become a Tool for Promoting Social Responsibility?

Introduction

Less than a decade ago, when the archaic UN corporate social responsibility effort began to develop clearer features in the form of its report on "Guiding Principles on Business and Human Rights: Implementing the UN Protect, Respect and Remedy Framework", investment law scholars raised a question:

> Whether or not the object and purpose of investment treaties – the increased flow of foreign investment – would be prompted or hindered by an extension of the subject matters of the treaties, and a corresponding new design of their nature, will have to be a necessary part of the future discussion on the usefulness of BITs [Bilateral Investment Treaties] in their traditional scope.[1]

Almost a decade has now passed since this question was raised. Indeed, investment treaties were redesigned, transforming through International Investment Agreements [IIA] reform, shifting, to some extent, away from their traditional structure and being recognized as "new generation" IIAs. New IIAs were signed and other old and traditional IIAs were terminated[2] to create a space for the new generation IIAs, while others were complemented with joint declarative interpretations.[3] All of this was done to harmonize and bring investment up to date with the contemporary global trends in human rights, for states to respect, protect and fulfill, and for corporations too to respect human rights in the scope of their business activities in investments in states' territories or under their extraterritorial obligations, and to be sustainable development-oriented.

In 2018, according to the latest World Investment Report, foreign direct investment flows in developed countries are the lowest since 2004, at 1.3 trillion dollars.[4] One explanation for this is the unfavorable climate for investment policy in these states.[5] In developing

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[1] R. Dolzer & C. Schreuer, *Principles of International Investment Law* (Oxford University Press, 2012), 27-28

[2] In 2018, 24 IIAs terminations entered into force: "By the end of the year, the total number of effective terminations reached 309 (61 per cent having occurred since 2010)." United Nations Conference on Trade and Development World Investment Report (2019), 100 (https://unctad.org/en/PublicationsLibrary/wir2019_en.pdf, accessed 12/07/2019) (henceforth World Investment Report 2019)

[3] Ibid., 109-110

[4] Ibid., x

[5] Ibid., IX

countries, investment flows remained more or less the same.[6] It is still too early to assess and to conclude whether the new generation IIAs are the reason for the reduction in investment flow, considering that the new generation IIAs constitute only 10 percent of the body of investment treaties. As of today, investment arbitration tribunals have still not fully begun to react to the new inclusions such as measures focusing on corporate social responsibility, or other "trendy" provisions in the newly concluded IIAs. Furthermore, the impact of the new IIAs in protecting the human rights of states' populations is still unclear, with 70% of the publicly available arbitral decisions in 2018 rendered in favour of the investor, either on jurisdiction or on the merits.[7] Therefore, the answer to the question regarding whether investment flows will be impacted by the new generation IIAs, will remain a part of future discussions. Still, what can be assessed through the last decade's developments, are how CSR reform has affected investment agreements, with CSR going from a largely neglected aspect of investment to the inclusion of CSR becoming a mainstream aspect in IIAs, and how investment law can be a tool for promoting corporate responsibility and perhaps liability.

Overviewing the recent developments on CSR and their incorporation in new generation IIA, the question is could these CSR provisions turn promote CSR through investment law? In order to answer this question on the interrelations between CSR and investment law, I will address in the first chapter the developments in CSR and the functions it can fulfil as soft law in Investment Arbitration. In the second chapter, I will overview the evolution of BITs, a prominent aspect of investment law, from the classical notion of safeguarding investor protection, to the era of asymmetry in investment and dissonance in international human rights law, leading to the need for rebalancing the investor-host state relationship in BITs, *inter alia* by promoting corporate social responsibility as demonstrated in the Urbaser v. Argentina Award. In Chapter III, I will overview how CSR has been integrated in IIAs in the last five years. Finally, in Chapter IV, I will discuss the future implications of CSR integration in IIAs on investment tribunals' decisions, in an attempt to answer the question: can investment law be a tool for promoting CSR?

[6] Ibid., x. Investment flows to developing countries increased by 2%.
[7] Ibid, 102

Chapter I: The Functions of Corporate Social Responsibility in Investment Law

A. Recent Developments in Corporate Social Responsibility

Investments have a significant impact on the human rights of the population of the host states. This impact can either promote human rights[8] or negatively affect them, and in some cases breach the human rights of the host state's population.[9] Yet as affirmed in the 2019 World Investment Report, "[t]he need to attract investment and promote exports to support industrialization, economic diversification and structural transformation is as great as ever for developing countries, especially the least developed countries."[10]

In developing countries,[11] flows of foreign investment can be even larger than the host country's development funds or international organizations funds.[12] In addition, investment might have additional benefits in host states, such as bringing expertise and knowledge to the country.[13] In 2018, global foreign direct investment flows reached 1.3 trillion dollars.[14] Given this impact and the in lack of international law that regulates rights and obligations of the

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[8] Report of the High Commissioner for Human Rights, Human Rights, Trade and Investment (2003), E/CN.4/Sub.2/2003/9, 8

[9] J. Ruggie, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, Addendum: Corporations and Human Rights: A Survey of the Scope and Patterns of Alleged Corporate-Related Human Rights Abuse (2008), A/HRC/8/5/Add.2 (https://www.ohchr.org/documents/publications/GuidingprinciplesBusinesshr_eN.pdf, accessed 11/07/2019) ; Peter T. Mushlinski, "Human Rights and Multinationals: Is there a problem?" *International Affairs* 77 (2001), 31-48

[10] World Investment Report 2019, iv

[11] In 2018, foreign direct investment flows reached 1.3 trillion dollars, 13% less than in 2017. The decline was largely in developed countries, remaining stable in developing countries. World Investment Report 2019, 2

[12] Ursula Kreibaum, "The Ruggie Principles and Investment Arbitration" in Patricia Hladschik & Fiona Steinert (eds.), *Making Human Rights Work: Festschrift für Manfred Nowak und Hannes Tretter* (Neuer Wissenschaftlicher Verlag, 2019), 565

[13] J. Pohl, "Societal Benefits and Costs of International Investment Agreements", OECD working paper (2018). "Some of the positive impacts of MNE's in developing countries include economic growth, export based industrialization, capital formation, technology development and work process improvement, clear environment, poverty alleviation (reduction), employment generation, building competence and skills. Negative impacts on the other hand are prevention of autonomous development (dependency), outflow of capital, organized crime, exploitation of labour force, tax evading, environment pollution, health and safety risks, and human rights violations." A. Yildiz, "The OECD Guidelines on Multinational Enterprises: Strengths and Weaknesses" (2019), 1 (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3390443, accessed 12/07/2019)

[14] World Investment Report 2019, x

investors as TNCs,[15] this significant impact of transnational corporations on human rights has led to developments and trends acknowledging these corporations' effects on human rights and, in some cases, the inability of the states to monitor and enforce their regulations in regard to human rights.[16]

The notion arose of the need for transnational corporations (hereinafter TNCs)[17] to hold responsibilities, beyond being regulated and monitored by states. S. Ratner establishes this notion with a triple reasoning: developing states' interests in welcoming foreign investments overcomes it interest in or ability for monitoring foreign investors; governments may use foreign investors' resources to commit human rights abuses; and investment corporations can be much stronger than states, and thus create situations which the states are unable to control.[18]

The first initiative to regulate the rights and duties of TNCs is the OECD Declaration on International Investment and Multinational Enterprises,[19] adopted in 1976 and reviewed few times, the last time in 2011.[20] The declaration is composed of four parts. The first, with the greatest impact, is the OECD Guidelines for Multinational Enterprises, which are recommendations by governments addressed to TNCs operating in or from OECD countries, in an acknowledgement that "a large share of International direct investment" originates from OECD countries.[21] The guidelines aim to harmonize the conduct of TNCs with the governments' shared policies and values, and with the societies where the TNCs act, for this

[15] Ibid., 1

[16] Melik Özden, "Transnational Corporations and Human Rights: What is at Stake in the United Nations Debate over the Norms and other Business Enterprises with Regard to Human Rights" (n/d) (http://www.cetim.ch/legacy/en/documents/bro2-stn-A4-an.pdf, accessed 14/07/2019)

[17] The first initiative to regulate the rights and duties of TNCs was the OECD Declaration on International Investment and Multinational Enterprises, adopted in 1976 and reviewed several times, the last time in 2011. Text of the OECD Declaration on International Investment and Multinational Enterprises (1976-2011) (https://www.oecd.org/daf/inv/investment-policy/oecddeclarationanddecisions.htm , accessed 14/07/2019) The declaration is composed of four parts, the first and the important part being the OECD Guidelines for Multinational Enterprises. OECD, "Multinational enterprises in the global economy: Heavily debated but hardly measured" (2015), 2 (https://www.oecd.org/industry/ind/MNEs-in-the-global-economy-policy-note.pdf, accessed 12/07/2019). According to the OECD Guiding Principles, "precise definition of multinational enterprises is not required for the purposes of the Guidelines. These usually comprise companies or other entities established in more than one country and so linked that they may co-ordinate their operations in various ways." Therefore, investors are included as TNCs. Article 4, 17

[18] S.R. Ratner, "Corporations and Human Rights: A Theory of Legal Responsibility", *Yale Law Journal* 111(3) (2001), 443-546, 462

[19] Text of the OECD Declaration on International Investment and Multinational Enterprises, op. cit.

[20] OECD, "Multinational enterprises in the global economy", op. cit., 2 (https://www.oecd.org/industry/ind/MNEs-in-the-global-economy-policy-note.pdf, accessed 11/07/2019)

[21] OECD Guidelines, 3

aim provides guidelines and standards for responsible corporate conduct.[22] The guidelines and standards in the general policies section instruct *inter alia* to: "respect the internationally recognized human rights of those affected by their activities";[23] "Develop and apply effective self-regulatory practices and management systems that foster a relationship of confidence and mutual trust between enterprises and the societies in which they operate";[24] "carry out risk-based due diligence, for example by incorporating it into their enterprise risk management systems, to identify, prevent and mitigate actual and potential adverse impacts…".[25] These guidelines foster more responsible investments, as investors are required to assess the human rights impact on host state populations, conduct consultations with affected populations representatives and abstain from breaching the recognized human right of the host states' population.

The United Nations' first attempt at bringing this situation under control was between the years 1974 until 1990, with continues attempts to draft codes of conduct for TNCs, but these codes remained as drafts[26] in 1998, when a working group was established to examine the working methods and activities of transnational corporations in regard to human rights,[27] followed by the launch of the Global Impact UN initiative in 2000, setting principles for corporate social responsibility to respect the protection of internationally proclaimed human rights, and make sure corporations are not complicit in human rights abuses, In 2003 the UN Sub-Commission on the Promotion and Protection of Human Rights, drafted Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to human Rights.[28] In the commentary on the Norms, the Sub-Commission sets an obligation on states to ensure transnational corporations and other business enterprises respect human rights, and elaborates on the wide obligations of transnational enterprises to promote, ensure the fulfilment of, respect and protect human rights within their spheres of activity, equally in the

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[22] Ibid., 13-14

[23] Ibid., Article 2, 19

[24] Ibid., Article 7, 19

[25] Ibid., Article 10, 13

[26] Alice De Jonge, *Transnational Corporations and International Law: Accountability in the Global Business Environment* (Edward Elgar Publishing,2011), 29; Draft United Nations Code of Conduct for Transnational Corporations, UN Doc. E/1990/94 (1990)

[27] The Sub-Commission on the Promotion and Protection of Human Rights, Resolution 1998/8 (1998)

[28] 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 (2003) (http://hrlibrary.umn.edu/links/norms-Aug2003.html, accessed 11/07/2019)

home country and the country in which the business is engaged in activity.[29] In addition, among other points, according to the commentary the Norms set due diligence obligations on enterprises to ensure their activities do not directly or indirectly contribute and/or benefit from human rights abuses, and encourages them to use their influence to help promote respect for and protection of human rights. Besides this, the Norms set an obligation on the corporations to conduct human rights impact assessments of their activities.[30]

In 2005 the Commission on Human Rights adopted a Resolution, E/CN.4/RES/2005/69, requesting the Secretary General to appoint a special representative on the issue of "human rights and transnational corporations and other business enterprises".[31] According to the Resolution the special representative holds the mandate, *inter alia*, to clarify transnational corporations and other business enterprises' accountability and responsibility in regard to human rights, and to elaborate the role of states in regulating and adjudicating transnational enterprises and other business corporations with regard to human rights.[32] John Ruggie, the director of the Global Compact at the time, was appointed the UN's Special

[29] "States have the primary responsibility to promote, secure the fulfilment of, respect, ensure respect of and protect human rights recognized in international as well as national law, including ensuring that transnational corporations and other business enterprises respect human rights. Within their respective spheres of activity and influence, transnational corporations and other business enterprises have the obligation to promote, secure the fulfilment of, respect, ensure respect of and protect human rights recognized in international as well as national law, including the rights and interests of indigenous peoples and other vulnerable groups". Commentary on the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, UN Doc. E/CN.4/Sub.2/2003/38/Rev.2 (2003) (https://digitallibrary.un.org/record/501578, accessed 12/07/2019)

[30] D. Weissbrodt & M. Kruger, "Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights". *American Journal of International Law*, 97(4) (2003), 901-922

[31] OHCHR, "Human rights and Transnational Corporations and Other Business Enterprises" E/CN.4/RES/2005/69 (2005) (http://ap.ohchr.org/documents/alldocs.aspx?doc_id=11160, accessed 11/07/2019)

[32] Ibid., "1. *Requests* the Secretary-General to appoint a special representative on the issue of human rights and transnational corporations and other business enterprises, for an initial period of two years, who shall submit an interim report to the Commission on Human Rights at its sixty-second session and a final report at its sixty-third session, with views and recommendations for the consideration of the Commission, with the following mandate:

(*a*) To identify and clarify standards of corporate responsibility and accountability for transnational corporations and other business enterprises with regard to human rights;

(*b*) To elaborate on the role of States in effectively regulating and adjudicating the role of transnational corporations and other business enterprises with regard to human rights, including through international cooperation;

(*c*) To research and clarify the implications for transnational corporations and other business enterprises of concepts such as "complicity" and "sphere of influence";

(*d*) To develop materials and methodologies for undertaking human rights impact assessments of the activities of transnational corporations and other business enterprises;

(*e*) To compile a compendium of best practices of States and transnational corporations and other business enterprises".

Representative. In 2011, after six years' effort, Ruggie in his mandate as a Special Representative submitted his report, "Guiding Principles on Business and Human Rights"[33] (hereafter "the UNGPs"), endorsed the same year by the Human Rights Council.[34]

The UNGPs are structured on three pillars:

The first pillar imposes duties on the host state to protect against human rights abuses "by third parties including business enterprises, in its territory or jurisdiction by preventing, investigating, punishing and redressing".

The second pillar asserts the corporate responsibility to respect human rights through drawing an appropriate policy and approaching human rights in due diligence.

The third pillar suggests the access to remedy against human rights abuses, whether through a state or a non-state mechanism, judicial or non-judicial.[35]

According to the commentary on the UNGPs, nothing in the principles should be read as creating new obligations in international law.[36] The state's duty to protect is a "standard of conduct", which requires "taking appropriate steps to prevent, investigate, punish and redress such abuses through effective policies, legislation, regulations and adjudication".[37] States are required to set an expectation that business enterprises in their territory or jurisdiction respect human rights throughout their operations.[38] In regard to businesses' extraterritorial activities, states are not expected to regulate themselves, but are required to set "strong policy reasons for home states to set out clearly the expectations that businesses respect human rights abroad". In direct relation to foreign investment, states are required to "maintain adequate domestic policy space to meet their human rights obligations when pursuing business-related policy objectives with other States or business enterprises, for instance through investment treaties or contracts.[39]

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[33] J. Ruggie, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises. Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework, A/HRC/17/31 (2011) (hereafter UNGP)

[34] HRC, Resolution 17/4 (2011)

[35] UNGP

[36] UNGP, 2

[37] UNGP, Principle 1

[38] UNGP, Principle 2

[39] UNGP, Principle 9. According to the commentary on this article, "Economic agreements concluded by States, either with other States or with business enterprises – such as bilateral investment treaties, free trade agreements or contracts for investment projects – create economic opportunities for States. But they can also

According to the second pillar concerning the corporate responsibility to respect human rights, the responsibility to respect applies to all corporates, regardless of size or sector.[40] What is meant with respect, is that states "should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved".[41] According to the commentary, addressing adverse human rights impacts "requires adequate measures for their prevention, mitigation and where appropriate remediation".[42] The requirement to respect refers to "The International Bill of Human Rights[43] and the principles concerning fundamental rights set out in the International Labour Organization's Declaration on Fundamental Principles and Rights at Work".[44] The means that respect for human rights is achieved by setting policy commitments and human rights due diligence processes[45] to identify, prevent and mitigate any potential negative impacts, and account for how they address their impacts on human rights.[46] In addition, there is a requirement to set a process to enable remediation for adverse human rights impacts.[47]

affect the domestic policy space of Governments. For example, the terms of international investment agreements may constrain States from fully implementing new human rights legislation, or put them at risk of binding international arbitration if they do so. Therefore, States should ensure that they retain adequate policy and regulatory ability to protect human rights under the terms of such agreements, while providing the necessary investor protection." UNGP, 11

[40] UNGP, Principle 14

[41] UNGP, Principles 11, 13

[42] UNGP, 13

[43] The International Bill of Rights consists of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic Social and Cultural Rights.

[44] UNGP, Principle 12

[45] Due diligence in respect of human rights is illustrated in UNGP Principle 17: "In order to identify, prevent, mitigate and account for how they address their adverse human rights impacts, business enterprises should carry out human rights due diligence. The process should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed. Human rights due diligence:

(a) Should cover adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships;

(b) Will vary in complexity with the size of the business enterprise, the risk of severe human rights impacts, and the nature and context of its operations;

(c) Should be ongoing, recognizing that the human rights risks may change over time as the business enterprise's operations and operating context evolve."

[46] UNGP, Principles 15(a), 15(b), 17,18

[47] UNGP, Principle 15(c)

According to the third pillar of the UNGP, states are required to ensure access to remedies when the abuses occur in their territory of jurisdiction, both judicial and non-judicial.[48]

The endorsement of the UNGPs by the UN Human Rights Council has had an immense influence on law at both national and international levels, meaning, amongst other impacts, that significant number of states adopted national action plans, and there were changes in national legislation, mainly regarding corporate reporting.[49] The above-mentioned OECD Guidelines were last updated in 2011 in order to incorporate elements from the UNGPs to comply with corporate responsibility to respect human rights and due diligence processes.[50]

In 2014, the human rights council established an intergovernmental working group on transnational corporations and other business enterprises (IGWG), with a mandate "to elaborate an internationally binding legal instrument to regulate in international human rights law, the activities of transnational corporations and other business enterprises".[51] Recently in 2017, the guidelines were adopted by the Committee on Economic, Social and Cultural rights (ICESCR), in its General Comment No. 24 (hereinafter General Comment 24), which further elaborates the extra-territorial responsibilities of business enterprises.[52]

General Comment 24 aims to clarify the duties of state parties to the ICESCR in preventing and addressing the adverse impacts of business activities on human rights.[53] In writing the comment, the ICESCR committee took into consideration the UNGPs,[54] and General Comment 24 addresses businesses acting both domestically and transnationally.[55] According to the General Comment, under international standards business entities are expected to respect the rights enshrined in the covenant, even if they are not incorporated into

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[48] UNGP, Principles 25-31

[49] ILA study group on Business and Human Rights, Draft Report (2017), 7 (http://www.ila-hq.org/images/ILA/DraftReports/DraftReportSG_BusinessHR.pdf, accessed 12/07/2019) (hereafter ILA Report); UK Modern Slavery Act 2015

[50] Yildiz, op. cit., 4

[51] UNHRC, Elaboration of International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights, UN Doc A/HRC/RES/26/9 (2014) (https://www.ihrb.org/pdf/G1408252.pdf, accessed 12/07/2019)

[52] UN Committee on Economic, Social and Cultural Rights, General Comment No.24 on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities, E/C.12/GC/24 (2017) (hereinafter General Comment 24) (https://www.refworld.org/docid/5beaecba4.html, accessed 10/07/2019)

[53] Ibid., Article 1

[54] Ibid., Article 2

[55] Ibid., Article 3

domestic law.[56] As elaborated in the General Comment, states have obligations to respect and to protect; to fulfill the covenant rights, states therefore must take measures to ensure effective protection and impose sanctions in case of violation. In addition, the state parties should adopt a legal framework requiring businesses entities to exercise due diligence and ensure, where appropriate, assessments of the impacts of the business, such as how the business activity may affect indigenous people. The General Comment further requires consulting in good faith with the indigenous peoples concerned.[57]

Moreover, the General Comment requires states to limit the activity of the businesses through regulation when the activity affects the rights enshrined in the covenant, such as the right to public health in regard to tobacco selling, and other activities that might affect rights such as the right to adequate housing.[58] In the General Comment, the committee raises a particular concern over the goods and services provided by the private sector necessary for the enjoyment of basic ESCR.[59] States are required to fulfil these rights by taking necessary steps to the maximum of their available resources.[60]

The most significant part in relation to TNCs and investors in the General Comment, concerns the extraterritorial nature of the state parties' obligations, for the obligations do not stop at the state's territorial border:[61]

> Extraterritorial Obligations arise when a state party may influence situations located outside its territory, consistent with the limits imposed by international law, by controlling the activities of corporations domiciled in it territory and or under its jurisdictions, and thus may contribute to the effective enjoyment of economic, social and cultural rights outside its national territory.[62]

Finally, the General Comment, in accordance with the UNGPs, includes in the duty to protect, the states' duty to create an enforcement framework to ensure accountability in case of

[56] Ibid., Article 5
[57] Ibid., Articles 10-17
[58] Ibid., Article 19
[59] Ibid., Article 22
[60] Ibid., Articles 23-23
[61] Ibid., Articles 26-36
[62] Ibid., Article 28

a breach and access to at least non-judicial, but preferably judicial, remedies and means of redress for aggrieved individuals.[63]

The abovementioned OECD Guidelines, UNGP, General Comment 24 and UN initiatives have complemented more than 200 voluntary initiatives, related to both intergovernmental[64] and business sector[65] guidelines and standards,[66] initiatives which were however found to be ineffective[67] due to their voluntary nature. This was in large part because their effectiveness was related to the good will of the business corporations, the international contentment feelings, and the reputation of the brand. All the above-mentioned standards and regulations are non-obligatory soft laws. While in 2014, in its 26th session the UN Human Rights Council passed a resolution to set up an "intergovernmental working group to elaborate a legally binding instrument to regulate the activities of transnational corporations and other business enterprises with regard to Human Rights,"[68] only in 2018 was a draft of the treaty published,[69] the chances to conclude such a treaty are not high, the votes for concluding it passed only by plurality and there is a disagreement both geographically and ideologically.[70]

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[63] Ibid., Articles 38-57

[64] International Labor Organization, Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (2017) (https://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/---multi/documents/publication/wcms_094386.pdf, accessed 15/07/2019); Voluntary Principles on Security and Human Rights for the extractive and energy sector (2000) (https://www.voluntaryprinciples.org/what-are-the-voluntary-principles, accessed 15/07/2019); The Extractive Industries Transparency Initiative (https://eiti.org/, accessed 15/07/2019)

[65] The Global Sullivan Principles (1977) (http://hrlibrary.umn.edu/links/sullivanprinciples.html, accessed 10/07/2019); The Caux Round Table Principles for Business and International Peace Operation Associations (2009) (http://ethics.iit.edu/codes/CRT%202010.pdf, accessed 10/07/2019)

[66] Report of the United Nations High Commissioner for Human Rights on the Responsibilities of Transnational Corporations and Related Business Enterprises with Regard to Human Rights. Report of the Sub Commission on the Promotion and Protection of Human Rights, UN. Doc. E/CN.4/2005/91 (2005), para. 7 (https://www.humanrights.ch/cms/upload/pdf/050726_reportE-CN4-2005-91_TNCandHR.pdf, accessed 11/07/2019)

[67] P. Simons, "Corporate Voluntarism and Human Rights: The Adequacy and Effectiveness of Voluntary Self-Regulation Regimes", *Industrial Relations* 59(1) (2004), 101-141, 101, 130; C.M. Vázquez, "Direct vs. Indirect Obligations of Corporations Under International Law", *Columbia Journal of Transnational Law* 43 (2005), 927-959

[68] UNHRC, Elaboration of International Legally Binding Instrument on Transnational Corporations, op. cit.

[69] Ibid.; Zero Draft Treaty (2018) (https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/DraftLBI.pdf Accessed 12/07/2019); for more details on the treaty, see D. Cassell, "The Third Session of the UN Intergovernmental Working Group on a Business and Human Rights Treaty", *Business and Human Rights Journal* 3(2) (2018), 277-283

[70] D. Cassell, "Building a Treaty on Business and Human Rights: Context and Contours", *Human Rights Quarterly* 41(2) (2019), 497-508, 497. In this article, the need for a treaty was phrased as such: "The introduction by David Bilchitz identifies four key problems to show the need for a treaty. First is the current lack of clarity as to the existence, nature, and extent of business human rights obligations under international law. Second, while international human rights law at present calls on states to protect people from business,

The question remains, how effective have the evolving corporate responsibilities soft laws, mainly the UNGP, been since their endorsement in 2011 and until today, given the fact of their unbinding nature on business enterprises? In the following section, I will discuss the functions of the guiding principles as soft, and how can they affect international law. I will then investigate corporate social responsibility's impacts on international investment law. Finally, I will discuss how corporate social responsibility developments can be further integrated in international investment bilateral treaties and arbitration, creating a more robust commitment for states to protect, and corporations to respect, human rights.

B. Corporate Social Responsibility as Soft Law and its Functions in International Law

As corporations have a legal personality according to national law,[71] which derives from the state through incorporations,[72] a question is raised as to whether corporations have an international legal personality according to international law.[73] According to the dominant view, international law does not regulate the rights and obligations of investors,[74] and corporations are not subject to any form of liability. The American Court of Appeals has ruled that corporations are not subject to any kind of liability under the customary international law of human rights:

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many states—often themselves the principal violators—are too complicit, corrupt, or incapable to protect people from powerful corporations. Third, doctrines of separate legal personality and limited liability often shield parent and lead companies from liability for human rights violations committed by subsidiaries and business partners. And fourth, victims pursuing justice against companies encounter a formidable array of obstacles. These range from practical hurdles, such as high costs of litigation, to legal barriers, such as the doctrine of *forum non conveniens*.

"A treaty is needed, Bilchitz argues, to impose legally enforceable obligations on corporations, to assure states that regulate business that they will not be undercut by economic competition from more permissive states, to clarify applicable norms, to make clear that business rights under trade and investment treaties do not necessarily trump human rights, and to facilitate victims' access to remedies." Ibid., 498

[71] P. Dumberry & É Labelle-Eastaugh, "Non-State Actors in International Investment Law: The Legal Personality of Corporations and NGOs in the Context of Investor-State Arbitration", in Jean D'Aspremont (ed.), *Participants in the International Legal System: Multiple Perspectives on Non-State Actors in International Law* (Routledge, 2011), 360-371, 362

[72] S.M. Watson, "The corporate legal person", *Journal of Corporate Law Studies*, 19(1) (2019), 137-166, 137

[73] Dumberry & Labelle-Eastaugh, op. cit., 362

[74] Ibid.; Yildiz, op. cit., 1

> No corporation has ever been subject to any form of liability (whether civil, criminal, or otherwise) under the customary international law of human right. Rather, sources of customary international law have, on several occasion, explicitly rejected the idea of corporate liability.[75]

Scholars assume international corporations possess a limited personality, and some rights granted by the will of the state, such as the right to arbitration granted in a BIT.[76] While this notion grants only the right to arbitration and do not Impose any obligations on International corporates[77].

The UNGPs and General Comment 24 are soft law, which are incapable of changing the lack of corporate direct obligations in international human rights law.[78] But as soft laws, they fulfill several useful functions in international law in general and in investment law in particular. According to Blitt, the UNGPs are "a good starting point" for corporations, yet there is a need for a more "rigorous" approach, one which would bind the companies to the standards set according to the UNGPs.[79] Yet Blitt[80] holds an ambitious approach compared to the initial status of the declaration on human rights as a soft law, prophesying the development of its status in international human rights law into hard law:

> Thus, the story of the UDHR [Universal Declaration of Human Rights] is the story of how aspirational non-binding principles, or "soft law"- either in the form of a written treaty or in the consolidation of customary international practice. […] This is the most important lesson for corporate counsel to internalize when contemplating the evolving relationship between business and human rights. Put simply, although SRSG Ruggie's freshly minted Guiding Principles might strike one as plainly non-binding and aspirational today, these same principles can and will find surreptitious ways of growing up and

[75] Kionel v. Royal Dutch Petroleum Co., United States Court of Appeals, Second Circuit, 17.9.2010, 621 F.3d 111 (2010), pp. 148-149
[76] Dumberry & Labelle-Eastaugh, op. cit.
[77] A. Clapham, *Human Rights Obligations of Non-State Actors* (Oxford University Press, 2006), xxix
[78] R.C. Blitt, "Beyond Ruggie's Guiding Principles on Business and Human Rights: Charting an Embracive Approach to Corporate Human Rights Compliance", *Texas International Law Journal* 48 (2012), 33, 35
[79] Ibid, 35
[80] Ibid., 37-41

becoming enforceable international norms that may carry serious repercussions for corporations, officers and ill-prepared shareholders.[81]

The UDHR is an example of soft law evolving into hard law, but the relationship between soft law and international law can take another path: for soft law to be adopted in future treaty,[82] or for the use of soft law as an instrument to interpret binding international treaties.[83] According to Article 38 (1b) of the ICJ Statute,[84] there are two elements required for a soft law, resolution or principle to be part of customary law, general practice and *opinio juris*; but according to some scholars, there is a tendency in economic development, human rights and environmental laws to create new customary law based on *opinio juris* without unified general practice among states.[85]

In most investment disputes, tribunals primarily apply the rules of bilateral investment treaties.[86] But customary law becomes relevant when the relation between the host state and the investor is not regulated in an investment treaty.[87] Though the majority of investment law rules are part of treaties,[88] in case of a lacunae as a result of a specific question not being regulated in treaties, the tribunal refers to customary law.[89] While soft law is not normatively

[81] Ibid., 41

[82] Moshe Hirsch, "Sources of International Investment Law", in Andrea K. Bjorklund & August Reinisch (eds.), *International Investment Law and Soft Law* (Edward Elgar, 2012), 9-38. "The 1967 Outer Space Treaty was largely based on the Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space", ibid., 15. For further examples of soft law adopted into treaties, see Alan Boyle & Christine Chinkin, *The Making of International Law* (Oxford University Press, 2007), 216. Another example is the Helsinki Rules on the Uses of the Waters of International Rivers, which "had no legally binding effect *per se*. However, until the adoption of the UN Convention 30 years later, they remained the single most authoritative and widely quoted set of rules for regulating the use and protection of International watercourses. Indeed, those Rules are the first general codification of the law of international watercourses. As noted by Charles Bourne, the Helsinki Rules were soon accepted by the international community as customary International law (Bourne, 1996). The Rules have been referred to or adopted by a number of organizations and countries". M.A. Salman, "The Helsinki Rules, the UN Watercourses Convention and the Berlin Rules: Perspectives on International Water Law", *Water Resources Development* 23(4), 625-640 (2007), 625, 630

[83] Hirsch, op. cit., 9-38, 15

[84] Statute of the International Court of Justice (1945) (http://legal.un.org/avl/pdf/ha/sicj/icj_statute_e.pdf, accessed 08/07/2019)

[85] See Hirsch, op. cit., 20; Lori F. Damrosch *et al*, *International Law: Cases and Materials* (West Academic Publishing, 2001 [4th edn.]), 96

[86] Christoph Shreuer *et al*, *The ICSID Convention: A Commentary* (Cambridge University Press, 2009 [2nd edn.), 605

[87] Hirsch, op. cit., 15

[88] Jeswald W. Salacuse, "The Treatification of International Investment Law: A Victory of Form Over Life? A Crossroad Crossed?" *Transnational Dispute Management* 3 (2006)

[89] Hirsch, op. cit., 16

binding, it can affect investment arbitration tribunals' decisions.[90] Some scholars agree that soft law has influential functions, though it does not create binding obligations; yet referring to soft law in judicial decisions can be confusing, making it difficult to disentangle soft and hard law in "the real life of investment law".

Soft law plays three main functions in international law. Firstly, as mentioned above and as Blitt argues, soft law can turn into hard law over time, and therefore "play [a] major role in the development of international law" and take part in the evolution of international law. Soft law is conceived of as a tool, helping "those who are trying to understand the complex and phased international law-making processes. Secondly, soft laws create expectations of states and other legal entities which accepted them, to take the issue behind the soft laws seriously. Thirdly, soft law, though not binding, has a legal effect, in the interpretation of the judicial authority of the normatively binding instrument and complementing it.

As mentioned above, referring to soft law in judicial tribunals, and the lack of a clear separation between hard law and other nonbinding norms such as guidelines by defining them as soft law, locates them in a grey area and can create confusion. Weil, who believes there is no place for soft law in the international legal regime, phrases this as such:

> It would seem better to reserve the term 'soft law' for rules that are imprecise and not really compelling, since sublegal obligations are neither 'soft law' nor 'hard law': they are simply not law at all. Two basically different categories are involved here; for while there are, on the one hand, legal norms that are not in practice compelling, because too vague, there are also, on the other hand provisions that are precise, yet remain at the pre- or subnormative stage. To discuss both of these categories in terms of 'soft law' or hard law is to foster confusion.[91]

[90] A. Boyle, "Soft law in International Law-Making", *International Law* 2 (2006), 141-158, 125; Gabrielle Kaufmann-Kohler, "Soft Law in International Arbitration: Codification and Normativity", *Journal of International Dispute Settlement* 1(2) (2010), 283-299. According to Hirsch, op. cit., 31, soft laws fulfill three functions in investment jurisprudence: "interpreting ambiguous provisions included in international treaties, filling gaps in existing international investment law, and supporting legal findings arising from other sources of investment law (e.g. deriving from treaty or customary law)".

[91] Prosper Weil, "Towards Relative Normativity in International Law?", *The American Journal of International Law* 77(3) (1983), 413-442, 415

I argue that soft laws in general, and in regard to corporate social responsibility in particular, while creating confusion in their application in judicial tribunals, are fulfilling their function as international law development "catalyzers". Transformation and development phases are intrinsically flexible and confusing, and in this phase soft laws are the appropriate, sole normative instrument for the required evolution. As Boyle outlined, in comparison to conventions, it is easier to agree on soft law; while it is not binding, soft law instruments do not require domestic ratification from a state, and are flexible and easier to supplement or replace than a treaty.[92]

C. Potential Functions of Corporate Social Responsibility as Soft Law in Investment Law

This brings us to the question of how the UNGP and the abovementioned recent developments in corporate social responsibility soft law play a role in international investment law. The Urbaser decision,[93] as discussed throughout this paper, has triggered a discussion on the role of the UNGP in international law and the question of whether they can create a binding obligation upon corporations, leading to the tribunal's confusion in regard to the functions of soft law in international law and international investment law in particular. I argue that the decision has highlighted the problem of integrating corporate social responsibility in arbitral tribunals, leading to reflection upon the role of soft law in international law and how it functions.

This has ramifications in international investment law, leading to reflection upon the old generation of international investment treaties and applying the lessons to the new generations of IIAs emerging in the past few years, where the expectations of the two-way investors and states to comply with corporate social responsibility should be outlined. The effect of corporate social responsibility soft laws on BITs is currently playing a major role in an ongoing evolutionary process. Recent transformations in International investment law

[92] Boyle, "Soft law in International Law-Making", op. cit., 121
[93] *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Bilkaia Ur Partzuergoa v. Argentine Republic*. Award 08/12/2016 (henceforth Urbaser)

manifest the functions soft laws are playing in developing the corporate social responsibility regime, perhaps clearing the way towards a binding treaty.[94]

As elaborated above, soft law has three main functions, which can be manifested in investment law, and thus fulfil the functions of CSR as soft law:

1. Soft law can play a major role in the development of international law and contribute in the evolution of international law and investment law. While gradually becoming part of the negotiations for International Investment Agreements and state-investor agreements,[95] and becoming integrated the in the agreements, it is part of the evolution of responsible investment law.
2. The second function CSR can play as soft law is creating the expectations of states and investors. To take the issue behind the soft laws seriously, as will be elaborated below, the legitimate expectation of the investor has a significant role in investment arbitration. CSR as a soft law can influence the framing of the expectations of states and create an expectation of the investor to act in due diligence, conduct proper assessment of the influence of its conduct on the human rights of the host state population, ensure it does not benefit from human rights abuses, and encourages them to use their influence to help promote respect for and protection of human rights. Besides this, the norms set an expectation on the investor to conduct human rights impact assessments of their activities.
3. CSR as a soft law has a legal effect in the interpretation of the investment tribunals of the normatively binding instrument, and complementing it. CSR provisions in investment agreement preambles can influence the interpretation of the agreement in general, as the purpose of the agreement is manifested in the preamble. They may also impact due diligence considerations when tribunals decide on the jurisdiction and on the merits whether the investor deserves investment protection if it had acted contrary to human rights legislation.

[94] However, as mentioned above, the chances for concluding the treaty are low, due to the ideological and geographical disagreement. Ibid., footnote 71

[95] This does not resolve the asymmetry when the state is weak; *vis-à-vis* an economic powerful investor it will has less negotiating capacity, P. Thielborger, "The Human Right to Water v. Investor Rights", in E.U Petersmann, F. Francioni & P.M. Dupuy (eds), *Human Rights in International Investment Law and Arbitration* (Oxford University Press, 2009), 487

In the following chapters, I will examine how CSR as soft law can influence Investment Law and to some extent turn investment arbitration into a tool for promoting CSR.

Chapter II: The Evolution of BIT-Based Investment Law into the New Generation of IIAs

A. The "Classic" Investors' Protection Approach in Investment Law

In the historical evolution of investment law, as will be elaborated below, BIT-based investment law was developed in order to protect foreign investors in the host state. This is the traditional role of investment law, challenged by the new generation of IIAs aiming to protect the human rights of the host state population.

As of 2019, the investor-state relationship in regard to foreign investment is regulated in 3,317 International Investment Agreements (2932 BITs and 385 treaties with investment provisions TIPs). At least 2658 of them are in force,[96] *id est* the main contractual relation is bilateral in concluding BITs, other is multilateral agreements, such as Free Trade Agreements (FTAs) or Economic Partnership Agreements (EPAs). In recent decades, investors have had the option to use investor-state dispute settlement (ISDS) mechanisms, according to most of the IIAs, as a tool for the protection of their interests in host states, in accordance with the role investment law has historically played. Investment law was initially created for the narrow purpose of protecting foreign investors from the dragnets of host states, through provisions preventing expropriation without fair compensation and ensuring investors would be protected through standards designated for this purpose, Hence "investment security" clauses,[97] which are clauses in the IIAs, legislate that states must treat the investor in a fair and equitable manner (FET), in a non-discriminatory manner, and grant the investor full protection and security, and compensation in the case of expropriation.

Historically, the origins of investment law go back to the Middle Ages, when states had to protect their nationals' property during wars.[98] Until the emergence of the "Calvo" doctrine in the nineteenth century, states protected their nationals' property through the law of

[96] UNCTAD "Taking stock of IIA Reform: Recent Developments", *IIA Issues Note* 3 (2019), 1
[97] Adam H. Bradlow, "Human Rights Impact Litigation in ISDS: A Proposal for Enabling Private Parties to Bring Human Rights Claims through Investor-State Dispute Settlement Mechanisms", *Yale Journal of International Law* 43(2) (2018), 355-390
[98] T.G. Nelson, "Human Rights Law and BIT Protection: Areas of Convergence", *The Journal of World Investment & Trade* 12(1) (2011), 27-47, 32

the host states.[99] The Calvo doctrine established general international standards for the protection of investors.[100] The Calvo doctrine was incapable of protecting investors after World War I and the 1917 Russian Revolution. In the 1930s, the Mexican government expropriated American investments without compensation, leading the US to seek a more rigorous protection for investors, resulting in Cordell Hull, the US secretary of state, requiring Mexico to deliver "prompt payment of just compensation to the agrarian land owners in accordance with the universally recognized rules of law and equity". This compensation formula was later adopted and known as "the Hull formula".[101] From 1946, a multilateral trade agreement movement was initiated with the General Agreement on Tariffs and Trade (GATT), and the American initiative which lasted for 20 years, of Friendship, Commerce and Navigation (FCN), 21 agreements which extended treaty protections to corporates and included guarantees allowing fair and equitable and national treatment to foreign corporates; still, before seeking resort in international law, investors had to exhaust local remedies, firstly claiming in the home states.[102]

The need for the reestablishment of investment protection reemerged in the post-colonial era, when investment was conceived as a variety of neocolonialism in the newly decolonized states and to the Soviet bloc. There was a need to protect less developed countries from the unscrupulous practices of developed ones, whilst acknowledging the benefits of investments for the developing countries.[103] The need to protect foreign investments was also still required. In 1959 came the Abs-Shawcross Draft Convention on Investment Abroad, established for the protection of Western investors in newly decolonized regions.[104] In 1965, the Investment Dispute Convention (ICSID) was established, constructing a dispute settlement mechanism allowing investors to refer disputes to arbitration without the need to first exhaust local remedies or diplomatic protection.[105] In 1974, due to pressure from decolonized states and the Soviet bloc, the UN General assembly adopted the Charter of Economic Rights and Duties of States (CERDS) in a compromise between the developed countries and the

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[99] Dolzer & Schreuer, op. cit., 1-2
[100] Ibid.
[101] Nelson, op. cit., 33
[102] K. J. Vandevelde, , "A brief history of international investment agreements", *UC Davis Journal of International Law & Policy* 12(1) (2005), 157-194, 162-165
[103] Ibid., 166-167
[104] Bradlow, op. cit., 360. In the same year, Germany was the first country to sign BITs after its loss in the War. The first BITs were with Pakistan and the Dominican Republic. Vandevelde, op. cit., 169.
[105] Convention on the Settlement of Investment Disputes between States and Nationals of other States (1965), 575 UNTS, 159

postcolonial world and Soviet bloc, stating states "should" pay compensation in case of nationalizing or expropriating. This soft phrasing led developed states and investors to look for a more robust protection through treaties, leading to the beginning of the BIT era.[106] Initially the BITs as FCNs referred disputes to the International Court of Justice; later on, the BIT's dispute resolution clause referred cases to investor-state arbitration.[107]

As discussed, from the historical evolution of investment law, we see that the main aims of BITs were to protect foreign investors through treatment protection standards. In the case of a dispute, the BIT's settlement clauses granted the investor a right to refer the dispute to arbitration, by granting this right to investors, turning them into a limited legal personality.[108]]Developing states accepted this investment regime, acknowledging the importance of investment for their economy.[109] The BITs was a means for developing states to attract and encourage foreign investment, one of the components of which is to contribute to the economic development of the host country.

As a result of this investment logic, BITs granted rights to the investors on one hand, and obligations on states on the other, resulting that over time, in some cases, investors came to use these protection standards for purposes beyond their narrow original function, broadening their application to the promotion of their business interests when making a claim via ISDS mechanisms and tribunals for a breach by the state of an investment treaty whenever the state initiated a regulatory reform that might affect the economic interests of the investor. Using the ISDS claim, investors could block regulatory reform attempts made by the host states to promote human rights, mainly those concerning economic and social rights, including environmental rights.[110]

[106] Vandevelde, op. cit., 168
[107] Dolzer & Schreuer, op. cit., 7
[108] Dumberry & Labelle-Eastaugh, op. cit., footnote 72
[109] World Bank Group, Preamble of the World Bank Guidelines, "Guidelines on the Treatment of Foreign Direct Investment" Legal Framework for the Treatment of Foreign Investment: Volume II: Guidelines (1992), 35-44
[110] Ibid., 359; Valentina Cagnin, "Investor-State Dispute Settlement (ISDS) from a Labour Law Perspective", *European Labour Law Journal* 8(3) (2017), 217-231; Denis Côté, "Whose Rights Are We Protecting? Ensuring the primacy of human rights over investors protection in the international legal regime", Report prepared for the regional WG on the Canadian Council for International Co-operation (2015). For some cases In which the investor was able to narrow the host state's regulatory space, see: Tecmed v. Mexico, ICSID Case No. ARB/00/2 (29/05/2003); CMS Gas Transmission Co v. Argentina, ICSID Case No. ARB/01/8 (12/05/2005); Azurix Corp. v. Argentina, ICSID Case No. ARB/01/12 (14/07/2006); Suez, Sociedad General de Aguas Barcelona, S.A and Vevendi Universal, S.A. v. Argentina, ICSID Case No. ARB/03/19 (30/07/2010); Impreglio S.P.A v. Argentina, ICSID Case No. ARB/07/17 (21/06/2011)

As an estimate of the magnitude of the effect of ISDS tribunals, by January 2018 the number of ISDS claims against states reached 855,[111] covering 109 countries, and the amount ruled for states to pay in compensation to investors reached billions.[112] Between 1987 and 2017, in 61% of ISDS cases decided on the merits the decisions found in favor of the investor, while in 39% they found in favor of the state.[113]

B. The Era of Investor-State Asymmetry

As mentioned, the role of International Investment Law was traditionally conceived as ensuring the state's compliance with its obligations towards the investor in accordance with the BIT, while imposing no obligations whatsoever on the investor.[114] This was illustrated in the "Roussalis Standard", following the ICSID decision in *Roussalis v. Romania*: "BIT limit jurisdiction to claims brought by investors about obligations of the host state. The meaning of the 'dispute' is the issue of compliance by the state with the BIT […] [T]he BIT imposes no obligations on investors, only on the contracting states."[115]

This asymmetry[116] is a result of the structure of BITs and the investment arbitration mechanisms, both in the duties arising from the BIT and from the arbitration itself. The practice of states imposing obligations on investors through counterclaims has been limited. This has been in addition to procedural deficiencies, such as the unpredictability of the arbitration results, the confidentiality of the arbitration, and lack of transparency.[117]

The main problem for host states is the ICISD's record of decisions favoring the business interests of investors through a wide interpretation of standards imposed on the host states as the reasonable expectation of the investors according to the legal situation in the host

[111] United Nations Conference on Trade and Development, 88 (https://unctad.org/en/PublicationsLibrary/wir2018_en.pdf, accessed 06/07/2019)
[112] Côté, op. cit., *supra* note 3, 11
[113] World Investment Report 2018, op. cit., *supra* note 4, 94
[114] Kevin Crow & Lina Lorenzoni (2017), "International Corporate Obligations, Human Rights, and the Urbaser Standard: Breaking New Ground?", *Boston University International Law Journal* 35(87) (2017), 11
[115] Spyridon Roussalis v. Romania, ICSID Case No ARB/06/1 (07/12/2011) (https://www/italaw.com/cases/927, accessed 01/07/2019)
[116] Crow & Lorenzoni, op. cit., *supra* note 8, 10
[117] Cagnin, op. cit., *supra* note 3

state at the time of signing the BIT.[118] This has led to a situation in which any reform or regulatory change made by the state which has an effect on investors' business interests, is "frozen" by an ISDS claim. This is costly to states, and entails a risk to the state of paying very high compensation to the investor. This, in turn, leads states to refrain from regulatory changes that would benefit their nationals and their human rights. This is a phenomenon described as "regulatory chill".[119] This situation has caused the ISDS mechanism to be viewed as a form of ″dissonance″ in the development of human rights, especially social and economic rights and environmental rights, which may be directly affected by the state's BIT obligations in the absence of any obligations on investors as business corporations to respect human rights. Attempts to address this have been made by the development of the recent soft law mechanisms mentioned in Chapter I above, and the related, more recent United Nations Guiding Principles on Business and Human Rights (UNGPs),[120] and the later General Comment 24 adopting these guidelines.[121] As mentioned, Principle 9 of the UNGPs, directly addresses this problem, requiring states "maintain adequate domestic policy space to meet their human rights obligations when pursuing business-related policy objectives with other States or business enterprises, for instance through investment treaties or contracts."[122]

Hence, there is a double asymmetry in the favor of the investors. Firstly, they enjoy rights while imposing obligations on states according to international investment law; secondly, states bear obligations according to international human rights law, while corporations bear no obligations. In practice investment tribunals, in accordance with their jurisdiction[123] according to investment law, have applied human rights law in regard to states'

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[118] "The Arbitral Tribunal considers that this [fair and equitable treatment] provision of the agreement […] requires the contracting parties to provide to international investment treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment […] so that it may know beforehand any and all rules and regulations that will govern its investments". Técnicas Medioambientales Tecmed S.A. v. United Mexican States, ICSID Case No. ARB (AF)/00/2 (29/05/2003)
[119] Bradlow, op. cit., *supra* note 1; Cagnin, op. cit., *supra* note 3; Côté, op. cit., *supra* note 3
[120] UNGP, op. cit.
[121] General Comment 24, op. cit.
[122] Ibid., Principle 9
[123] According to Article 42(1) to the ICSID Convention: "The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable."

human rights obligations,[124] while being reticent in referring to human rights law in case of a breach by the investor, as will be elaborated below concerning the Urbaser decision.

International investment law has resulted, in some cases, in host states having contradictory obligations, towards investors in accordance with BITs, and toward the human rights of their nationals, as enshrined in international law. An explicit example of this is *Vattenfall v. Republic of Germany*,[125] concerning the environmental protection of the Elbe River. When the German government required new environmental measures for the investor's plant, the investor initiated an ISDS procedure, filing a claim for 1.4 million euros in compensation. Eventually, the German government reached a settlement with the investor, abandoning the protection of the Elbe River, leading the European Commission to refer Germany to the European Union's Court of Justice because of its failure to protect fish species in the river.[126]

This ISDS "human rights dissonance" was followed by a backlash against the legitimacy of the investment arbitration mechanism, with some calling for it to be harmonized with the interests of human rights, and others for it to be eliminated.[127] The ISDS was even described as a "grave danger to the enjoyment of human rights."[128] While investment arbitration was conceived as "dissonance" in the development of an international human rights regime, a view held by "human righters", international investment law experts, referring to ISDS decisions, hold the view that the state obligations in BITs and international human right law are lateral and not contradictory.[129] This view has been reaffirmed in investment tribunal decisions: "human rights obligations and its investment treaty obligations are not inconsistent, contradictory or mutually exclusive […] the state must respect both of them."[130]

In addition, investment law experts and tribunals hold the view that investment awards should be based on investment law, and that usually there is no reason to resort to international

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[124] Tecnias Medioambienrales Tecmed S.A. v. Mexico, ICSID Case No ARB (AF)/99/2 (02/05/2003), para. 122; Azurix Corp v. Argentina, para. 312; Biloune v. Ghana, Investments Centre UNCITRAL, Award on Jurisdiction and Liability (1989), 95 IRL 183, para. 202-203

[125] Vattenfall AB v. Federal Republic of Germany, ICSID case No. ARB/09/6, Request for Arbitration (30/03/2009)

[126] Bradlow, op. cit. *supra* note 1, 363

[127] Ibid.

[128] Alfred Maurice de Zayas, United Nations independent expert, cited ibid., 366

[129] Kriebaum, op. cit.

[130] Suez, Sociedad General de Aguas de Barcelona S.A. v Argentina, para. 262

human rights law.[131] According to this view, the legitimate expectations of the parties to the dispute are the key issue. For example, in decisions which have found states' new environmental and health regulations which affect investors, amongst others, to be legitimate, the fair and equitable treatment standard applied in due process and in a non-discriminatory manner will find that such reforms do not constitute an expropriation, and investors will not be compensated for the negative affects they bare as a result. This view was exemplified in the Methanex Corp case:[132]

> [A]s a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and which affects, *inter alios*, a foreign investor or investment is not deemed expropriatory and compensable unless specific commitments had been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation.[133]

The Methanex decision was re-affirmed in the Saluka case:[134] "It is now established in international law that states are not liable to pay compensation to a foreign investor hen, in the normal exercise of their regulatory powers, they adopt on a non-discriminatory manner *bona fide* regulations that are aimed at the general welfare."[135]

More recently, in 2018, the UN Commission of International Trade Law permanent court of Arbitration (PCA), has acknowledged explicitly the need to leave a "regulatory space" for the host state, and to be sensitive toward environmental legislation, a decision complying with principle 9 of the UNGP[136]:

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[131] Kevin Crow & Lina Lorenzini Escobar, "International Corporate Obligations, Human Rights, and the Urbaser Standard: Breaking New Ground", *Boston University International Law Journal* 36(87) (2018), 10–11: "Professional specialization in international investment law should not lead arbitrators to overlook adjoining fields, principles and practices of general international law, awards by arbitral tribunals under investment treaties have, at times, done so in the past. Such shortsighted approaches have fueled the ILL asymmetry debate and even convinced counsel argue cases based on such asymmetry"; Kreibaum, op. cit., 29-30. Regarding the ICSID decision in Biwater Gauff Ltd v. Tanzania (2008), in this case the tribunal solved the dispute without referring explicitly to *amicus curiae* human rights argument. Concluding only based on investment law, the state did not breach the BIT FET standard.

[132] Methanex Corporation v. United States of America, UNICITRAL, Final Award (03/08/2005), Part IV, Ch. D

[133] Ibid., para 7

[134] Saluka Investments B.V v. The Czech Republic, UNCITRAL, Partial Award (17/03/2006), 15; ICSID Report, op. cit., 274

[135] Ibid. para. 255

[136] Ibid., Principle 9

> The express objectives of NAFTA do include the encouragement of investment. Chapter Eleven does seek to avoid "investor chill" that might result from the prospect of certain kinds of discrimination or unfair treatment. In interpreting and applying these provisions, however, the majority of the present Tribunal agrees with the concern of our colleague that a NAFTA tribunal must be sensitive to the need to avoid "regulatory chill", including with respect to protection of the environment.[137]

Therefore, as mentioned, the legitimate expectation is the key issue, and state regulatory space for public interest non-discriminatory legislation will be narrowed only if the investor can prove that the host state promised or presented differently.[138]

Moreover, the harmonization of human rights and investment law can be achieved through investment law; in fact, there is no reason why provisions cannot be made allowing state counterclaims and referrals to host state domestic law, and in addition referring explicitly to human right provisions in the IIA and by this widening the investment arbitration tribunals' jurisdiction to include human rights obligations.[139]

In the above review, we can see the short sightedness of the asymmetry state-investor relationship notion in investment law to the benefit of the investor. This leaves us with the state-investor asymmetry in international law, where states hold obligations and international corporations are not a legal personality holding obligations. This asymmetry can be easily solved with states complying with their obligations according to international law through domestic law regulations. The investor might be bound to these obligations through an explicit reference in the BIT or the investor-state treaty to the local law, or through legitimate expectation in the FET. Nevertheless, the problem occurs in investments in states which do not regulate their domestic laws in accordance with human rights obligations, in corrupt regimes and in states so eager for investment that they seek to guarantee to the investors to not change human rights regulations that could affect investment. In these situations, there is more need for corporate responsibility to respect human rights. The Urbaser v. Argentina case manifested

[137] Clayton v. Canada, PCA on Merits (2018), para. 737
[138] Kreibaum, op. cit., 35
[139] Patrick Dumberry,."Suggestions for Incorporating Human Rights Obligations on Corporations into BITs", Kavaljit Singh and Burghard Ilge (eds.), *Rethinking Bilateral investment Treaties: Critical Issues and Policy Choices* (Both ENDS/Madhyam/Somo, 2016), 211-230

the need for corporate responsibility in these cases and the blocks towards it, as will be discussed below.

C. *Urbaser v. Argentina* Points the Way

The Urbaser decision was the first arbitration decision to set human rights obligations on investors, in accordance with the trend to extend human rights responsibility on private corporations.[140] [141] The decision emphasized that TNC's are not "immune from international subjectivity."[142] The decision provoked discussion on its correctness, both according to investment law and its rationale to protect investors, and according to international law.[143] Still, it has broken down the barriers for imposing human rights obligations on investors; by overcoming these barriers, corporate social responsibility (CSR) can be integrated into investment arbitration. As I will elaborate below in Chapter IV, the current reforms in IIAs and the new generation of IIAs include provisions enabling the integration of CSR in future investment arbitrations, partly solving the barriers the tribunal had to overcome in the Urbaser case.[144]

The Urbaser case deals with an arbitration claim by the company Urbaser, which held the majority if the shares in a Spanish investor company which was awarded water and sewage concession in 2001-2002, when Argentina faced economic crisis and privatized some services. Argentina later terminated the concession, and Urbaser started arbitration proceedings according to the Spain-Argentina BIT. Argentina raised a counterclaim that Urbaser had breached the human right to water. The arbitration tribunal enabled the claim, though it was eventually overruled, because according to the counterclaim, the investor has a duty according

[140] Crow & Escobar, op. cit., 9
[141] Though there is no precedents in investment arbitration, the effects of decisions on future arbitration tribunals is described as being "de facto precedent", or "common law of international arbitration". When tribunal rulings are consistent, "they acquire a collective normative weight […] this collective discourse have their own legitimacy and inevitably constrain both future tribunals and future state negotiations". P.M. Norton, "The Role of Precedent in the Development of International Investment Law", *ICSID Review -Foreign Investment Law Journal* 33(1) (2018), 280-301, 280, 301
[142] Urbaser, para. 1195
[143] Crow & Escobar, op. cit.; Blitt, op. cit.; Kreibaum, op. cit.
[144] These IIA new generation reforms cannot necessarily be claimed as a direct and exclusive result of Urbaser, but Urbaser is part of the trend to integrate CSRs in investment law. The decision both manifested these blocks, and showed the way to overcome them towards CSR in investment law.

to international law to *fulfill* the right to water, but not to respect. The Urbaser decision was described as the first time the ICSID has affirmed the "possibility of counterclaims in investment arbitration based on investor obligation under human rights to water."[145] Yet some have claimed the tribunal made an overly activist decision, practicing "interpretive acrobatics" to establish the argument that corporations have a legal persona, thus barring obligations, beyond soft responsibility, to respect human rights. Some scholars believe this "award cannot be sustained under the current state of international law."[146] Still, *Urbaser* highlights how BITs need to be strengthened in the future to protect the human rights of the nationals of the host state, rebalancing the relationship between states and investors in arbitration. As I argue here, in this rebalancing of the investor-state relationship in investment law, the CSR as a soft law fulfills its three functions as elaborated in Chapter 1.C: contributing to the development of investor responsible investment law; creating the expectation of the investor to respect human rights and act in due diligence; and, finally, to influence the interpretation of the investment tribunals. In addition, the decision manifests the confusion of arbitration tribunals regarding soft law deciding on investor's subjectivity in international law.

The barriers the Urbaser tribunal had to deal with were:

1) How to allow the state counterclaim in an absence of an explicit provision in the BIT. The tribunal interpreted that the state can raise a counterclaim over the lack of provision in the Spain-Argentina BIT, explicitly stating that states do not have right to raise counterclaims.[147]
2) How to refer to international human rights law with the lack of explicit reference in the BIT. With the lack of explicit reference to international human rights law, the Urbaser tribunal interpreted the reference to international law and general principles of international law in the BIT,[148] to include human rights: "The BIT cannot be interpreted and applied in a vacuum […] the BIT has to be constructed in harmony with other rules

[145] Patrick Abel, "Counterclaims Based on International Human Rights Obligations of Investors in International Investment Arbitration" (2018) (https://brill.com/view/journals/bol/1/1/article-p61_61.xml?lang=en, accessed 11/07/2019)
[146] Ibid., *supra* note 21, 1
[147] Urbaser, para. 1186-1187
[148] "BIT refers to general principles of international law and general international law, all of which are extra BIT sources that can be applicable. The BIT is not to be interpreted in isolation, but rather due consideration must be given to rules of international law external to the BIT's own rules." Urbaser, para. 1192

of international law of which it forms part, including to those relating to human rights."[149]

3) How to constitute an obligation on investors in international law, after integrating international human rights law. The tribunal tried to establish such an obligation by constituting corporate legal personality, bearing rights and duties in international law. If corporations have rights, they therefore also have obligations.[150]

The tribunal established the investor duties on the existence of investor rights in international law as referred to in the BIT, and concluded TNCs are no longer immune from international subjectivity:[151] "If the BIT therefore is not based on a corporations' incapacity of holding rights under international law, it cannot be admitted that it would reject by necessity any idea that a foreign investor company could not be subject to international law obligations."[152] The tribunal acknowledged that CSR initiatives, are not sufficient on their own to create obligations, and the context of the specific corporate activities and their relation to human rights determine the existence of international law obligation on non-state individuals.[153]

After establishing the right to water is a human right and part of the right to health, life and human dignity, the tribunal affirmed the corporate obligation to abstain from violating the human right to water from article 30 of the UNDHR, the ICSCR, the ILO Tripartite Declaration and the UNGP, referring to the Article 5(1) of the ICSCR, according to which

> nothing in the present covenant may be interpreted as implying for any state, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights or freedoms recognized herein, or at their limitation to a greater extent than is provided for in the present covenant.[154]

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[149] Ibid., para. 1200
[150] Crow & Escobar, op. cit.
[151] Urbaser, para. 1195
[152] Ibid., para. 1194
[153] "[E]ven 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 individuals." Urbaser, para. 1195
[154] ICSCR, op. cit., Article 5(1)

The tribunal went further, establishing TNCs commitment to "comply with human rights in the framework of those entities' operations conducted in countries other than the country of their seat or incorporation."[155] The tribunal further decided that the duty to abstain from committing acts which violate human rights applies "not only upon states, but equally to individuals and other private parties."[156] *Vis-à-vis* this obligation, the tribunal dismissed the existence of obligations on corporations to protect, unless agreed by the particular investor and state in a contractual relationship.[157]

This decision is held as unconvincing according to investment and international law experts, as the arguments given on Urbaser do not prevent the investor from relying on the BIT.[158] Another scholar has viewed this decision as inconsistent with international investment law theories by, "drawing a sharp distinction between an investor's contractual obligations and general international law",[159] and in addition it creates "horizontal obligations" for investors towards host states' nationals creating confusing and paradoxical situations in human rights law.[160]

D. *Urbaser v. Argentina* and Forward

Though the Urbaser decision can be easily challenged in both international and international investment law, and can to some extent be confusing, the decision points the way for the possible integration of CSR in investment law in a manner that creates less tension between international law and investment law and blocks created, by enabling states' counterclaims, by accepting explicit references to international human rights law and domestic law, especially in dualist system and direct CSR provisions, all being part of the current IIA

[155] Ibid., para. 1195
[156] Urbaser, para. 1210
[157] "The enforcement of the human right to water represents an obligation to perform […] 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 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." Urbaser, para. 1210
[158] Kreibaum, op. cit., 578-579
[159] Crow & Escobar, 18
[160] Ibid., 18

reform. The benefits can be accomplished by using the CSR soft law functions in the negotiating phase, and enabling the use of these provisions and integrating CSR in IIAs which may have implications on future investment arbitration.

In the last decade, IIAs have undergone reform, from first generation to second generation IIAs, in which states are seeking way to rebalance the investor-state asymmetry and integrate CSR provisions in the IIAs, whether in new IIA or through interpretative declarations, as I will discuss in the following chapter. These IIA and CSR provisions are still undiscussed in arbitration tribunals, but I discuss in the last chapter how these developments might affect arbitration tribunal decisions.

Chapter III: CSR Provisions in Second Generation IIAs

Prior to the developments in CSR as elaborated in Chapter I, CSR provisions did not exist in IIAs, which were concluded for the narrow purpose of protecting investors. In recent years, CSR provisions are becoming a regular part of a significant percentage of IIAs. Here particularly I review the CSR provisions incorporated in IIAs concluded between and 2018 June 2019. In this chapter, I try to illustrate this development and the manner in which the CSR provisions are incorporated, in order to reflect in the following chapter on how these provisions might impact arbitration tribunals and whether these developments can turn investment law into a tool for promoting CSR.

A. General Overview from the IPFSD to the Latest IIA Reform Report, 7 June 2019

Already in 2010, UNCTAD put forward the Investment Policy Framework for Sustainable Development (IPFSD), which sets guidelines for states in IIA negotiations, aiming to balance investor-state commitments and to promote responsible investment, and stipulates states to include in the IIA what consequences the investor will bear in case of failing domestic law obligations, and raises the option that "IIAs could refer to commonly recognized international standards and support the spread of CSR standards".[161] In 2011, the European Parliament in a resolution on the future of international investment policy, recommended the inclusion of a CSR clause in every FTA signed.[162] This call was re-affirmed in a more obligatory manner in 2016, by the European Parliament:

> Provisions on human rights, social and environmental standards, commitments on labour rights based on the ILO's [International Labour Organization's] conventions and principles of corporate social responsibility(CSR), including the OECD principles for multinational companies and the UN principles on

[161] UNCTAD, Investment Policy Framework for Sustainable Development (2012, updated 2015), 8
[162] European Parliament Resolution of 6 April 2011 on the Future European International Investment Policy (2010/2203 (INI)) (2011) 2010/C 296 E/05

> Business and Human Rights, should be binding and must form a substantial part of EU trade agreements through enforceable commitments.[163]

According to the latest UN World Investment Report, the year 2017 was characterized by the lowest number of new IIAs since 1983, with only 18 agreements. This decline marks, according to the report, a "turning point" in the making of IIAs, and "a period of reflection on, and review of, international investment policy," and the reports labels the IIAs conducted up to 2017 as "first-generation IIAs in need of reform."[164] According to the UNCTAD World Investment Report 2017,[165] IIA reform has made "significant progress", as "most of today's new IIAs include sustainable development-oriented reform elements that preserve the right to regulate, while maintaining investor protection, foster responsible investment and improve investment dispute settlement".[166]

In 2018, there was a rise in the number of IIAs concluded, most of them containing reform features, mainly in allowing regulatory space for the host state, and being oriented towards sustainable development.[167] According to UNCTAD, almost all treaties concluded in 2018, 40 in number, contain significant reform features,[168] and have a sustainable development orientation. Furthermore,

> Of the 29 agreements reviewed, 19 have general exceptions – for example, for the protection of human, animal or pant life or health, or the conservation of exhaustible natural resources. Sixteen recognize that the parties should not relax health, safety or environmental standards to attract investment. Twenty-five of the preambles refer to the protection of health, safety or environmental standards and safety, labour rights, the environment or sustainable development. Finally, corporate social responsibility obligations and the inclusion of pro-active investment promotion and facilitation provisions are becoming more prevalent, but they still do not feature consistently in recent

[163] European Parliament Resolution on a new forward-looking and innovative future strategy for trade and investment (2015/2015(INI)) (2016)
[164] United Nations Conference on Trade and Development, op. cit., *supra* note 4, 88
[165] United Nations Conference on Trade and Development World Investment Report (2017), 119 (https://unctad.org/en/PublicationsLibrary/wir2017_en.pdf, accessed 13/07/2019)
[166] Ibid., 119
[167] World Investment Report 2019, 99
[168] UNCTAD IIA Reform, op. cit., 1

IIAs. This is especially true for CSR provision, which appeared in only 13 of the 29 IIAs.[169]

Despite the lagging behind of provision for CSR, many of these other provisions, which appeared to be “innovative” before 2012, were becoming regular in 2018.[170] This development is not limited to BITs, but can also be seen on the multilateral level. For example, the Energy Charter Conference approved the discussion of the modernization of the Energy Charter Treaty, and bringing it up to date in different topics, including CSR provisions.[171]

B. CSR Provisions in IIAs

The CSR provisions in the IIAs concluded in recent years address both the state parties to the IIA, and the investors. Through reviewing IIAs concluded from 2018 to June 2019, I found four kinds of CSR provisions: (1) CSR Provisions addressing state parties; (2) CSR provisions addressing investor; (3) Preambles acknowledging CSR; (4) CSR provisions addressing home states. In the Brazilian BITs, while on one had CSR provisions are incorporated, on the other the CSR provisions excluded from arbitration. An overview of these provisions will be elaborated below.

These CSR provisions have a triple function: to encourage states to legislate domestic laws or polices aiming to bound states to CSR standards, and to “attune investors to their sustainable development-related responsibilities and operate as a source of interpretative guidance for ICSID tribunals”.[172] In addition, these provisions are compatible both with the traditional function of international investment and with the state’s obligations according to international law. The CSR provisions encourage states to fulfill CSR obligations upon states

[169] Ibid., p. 2; World Investment Report 2019: “Corporate social responsibility (CSR) obligations and the inclusion of pro-active investment promotion and facilitation provisions are becoming more prevalent, but they still do not feature consistently in recent IIAs. This is especially true for CSR provisions, which appeared in only 13 of the 29 IIAs.” 105
[170] UNCTAD IIA Reform, 2
[171] World Investment Report 2019, 106
[172] World Investment Report 2017, 139

and not on investors. The phrasing is in terms of promotion, encouraging voluntary actions by the states in accordance with soft law functions.

1. **CSR Provisions Addressing State Parties**

Most of the treaties which added provisions for CSR and sustainable development in the early reform stage, excepted the use of the provision by the investor against the state and excluded it from state-state arbitration.[173] One of the earliest attempts to include CSR provision was in the 2007 Norwegian Draft BIT,[174] according to which "parties agree to encourage investors to conduct their investment activities in compliance with the OECD Guideline on Multinational Enterprises and to participate in the United Nations Global Compact".[175] Canada was among the first states to incorporate soft law CSR provisions in hard law investment treaties.[176] Article 16 of the 2013 Benin - Canada BIT reads

> Each contracting party should encourage enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate internationally recognized standards of corporate social responsibility in their practices and internal policies, such as statement of principle that have been endorsed or are supported by the contracting parties. These principles address issues such as labor, the environment, human rights, community relations and anti-corruption.[177]

[173] Yung Zhu, "Corporate Social Responsibility and International Investment Law: Tension and Reconciliation", *Nordic Journal of Commercial Law* 1 (2017), 90-119, 117
[174] The 2007 Norwegian Draft Model BIT mentioned in ibid., 111
[175] Ibid.
[176] Ibid. 112
[177] Benin - Canada BIT (2013), Article 16 (https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/563/benin---canada-bit-2013-, accessed 13/07/2019)

Similar provisions were adopted in later Canadian BITs;[178] [179] in these later BITs the voluntary wording was exchanged to obligatory wording.[180] In Europe a similar progress occurred, and CSR provisions addressed to state parties were included in newly concluded TIPs, in a promotional non-obligatory wording, while some making general reference[181] and others referring to more particular CSR standards.[182]

In all the available IIA BITs concluded between 2018 and June 2019, CSR provisions may be found, nine of them more or less reading similarly to the below:

> The Parties affirm the importance of each Party encouraging enterprises operating within its Area or subject to its jurisdiction to voluntarily incorporate into their internal policies those internationally recognised standards, guidelines and principles of corporate social responsibility that have been endorsed or are supported by that Party.[183]

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[178] Yung Zhu, op. cit., 12; Article 16, Canada - Serbia BIT (2014), (https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/3502/canada---serbia-bit-2014-, accessed 13/07/2019); Article 16, Canada - Nigeria BIT (2014), (https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/3531/canada---nigeria-bit-2014-, accessed 13/07/2019) ; Article 15, Cameroon - Canada BIT (2014), (https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/3537/cameroon---canada-bit-2014- , accessed 13/07/2019); Article 8.16 Canada - Republic of Korea FTA (2014) (https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/korea-coree/fta-ale/index.aspx?lang=eng, accessed 13/07/2019) ; Article 15 Canada - Cote d'Ivoire BIT (2014) (https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/3539/canada---c-te-d-ivoire-bit-2014-, accessed 13/07/2019)

[179] All these (excluding the Burkina Faso - Canada BIT) were followed with provisions excluding the raising of claims by investors based on CSR provision in investment arbitration. Yung Zhu, op. cit., 13; Burkina Faso-Canada BIT (2015) (https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/3557/burkina-faso---canada-bit-2015-, accessed 13/07/2019)

[180] Yung Zhu, op. cit., 112; Article 15(3), Canada - Mali BIT (2014) (https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/3540/canada---mali-bit-2014-, accessed 13/07/2019); Article 16 Burkina Faso - Canada BIT

[181] Yung Zhu p. 116: "the parties agree to promote best business practices related to corporate social responsibility". Article 271(2), Columbia - EU - Peru FTA (2012), (https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:354:0003:2607:EN:PDF, accessed 13/07/2019); Article 293 EU - Ukraine Association Agreement (2012); -

[182] Article 422, EU - Ukraine Association Agreement (2012); Article 367(e), EU - Moldova Association Agreement (2014); Article 231(e), EU - Georgia Association Agreement, mentioned Yung Zho, 116

[183] Article 16, Australia - Hong Kong BIT (2019) (https://investmentpolicy.unctad.org/international-investment-agreements/treaties/treaties-with-investment-provisions/4893/australia---hong-kong-investment-agreement-2019-, accessed 13/07/2019)

Similar provisions, some referring explicitly to OECD Guidelines while others do not, can be found in the Cariforum States - United Kingdom EPA,[184] the Australia - Indonesia Comprehensive Economic Partnership Agreement,[185] the Argentina-Japan BIT,[186] the Agreement between the United States of America, the United Mexican States, and Canada,[187] the Agreement between the EU and Japan for an Economic Partnership,[188] the Ecuador - EFTA FTA,[189] the Argentina - United Arab Emirates BIT,[190] the Comprehensive and Progressive

[184] Article 196(2)(d), Cariforum States - United Kingdom EPA (2019) (https://investmentpolicy.unctad.org/international-investment-agreements/treaties/treaties-with-investment-provisions/4892/cariforum-states---united-kingdom-epa-2019-, accessed 13/07/2019)

[185] "Each Party reaffirms the importance of encouraging enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate into their internal policies those internationally recognised standards, guidelines and principles of corporate social responsibility that have been endorsed or are supported by that Party." Article 14.17, Australia - Indonesia Comprehensive Economic Partnership Agreement (2019) (https://investmentpolicy.unctad.org/international-investment-agreements/treaties/treaties-with-investment-provisions/4890/australia---indonesia-cepa-2019, accessed 13/07/2019)

[186] Article 17, Argentina - Japan BIT (2018) (https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/3871/argentina---japan-bit-2018-, accessed 14/07/2019)

[187] Article 14.17, Agreement between the United States of America, the United Mexican States, and Canada, (USMA) (2018). **"**The Parties reaffirm the importance of each Party encouraging enterprises 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, which may include the OECD Guidelines for Multinational Enterprises. These standards, guidelines, and principles may address areas such as labor, environment, gender equality, human rights, indigenous and aboriginal peoples' rights, and corruption." https://investmentpolicy.unctad.org/international-investment-agreements/treaties/treaties-with-investment-provisions/3841/usmca-2018-, accessed 14/07/2019)

[188] Article 16.5.e, Agreement between the EU and Japan for an Economic Partnership (2018): "…shall encourage corporate social responsibility and exchange views and information on this matter through the Committee on Trade and Sustainable Development, and as appropriate through other fora. In this regard, the Parties recognise the importance of the relevant internationally recognised principles and guidelines, including the OECD Guidelines for Multinational Enterprises which are part of the OECD Declaration on International Investment and Multinational Enterprises adopted by the OECD on 21 June 1976 and the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy adopted by the Governing Body of the International Labour Office in November 1977."

[189] Article 3, Ecuador - EFTA FTA (2018) (https://investmentpolicy.unctad.org/international-investment-agreements/treaties/treaties-with-investment-provisions/3872/ecuador---efta-fta-2018-, accessed 15/07/2019)

[190] Article 17, Argentina - United Arab Emirates BIT (2018) (https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/3819/argentina---united-arab-emirates-bit-2018-, accessed 15/07/2019)

Agreement for Trans-Pacific Partnership (CPTPP),[191] the Australia - Peru FTA,[192] and the Singapore - Sri Lanka FTA.[193]

2. CSR Provisions Addressing Investors

The new generation of IIAs and model BITs include a wide range of provisions addressing investors, some more concrete in reference to specific CSR provisions and phrased in obligatory wording such as "shall", "should", and others in terms of encouragement and referring to general or "abstract" CSR provisions continues the classic role which CSR has played as soft law. This may be assumed harden the CSR soft law by creating contractual duties on investors. We can find the soft CSR provisions in Article 12 of the Argentina - Qatar BIT, which encourages investors to "make efforts to voluntarily incorporate internationally recognized standards of corporate social responsibility into their business policies and practices".[194]

The Morocco - Nigeria BIT[195] includes more concrete contractual obligations imposing CSR on investors includes several specific CSR provisions:

- Article 14 requires investors to conduct environment and social impact assessments and, in accordance, to take precautionary measures;
- Article 18 requires investors to comply with labor and environmental standards;
- Article 17 requires investors to abstain from corruption;
- Article 20 establishes investors' liability;

Article 24 requires investors to comply with the host state's law, and for the investor and the substance of the investment to "strive to make the maximum feasible contributions to the sustainable development of the host state and local community through high level of

191 Article 9.17, Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) (2018) (https://investmentpolicy.unctad.org/international-investment-agreements/treaties/treaties-with-investment-provisions/3808/comprehensive-and-progressive-agreement-for-trans-pacific-partnership-cptpp-2018-, accessed 15/07/2019)
192 Article 9.17, Australia - Peru FTA (2018) (https://investmentpolicy.unctad.org/international-investment-agreements/treaties/treaties-with-investment-provisions/3805/australia---peru-fta-2018-, accessed 15/07/2019)
193 Article 10.26, Singapore - Sri Lanka FTA (2018) (https://investmentpolicy.unctad.org/international-investment-agreements/treaties/treaties-with-investment-provisions/3865/singapore---sri-lanka-fta-2018-, accessed 15/07/2019)
194 Article 12, Argentina-Qatar BIT (2016)
195 Morocco - Nigeria BIT (2016) (https://investmentpolicy.unctad.org/international-investment-agreements/treaties/otheriia/3711/morocco---nigeria-bit-2016-, accessed 14/07/2019)

socially responsible practices". In addition, Article 24 establishes the investor obligation to "apply the International Labour Organization's Tripartite Declaration on Multinational Investments and Social Policy as well as specific or sectorial standards of responsible practice where these exist".

As elaborated above, among the IIAs concluded from 2018 until June 2019, in this period there were more CSR provisions addressing state parties than addressing investors. The provisions addressing investors are less common, included only in four BITs. Three of these are BITs concluded by Brazil,[196] which have both a very specific and wide-ranging corporate social responsibility provision, referring, *inter alia*, explicitly to the OECD Guidelines, to endeavor for respecting internationally recognized human rights and to apply good practices of corporate governance.[197] But while the CSR provision is concrete and wide, the arbitration

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[196] Article 15, Brazil - United Arab Emirates BIT (2019) (https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/4896/brazil---united-arab-emirates-bit-2019-, accessed 15/07/2019); Article 15, Brazil - Guyana BIT (2018) (https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/3864/brazil---guyana-bit-2018-, accessed 15/07/2019); Article 14, Brazil - Ethiopia BIT (2018) (https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/3816/brazil---ethiopia-bit-2018-, accessed 15/07/2019)

[197] "Investors and their investment shall strive to achieve the highest possible level of contribution to the sustainable development of the Host State and the local community, through the adoption of a high degree of socially responsible practices, based on the voluntary principles , and standards set out in the OECD Guidelines for Multinational Enterprises.

2. The investors and their investment shall endeavor to comply with the following voluntary principle~ and standards for a responsible business conduct and consistent with the laws adopted by the Host State receiving the investment:

a) Contribute to the economic, social and environmental progress, aiming at achieving sustainable development;

b) Respect the internationally recognized human rights of those involved in the companies' activities;

c) Encourage local capacity building through close cooperation with the local community;

d) Encourage the creation of human capital, especially by creating employment opportunities and offering professional training to workers;

e) Refrain from seeking or accepting exemptions that are not established in the legal or regulatory framework relating to human rights, environment, health, security, work, tax system, financial incentives, or other issues;

f) Support and advocate for good corporate governance principles, and develop and apply good practices of corporate governance;

g) Develop and implement effective self-regulatory practices and management systems that foster a relationship of mutual trust between the companies and the societies in which its operations are conducted; h) Promote the knowledge of and the adherence to, by workers, the corporate policy, through appropriate dissemination of this policy, including programs for professional training; I

i) Refrain from discriminatory or disciplinary action against employees who submit grave reports to the board or, whenever appropriate, to the competent public authorities, about practices that violate the law or corporate policy;

j) Encourage, whenever possible, business associates, including service providers and outsources, to apply the principles of business conduct consistent with the principles provided for in this Article; and

k) Refrain from any undue interference in local political activities."

Article 15 Brazil - United Arab Emirates BIT exception excludes the corporate social responsibility from arbitration, by explicitly stating: " The following may not be subject to arbitration: […] Corporate Social Responsibility".[198] The fourth BIT is the Belarus - India BIT,[199] which encourages investors to voluntarily incorporate standards of social responsibility in their practices:

> Investors and their enterprises operating within the territory of each Party shall endeavor to voluntarily incorporate internationally recognized standards of corporate social responsibility in their practices and internal policies, such as statements of principle that have been endorsed or are supported by the Parties. These principles may address issues such as labour, the environment, human rights, community relations and anti-corruption.[200]

The question remains as to whether these provisions, representing a new development in IIAs, can turn investment law into a tool for promoting CSR, given the voluntary nature of these provisions. The possible implications of this will be addressed in the following chapter. In the case of the above-mentioned BITs recently concluded by Brazil, it is doubtful if they are intended to promote CSR, or on the contrary limit the considerations of arbitral tribunals and exclude from them any CSR claims, re-affirming the non-binding nature of CSR and blocking any possible claim by the state against the investor's conduct in regard to CSR.

3. CSR Provisions Addressing Home States

While in some host states we can find under-developed legal systems and "lack of political will" to deal with human rights violations; victims might therefore remain without redress.[201] As elaborated above in chapter I, the UNGP requires

> home States to set out clearly the expectation that businesses respect human rights abroad, especially where the State itself is involved in or supports those businesses. The reasons include ensuring predictability for business enterprises

[198] Article 25(3), Brazil - United Arab Emirates BIT; Article 25(3) Brazil Guyana BIT; Article 24 Brazil-Ethiopia BIT.
[199] Belarus - India BIT (2018) (https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/3839/belarus---india-bit-2018-, accessed 14/07/2019)
[200] Ibid., Article 12
[201] Judith Schrempf-Stirling & Florian Wettstein, "Beyond guilty verdicts: Human rights litigation and its impact on corporations' human rights policies", *Journal of Business Ethics* 145(3) (2017), 545-562

by providing coherent and consistent messages, and preserving the State's own reputation.[202]

General Comment 24 trues to deal with this problem by extending the home state jurisdiction to cover it bossiness's activity outside its territory and in case of a violation of rights in the scope of the ICESCR, home states are required to control activities of corporations domiciled under its jurisdiction and create an enforcement framework to ensure accountability, preferably judicial in case of a breach.

Article 20 of the Morocco - Nigeria BIT establishes the investor's civil actions liability in the home state:[203] "investors shall be subject to civil actions for liability in the judicial process of their home state for acts or decisions made in relation to the investment where such acts or decisions lead to significant damage, personal injuries or loss of life in the host state" .[204] Meanwhile, Article 17 of the South African Development Community Model BIT requires that home states

> shall ensure that their legal systems and rules allows for, or do not prevent or unduly restrict, the bringing of court actions on their merits before domestic courts relating to the civil liability of investors and investments for damages resulting from alleged acts, decisions or omissions made by investors in relation to the investments in the territory of the host state.[205]

These provisions comply with General Comment 24 and the UNGP third pillar, requiring states to apply a remedy in case of a breach of human rights. Moreover, these provisions have the potential to constitute the threat of human rights litigation, leading corporations to not breach human rights and abstain from possible breaches by applying, amending or adapting their human rights policies.[206]

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[202] UNGP, Commentary, 5
[203] Tarcisico Gazzini, "The 2016 Morocco–Nigeria BIT: An Important Contribution to the Reform of Investment Treaties", *Investment Treaty News* (2017) (https://iisd.org/itn/2017/09/26/the-2016-morocco-nigeria-bit-an-important-contribution-to-the-reform-of-investment-treaties-tarcisio-gazzini/, accessed 14/07/2019)
[204] Ibid.; Morroco - Nigeria BIT
[205] The South African Development Community Model Bilateral Treaty Template of 2012 with commentaries, (https://www.iisd.org/itn/wp-content/uploads/2012/10/SADC-Model-BIT-Template-Final.pdf, accessed 14/07/2019)
[206] Schrempf-Stirling & Wettstein, op. cit.

4. Preambles Referring to CSR

States are more regularly referring to human rights and signing treaties without relaxing states' human rights obligations. While some preambles do not refer specifically to CSR,[207] others do, such as the Nigeria - Austria BIT preamble, in which the parties acknowledge "responsible corporate behavior can contribute to mutual confidence between enterprises and host states".[208] According to the preamble to the Comprehensive Economic and Trade Agreement between Canada and the European Union (CETA), the state parties encourage "enterprises operating within their territory or subject to their jurisdiction to respect internationally recognized guidelines and principles of corporate social responsibility, including the OECD Guidelines for Multinational Enterprises, and to pursue best practices of responsible business conduct".[209]

From 2018 until June 2019, only two agreements included CSR provisions in their preambles. The Comprehensive Economic Partnership Agreement between the Republic of Indonesia and the EFTA acknowledges

> the importance of good corporate governance and corporate social responsibility for sustainable development, and affirming their aim to encourage enterprises to observe internationally recognised guidelines and principles in this respect, such as the OECD Guidelines for Multinational Enterprises, the OECD Principles of Corporate Governance and the UN Global Compact.[210]

The other agreement, the Ecuador - EFTA FTA, acknowledges[211]

> the importance of good corporate governance and corporate social responsibility for sustainable development, and affirming their aim to

[207] Cameroon - Turkey BIT (2012). The preamble declares the treaty is concluded "without relaxing health, safety and environmental measures as well as internationally recognized labour rights".
[208] Austria - Nigeria BIT (2013)
[209] CETA, entered into force 21/09/2017
[210] Comprehensive Economic Partnership Agreement between the Republic of Indonesia and the EFTA States (2018) (https://investmentpolicy.unctad.org/international-investment-agreements/treaties/treaties-with-investment-provisions/3873/efta-states---indonesia-epa-2018-, accessed 14/07/2019)
[211] Ecuador - EFTA FTA (2018)

encourage enterprises to observe and adhere to internationally recognised guidelines and principles in this respect, such as the UN Global Compact.

As shown in this overview, CSR provisions can be found more regularly in the IIAs concluded in recent years, yet the phrasing is voluntarily, complying with the soft law nature of CSR. In addition, it should be remembered that these provisions are incorporated only partly in new generation IIAs, which constitutes only 105 of the overall IIAs in force.[212]

In the following chapter I will reflect upon how this trend towards CSR provisions in new generation IIAs may affect future investment tribunal arbitrations.

[212] World Investment Report 2019, Id, p.102

Chapter IV: Reflections Upon How CSR Provisions in IIA New Generation Can Affect Investment Arbitration Tribunals

As reviewed in the previous chapter, CSR provisions are becoming a regular part of most newly concluded IIAs. The CSR provisions are, as we saw, of a voluntary and encouraging nature, and I believe that they are still far from hardening the soft law CSR guidelines by creating contractual obligations. Still, these provisions will have a potential effect on investment arbitration, in accordance with the three functions soft law can play. The challenge lies in how these provisions will be applied and interpreted in future ISDS arbitration disputes, and whether they can be a tool for the promotion of corporates' responsible conduct. As of June 2019, there were no arbitration cases concerning these provisions.[213] In this chapter, I will reflect upon and discuss this challenge.

As I expressed in the previous chapter regarding the newly concluded Brazilian BITs,[214] the inclusions of provisions which explicitly exclude CSR from arbitration have made the progress of CSR in investment arbitration more difficult. These BITs have excluded CSR matters from the possibility of arbitration. Therefore, I believe, in arbitration claims arising from such BITs the arbitrators will have an even a narrower space than in cases where the BITs do not include CSR provision at all, to raise corporate conduct, after the BITs explicitly excluded CSR provision from arbitration. In the other CSR provisions overviewed, though they are included in a very small percentage of all IIAs in force, these provisions can possibly influence the arbitration procedures by constituting a base for counterclaims, through *amici curiae* submission, interpreting the purpose of the IIA as manifested in the preamble, framing the legitimate expectations of the investor, or into taking the due diligence conduct of the investor at different stages of the arbitration, whether justifying the investor's conduct to deny them investment protection, or taking it into account when granting compensation. Possibly the unpredictability of how these provisions might influence arbitration tribunals decisions, and lead investors to refrain from initiating arbitration procedures.

[213] UNCTAD IIA Reform (2019); Yung Zhu, 117
[214] Ibid.

A. CSR Provisions as a Base for Counterclaims

As mentioned above in regard to the barriers the investment tribunal has had to overcome in the Urbaser case,[215] was allowing the host state's counterclaim. Recent IIAs more regularly include a provision allowing state counterclaims,[216] but they are a small percentage of IIAs in force. Moreover, if the counterclaim is allowed, the CSR misconduct claim must be related to the investment dispute. An example of a case where the court allowed and accepted a counterclaim based on environmental law was Burlington Resources Inc v. the Republic of Ecuador.[217] In this case, similarly to the Urbaser case,[218] the tribunal allowed an environmental counterclaim, according to article 42(1) to the ICSID convention, according to which international law is applicable, and then applied the Ecuadorian local environmental law and decided the investor should pay the state 41.7 million dollars.

CSR counterclaims may be applicable in the same manner, in case the CSR guidelines were adopted in local laws. It is easier for the tribunal to accept the counter claim if CSR provisions are part of the BIT. In the Burkington case, the tribunal was able to refer to the host state's law, in contrast to Urbaser in which the tribunal had to establish the investor obligation to respect human rights on international law, an obligation which does not exist in international law. For this reason, we can see a limited ability to accept state CSR counterclaims where the state has not integrated human rights and CSR obligations in its local law, or explicitly included CSR binding provision in treaties with the investor or in IIAs. This is required mostly in developing states but is unlikely to occur, since if the state is weak *vis-à-vis* an economic powerful investor, it will have less negotiating capacity.[219]

The above-discussed tendency of arbitration tribunals to accept counterclaims can be strengthened by the CSR provisions in IIAs, especially when the state's claim is that the investor did not respect the rights arising from international human rights conventions, while not acting with due diligence, not consult the state, or failing to make impact assessments.

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[215] Ibid.,
[216] World Investment Report 2019, 123, 129
[217] Burlington Resources Inc. v. Republic of Ecuador, ICSID Case No. ARB/08/5, Decision on Ecuador's Counterclaim (07/02/2017)
[218] Ibid.
[219] Thielborger, op. cit., 487

B. CSR as a Base for *Amici Curiae* Submissions

CSR provisions may establish *amici curiae* arguments. Recently we can find treaties allowing *amici curiae* participation, for example Canada's BITs with Guinea, which create jurisdiction for non-parties, with "significant interest" submission.[220] But without such provision, arbitral tribunals have allowed *amici curie* submissions, mainly as a solution in the mentioned above asymmetry era before the last few years of new generation IIAs, to shift the balance in favour of the public interest in the host state, which has had an influence on the population's enjoyment of human rights. Through *amici curiae* submissions, the investment tribunals can rebalance the asymmetry.[221] Investment tribunals have allowed *amici curiae* submissions in different instances.[222] Among the most well-known cases is *Methanex Corporation v. the United States of America*,[223] which saw the petition of an international NGO based in Canada, the International Institute for Sustainable Development.[224] The NGO

[220] Burkina Faso - Canada BIT; Canada - Guinea-BIT (2015)

[221] A. Sarava & S.R. Subramanian, "The Participation of *Amicus Curiae* in Investment Treaty Arbitration", *Journal of Civil & Legal Sciences* 5(4) (2016), 201, 205; C. Cross & C Schliemann-Radbruch, "When Investment Arbitration Curbs Domestic Regulatory Space: Consistent Solutions through *Amicus Curiae* Submissions by Regional Organisations", *The Law & Development Review* 6(2) (2013), 67-110, 67, 80

[222] E. Levine, "Amicus Curiae in International Investment Arbitration: The Implications of an Increase in Third-Party Participation", *Berkeley Journal of International Law* 29(1) (2011), 200, 208.

[223] Methane below

[224] Methanex Corporation v. United States of America, UNCITRAL, Decision of the Tribunal on Petitions from Third Persons to Intervene as 'amici curiae' (2001) (https://www.italaw.com/sites/default/files/case-documents/ita0517_0.pdf, accessed 10/07/2019)

The tribunal allowed the submission of written arguments, but not participation in the arbitration procedures or getting materials. The decision is according to Article 15(1), UNCITRAL Arbitration Rules (1976) UN Doc. A/RES/31/98; 15 ILM 701. Article 15.2 enables the tribunal to "conduct the arbitration in such manner as it considers appropriate". The tribunal concluded: "that by Article 15(1) of the UNCITRAL Arbitration Rules it has the power to accept *amicus* submissions (in writing) from each of the Petitioners, to be copied simultaneously to the legal representatives of the Disputing Parties, Canada and Mexico. In coming to this conclusion, the Tribunal has not relied on the fact that *amicus* submissions feature in the domestic procedures of the courts in two, but not three, NAFTA Parties. The Tribunal also concludes that it has no power to accept the Petitioners' requests to receive materials generated within the arbitration or to attend oral hearings of the arbitration. Such materials may however be derived from the public domain or disclosed into the public domain within the terms of the Consent Order regarding Disclosure and Confidentiality, or otherwise lawfully; but that is a quite separate matter without? the scope of this decision."

Article 47, Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/05/22, Procedural Order No. 5 (2007) (https://www.italaw.com/sites/default/files/case-documents/ita0091_0.pdf, accessed 10/07/2019). In this case the Tribunal accepted for an NGO to submit an *amicus curiae* submission according to Article 37(1) to the ICSID Arbitration Rules, even without the consent of one or both parties: "Rule 37(2) establishes the right of third parties to apply for *amicus curiae* status. This right does not extend to a right to have such submissions accepted by the tribunal, or for them to form a basis for the final award if they are so accepted. On the other hand, it does establish a right to make a full presentation to the tribunal in order to be able to meet the test for acceptance as an *amicus curiae.* The Petitioners emphasise that it is now explicit not only that the tribunal has the jurisdiction to accept *amicus curiae* submissions, but also that it may do so requested to take part in the proceeding as an *amici curiae*, due to the influence of the arbitration proceedings on the population's ability to enjoy human rights. Another case worth mentioning is *Glamis Gold Ltd v. the United States of America*, in which the request of an indigenous American group to take part in the arbitration as a third party was accepted.[225] Therefore, CSR provisions can be a ground for third party participation. A strong argument for this arises when the corporate did not fulfill its investment assessment duty, or did not act in due diligence, when failing to take into consideration the standpoint of indigenous people, or did not conduct prior consultation with their representatives. Acknowledging CSR in the preamble or other CSR provision can lead the tribunal to award in favour of the affected group joining the arbitration procedure.

C. The Impact of Mentioning CSR in Preambles on the Tribunal's Interpretation of the Purpose of the IIA

BITs which include references to CSR only in their preambles and not in the substantive parts of the treaty have the potential to influence the tribunal decision, since according to the Vienna Convention on the Law of Treaties (VCLT) the arbitrators must pay heed to the preamble in their interpretation. As Article 31 (1) to the Vienna Convention states: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".[226] On the purpose of a treaty, Article 31 (2) of the VCLT states: "The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text including its preamble and annexes".[227] As the "classical" purpose of investment treaties is to grant investment protection, arbitration tribunals have referred to the preamble in this context.[228] The recent developments in new generation

without the approval of one or both of the arbitrating parties." Para 17. According to Article 37(2) to the ICSID Rules of Arbitration, a non-disputing party submission can be approved, taking into consideration the following factors: "(a) the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties; (b) the non-disputing party submission would address a matter within the scope of the dispute; (c) the non-disputing party has a significant interest in the proceeding".

[225] Glamis Gold Ltd v. The United States of America, UNCITRAL, Decision on Application and Submission by Queshan Indian Nation (16/09/2005)

[226] Article 31(1) VCLT

[227] Article 31(2) VCLT

[228] Dolzer & Schreuer, op. cit., 29-30; Lauder v. Czech Republic, Award (03/09/2001), para. 292; MTD v Chile, Award (25/05/2004), paras. 104-105; Siemens v. Argentina, Decision on Jurisdiction (03/08/2004); Aguas del Tunari, SA v. Bolivia, Decision on Jurisdiction (21/10/2005), paras. 153, 240, 241, 247; Saluka, op. cit., para.

IIAs, including the move towards mentioning CSR in preambles, are shifting the equilibrium towards more responsible investments, and, in some IIAs where there are explicit provisions for CSR, to more reliable investments. These components are reasonable ground to assume that arbitration tribunals will refer to the provisions on CSR mentioned in IIA preambles. Especially when interpreting a Fair and Equitable Treatment Standard (FET) clause in a IAA, if its preamble refers to CSR, the arbitrators' perspective may be influenced by the preamble.[229]

D. Considering CSR Provisions When Framing "Legitimate Expectations"

When the tribunal decides upon a FET violation, usually the tribunal considers if the host state violated the expectations of the investor. When a regulatory change is claimed by the investor to breach the stability of the investment creating a violation of the FET standard, although preservation of regulatory space is the most desired component of the new IIA reform,[230] CSR provision, whether addressing the state parties or the investor, or in the preamble of the IIA, can influence the tribunal' s interpretation. It may lead the tribunal to decide whether the host state acted within the legitimate expectations to promote CSR, and not in a "manifestly inconsistent, non-transparent, unreasonable or discriminatory" manner.[231] Moreover, it can be assumes that when there are two investors, one responsible but the other

299; BG Group v. Argentina, Final Award (24/12/2007), paras. 132-134; Hrvatska Elekropriverda v. Slovenia, Decision on Treaty Interpretation Issue (12/06/2009), paras. 177-179

229 Similarly, the arbitrators' view can be affected by the references to human rights in the preamble. P. Dumberry & G. Dumas-Aubin, "How to Impose Human Rights Obligations Under Investment Treaties? Pragmatic Guidelines for the Amendment of BITs", *4 Yearbook International Investment Law and Politics* (2014), 569, 579 (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2404054, accessed 15/07/2019)

230 World Investment Report 2019, 120. "*Preservation of regulatory space.* Treaties concluded in 2018 include elements that aim more broadly than ever at preserving regulatory space and/or at minimizing exposure to investment arbitration. The number of new treaties that incorporate these reforms are substantial. Elements include (i) general exceptions (19 IIAs), (ii) clauses that limit the treaty scope (e.g. by excluding certain types of assets from the definition of investment (27 IIAs)), (iii) clauses that limit or clarify obligations (e.g. by omitting or including more detailed clauses on FET (all 29 IIAs) and/or indirect expropriation (23 IIAs)) and (iv) clauses that contain exceptions to transfer-of-funds obligations and/or carve-outs for prudential measures (all 29 IIAs). Notably, 28 of the 29 treaties omit the so-called umbrella clause (thus also narrowing the range of possible ISDS claims)." Though the tribunal decisions on old FET and expropriation clauses granted regulatory space, the new IIAs generation make this more explicit. Kreibaum, op. cit., 574

231 Saluka, para 309; A. Wythes, "Investor-State Arbitration: Can the Fair and Equatible Treatment Clause Consider International Human Rights Obligations?", *Leiden Journal of International Law* 23(1) (2010), 241-256, 241, 247

not acting according to the CSR guidelines, CSR consideration can justify discriminatory treatment of the investor which is irresponsible, and not of the responsible investor.[232]

As mentioned in the Urbaser decision, "[t]he Respondent rightly recalls the province had to guarantee the continuation of the basic water supply to millions of Argentines. The protection of this universal basic human rights constitutes the framework within which claimants should frame their expectations."[233] Therefore, as may be seen, CSR provisions may lead the investment arbitration tribunals to narrow the investor's legitimate expectations frame, to exclude states' obligations to respect human rights.

E. CSR Provision and Arbitration Tribunals' Consideration of Investors' Good Faith

Investment tribunals have considered good faith consideration to deem protection of the investment both on jurisdiction and on its merits. This claim is easier to make when the IIA includes a clause stipulating accordance to state law, a clause frequently contained in investment treaties.[234] It is much easier in "well-functioning regulatory systems"[235] for a tribunal to deny protection for investors breaching human rights, when it is explicit that state law applies. The inclusion of such as clause is important in dualist legal systems, since in such systems "human rights treaties do not form part of the domestic legal system unless they have been specifically incorporated."[236]

"In accordance with state law" embodies the doctrine of clean hands which originates from the general principle of good faith.[237] "In accordance with state law provision", is a *renvoi* to the state law, and makes it explicit the state law is included in the applicable law.[238]

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232 Yung Zhu, 119
233 Urbaser, para. 624; Kreibaum, op. cit., 574
234 Arif H. Ali & Eduardo Silva Romero, "Arbitration of Corruption Allegations: The International Comparative Guide to Investor-State Arbitration" (2019) (https://iclg.com/practice-areas/investor-state-arbitration-laws-and-regulations/2-arbitration-of-corruption-allegations, accessed 14/07/2019)
235 Kreibaum, op. cit., 576
236 Ibid.
237 Richard Kreindler, "Corruption in International Investment Arbitration: Jurisdiction and the Unclean Hands Doctrine," in K. Hober, A. Magnusson and M. Öhrström eds., *Between East and West: Essays in Honour of Ulf Franke* (Juris Publishing, 2010), 317; P. Dumberry, & G. Dumas-Aubin, "The Doctrine of 'Clean Hands' and the Inadmissibility of Claims by Investors Breaching International Human Rights Law" (2014), 1, 4 (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2404058&download=yes, accessed 10/07/2019)
238 Ibid., 4

Nevertheless, the absence of it does not mean that investors can act in a manner contradictory to the law and to good faith; tribunals have decided it can apply in an implicit manner, and can decide to deny investment protection in the jurisdiction decision or in the merits.[239] In *Plama Consortium Limited v. Republic of Bulgaria*, where the arbitration is according to the Energy Charter Treaty (ECT) which does not contain an “in accordance with state law” provision, the tribunal decided to deny the ECT protection, since the contract was gained by wrongful means, and the principle applies of *nemo auditor propriam turpitudinem allegans* (nobody can benefit from his own wrong).[240]

In the Hamester case,[241] referring to the Phoenix award, the tribunal decided:

> 123. The Tribunal considers, as was stated for example in *Phoenix v. Czech Republic*, that: “States cannot be deemed to offer access to the ICSID dispute settlement mechanism to investments not made in good faith.”
>
> An investment will not be protected if it has been created in violation of national law or international principles of good faith; by way of corruption, fraud, or deceitful conduct; or if its creation itself constitutes a misuse of the system of international investment protection under the ICSID Convention. It will also not be protected if it is made in violation of the host State’s law (as elaborated, e.g. by the tribunal in Phoenix).[242]

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[239] Ibid., 5

[240] Ibid., 6; and as illustrated in ICSID Case No. ARB/03124, Plama Consortium Limited v. Republic of Bulgaria, Award (27/08/2008), para. 143-144: “143. Claimant, in the present case, is requesting the Tribunal to grant its investment in Bulgaria the protections provided by the ECT. However, the Tribunal has decided that the investment was obtained by deceitful conduct that is in violation of Bulgarian law. The Tribunal is of the view that granting the ECT's protections to Claimant's investment would be contrary to the principle *nemo auditur propriam turpitudinem allegans* invoked above. It would also be contrary to the basic notion of international public policy - that a contract obtained by wrongful means (fraudulent misrepresentation) should not be enforced by a tribunal.
“144. The Tribunal finds that Claimant's conduct is contrary to the principle of good faith which is part not only of Bulgarian law - as indicated above at paragraphs. 135-136 - but also of international law - as noted by the tribunal in the *Inceysa* case. The principle of good faith encompasses, *inter alia,* the obligation for the investor to provide the host State with relevant and material information concerning the investor and the investment. This obligation is particularly important when the information is necessary for obtaining the State's approval of the investment.”

[241] Gustaf F.W. Hamester, GmbH & Co. Kg v. Republic of Ghana, ICSID Case No ARB/03/24, Award (18/06/2010), para 123

[242] Ibid.

Moreover, arbitration tribunals considered the due diligence of the investor in some cases, and even decided it to be an obligation imposed equally both on the investor and on the state:

> The Tribunal concurs with these findings. They reflect the specificities of the fair and equitable standard, which protects investors against a certain conduct, namely inacceptable and inappropriate changes of conditions and circumstances by the State. The investor is entitled to rely on the stability and transparency of the legal framework. However, the obligation of the State does not dispense the obligation of the investor to evaluate the circumstances. Reliance has at its prerequisite diligent inquiry and information. The investor has to understand the content and the context of the law and the administrative practice. Put differently, the standard is addressed to both the State and the investor. Fairness and equitableness cannot be established adequately without an adequate and balanced appraisal of both parties' conduct.[243]

In the *Biwater v. Tanzania* case,[244] the tribunal too named countervailing factors "such as the responsibility of foreign investors, both in terms of prior due diligence as well as subsequent conduct, the limit to legitimate expectations in circumstances where an investor itself takes on risks in entering a particular investment environment".[245] In the *Charanne Construction v. Spain* case, the tribunal conditioned the investor's enjoyment of legitimate expectation in FET protection by an analysis of the legal framework for the investment, conducted in due diligence:

> In this regard, the Arbitral Tribunal shares the Respondent's position according to which, "*in order to exercise the right of legitimate expectations, the Claimants should have made a diligent analysis of the legal framework for the investment.*" This position is consistent with the position adopted by other tribunals. The tribunal in *Frontier*, for example, considered that "*a foreign investor has to make its business decisions and shape its expectations on the basis of the law and the factual situation prevailing in the country as it stands*

[243] Mamidoil Jetoil Greek Petroleum Products Societe S.A. v. Republic of Albania, ICSID Case No. ARB 11/24, Award (30/03/ 2015), para. 634
[244] Biwater v. Tanzania, ICSID Case No. ARB/05/22, Final Award (24/07/2008)
[245] Ibid., para. 601

at the moment of the investment." Indeed, in order to be in violation of the legitimate expectations of the investor, regulatory measures must not have been reasonably foreseeable at the time of the investment. The Arbitral Tribunal considers that in the present case, the Claimants could have easily foreseen possible adjustments to the regulatory framework as those introduced by the rules of 2010…[246]

From the above overview, it can be concluded that tribunals on different occasions have established obligations upon investors for due diligence conduct and the principle that "nobody can benefit from his own wrong", all stemming from the "clean hands" principle in international law, and even extended this obligation to include legal situation assessment in host states. These decisions did not always refer to explicit "according to state law" provisions, or specific provisions in IIA. Those awards comply with the requirements upon investors according to the OECD guidelines. The message of the UNGP General Comment rests upon corporate due diligence conduct. Therefore, including CSR provision in BITs, both for states parties and upon investors, in addition to mentions of CSR in the preamble, are complementary to the above-mentioned arbitral rhetoric and awards, and have the potential to foster the conclusion of tribunals in accordance with the decisions. Where an investor does not act in due diligence, or presents wrongful impact assessments, or does not respect human rights, they will not enjoy investment protection. Tribunals can more easily reach such a conclusion when it is in accordance with state law provisions in a well- regulated system, but this does not prevent tribunals from reaching the same decision upon international law principles and the expectation from investors to act according to CSR guidelines and standards.

F. The Impact of CSR Provisions on Investors' Contributory Behaviour for Violations and Calculating Compensation

Investment arbitration tribunals can take into account investor behavior in regard to compliance with CSR commitments when awarding compensation. The Holland model BIT[247]

[246] Caharanne Construction v. Spain, SCC Case No. 062/2012, Award (21/01/2016), para 505; Y. Levashova, "The accountability and corporate social responsibility of multinational corporations for transgressions in host states through international investment law", *Utrecht Law Review* 14 (2018), 40, 52
[247] Netherlands Model Investment Agreement (2018), Article 23

explicitly enables this, but even without an explicit provision, investor due diligence and conduct can be taken into account while deciding upon compensation. A recent example of this, considering the "fault" of the investor, can be found in the Beer Creek Mining Case, and Arbitrator Sands' partly dissenting opinion. While the host state established the "contributory responsibility"[248] of the claimant, the investor in this case, the arbitrator referred to the Abengoa award. The Tribunal was called on to assess whether "events that led to the loss of the Claimants' investment would not have occurred" if "a social communication program had been timely implemented".[249] The case was concluded after acknowledging that ILO Convention 169 (the Indigenous and Tribal Peoples Convention) does not impose direct obligations on investor,[250] [251] but that does not mean the convection does not have legal effects:

> This Tribunal is entitled to take the Convention into account in determining whether the Claimant carried out its obligation to give effect to the aspirations of the Aymara peoples in an appropriate manner, having regard to all relevant legal requirements, including the implementing Peruvian legislation.[252]

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[248] Bear Creek Mining Corporation v. Republic of Peru, ICSID Case No AR B/14/21, Award (30/11/2017), Partly Dissenting Opinion of Professor Philip Sands QC, para 3

[249] Ibid., para. 5

[250] Ibid., para. 10

[251] In the Bear Creek Case, Arbitrator Sands applies the same considerations as in the Urbaser case, in regard to investors' obligations: "Yet the fact that the Convention may not impose obligations directly on a private foreign investor as such does not, however, mean that it is without significance or legal effects for them. In *Urbaser v Argentina*, the Tribunal noted that human rights relating to dignity and adequate housing and living conditions 'are complemented by an obligation on all parts, public and private parties, not to engage in activity aimed at destroying such rights.' The Urbaser Tribunal further noted that the BIT being applied in that case has to be construed in harmony with other rules of international law of which it forms part, including those relating to human rights". Article 42(1) of the ICSID Convention, together with the governing law clause of that BIT (Article X(5)), provided that that "Tribunal shall apply the law of the host State "and such rules of international law as may be applicable […] The same considerations apply in the present case". Ibid., para. 10-11

It is important to note that investment tribunals are not bound to previous decision by other tribunals, and each arbitral decision is binding only to the parties. This results in the *ad hoc* constitution of each arbitration case. However, previous tribunals decisions have a value; the tribunals consider and compare previous decisions in similar circumstance and have the duty to "seek to contribute to contribute to the harmonious development of investment law and thereby to meet the legitimate expectations of the community of states and investors towards certainty of the rule of law". Sapiem v. Bangaladesh, Decision on Jurisdiction, 21/032007, para. 76. They may also use them as "subsidiary means for the determination" AWG v. Argentina, UNCITRAL Arbitration, Decision on Liability, 30 July 2010, para 189; Dolzer & Schreuer, op. cit., 33-43; T. Gazzini, "Interpretation of International Investment Treaties" (2016), 292; Levashova, op. cit., 53; AES Corp v. Argentina, Decision on Jurisdiction, 26.04.2005, paras. 17-33; Duke Energy v. Ecuador, Award, (18/08/2008), paras 116-117; Austria Airlines v. Slovakia, Final Award (9/10/2009), paras 83-84; Burlington v. Ecuador, Decision on Jurisdiction, 2 June 2010, paras 99-100; Chemtura v. Canada, Award, 2 August 2010, paras 108-109;

[252] Id, Bear Creek, para 11

After proving the chief operation of the investment did environmental impact assessment also with a consultant, the arbitrator decided the investor "accepted that the Convention had been 'incorporated into' domestic law, including the right of the indigenous peoples to consultation under the Convention", and eventually concluded that "It was not as fully prepared for the making of an investment in the lands of the communities of indigenous peoples – the peoples concerned by the project it was embarked upon – as it should have been."[253] As a result of the investor conduct, arbitrator Sands reduced the compensation by half.[254]

G. Conclusion

In the possible effects of CSR on investment arbitration as discussed above, we can see that CSR can play a role and fulfil its functions as soft law. It plays a role in the development of investment law, while acknowledging CSR in preambles and by this turning it to be part of the IIA purpose, shifting the IIA aside from it traditional purpose to protect investor solely. CSR provision, can affect the framing of the investors' and states' expectations when included in the IIA, Investors will find it more difficult to claim and to influence the interpretation of binding instruments applied by the tribunals when the preamble acknowledges CSR and creates a base for allowing counterclaims and *amici curiae* submissions which will open the door for affected groups to base their argument of investors' failure to comply with CSR requirements, mainly to respect human rights and due diligence responsible conduct. We can also conclude CSR provisions, comply with and complement general international law principle such as the the obligation upon investors stemming principle of clean hand and nobody can benefit from his own wrong. Specifically, in this point CSR complement investment law and not as assumed contradicting the traditional notion, according to it, the rational of investment to is to protect investors while creating obligations only for states.

[253] Id, Bear Creek, para 12.

[254] For more scrutiny on the case and the concept of social license, see J. Paine, "Bear Creek Mining Corporation v Republic of Peru: Judging the Social License of Foreign Investments and Applying New Style Investment Treaties", *ICSID Review-Foreign Investment Law Journal* 33(2) (2018) 340-348, 342-344

Concluding Remarks

As investment law has evolved into the form of the BIT, aiming to protect foreign investors from host states, the power equilibrium has shifted in the last two decades, giving rise to an asymmetrical relationship in favour of the investors. This has led to a debate about inventors' unconstrained human rights breaches, and states' incapability to comply with their human rights obligations towards their nationals. This has been made more acute as a result of a chill in states trying to reform their regulatory system to be more compatible with international human rights law requirements, reforms which may impinge on foreign investors' business interests. This situation has led to calls for a reform in investment law, eventually manifested in the new generation of IIAs, aiming to keep regulatory space for host states' human rights obligations, create exceptions for investment protection in favour of the host state populations, promote lanes for state counterclaims and promote sustainable developments and CSR. All this is in addition to a parallel effort to set standard to and guide TNCs' conduct, both through states and investors, while states are required to protect human rights by regulating the conduct of corporations in their territory or extraterritorial jurisdiction, and keeping a regulatory space for human rights obligations. Investors are required to respect the human rights of the populations impacted by their businesses' conduct. Moreover, both states and investors are required to create framework for remediation in case of adverse human rights breaches.

The development of CSR has had mutual ramifications on investment law, though the latter is not yet bound to CSR which is of soft law nature. CSR has influenced investment law by CSR consideration in investment arbitration tribunals, starting with the Urbaser award, the first arbitral decision to impose CSR obligation on investors to respect human rights. It was followed with the dissenting opinion in the Abengoa award, which identified the investor's failure to conduct with due diligence an impact assessment in calculating the compensation.

The Urbaser award, has highlighted the block an arbitration tribunal might face trying to impose obligations on investors to respect human rights in investment law and, *id est*, the possibility of allowing a state's counterclaim against investors' failure to respect human rights and comply with CSR requirements: the lack of provisions in the relevant BITs referring to human rights law, and the lack of corporate obligations according to international law. A growing number of IIAs have contained provisions dealing with these blocks. As elaborated in Chapter III, CSR provisions are becoming regular part of the newly concluded IIAs. As was shown in the overview of the IIAs concluded between 2018 and June 2019, these provisions are of a voluntarily nature, in accordance with the non-binding nature of CSR guidelines and standards as soft law. Nevertheless, and though soft law oriented, these provisions have ramifications on investment law, and have the potential to turn it into a tool for promoting CSR.

Keeping in mind that the new generation IIAs are only a peripheral part of the overall IIAs in force, this development still has a potential to play a role in the promotion of CSR through investment law, while fulfilling the functions CSR play as soft law in investment law, *inter alia*, in developing investment law. CSR provisions can help in framing the expectations of states and investors in the negotiations on IIAs and state-investor treaties, in arbitration procedures, and can influence the overall interpretation of hard law applied by investment arbitration tribunals.

In Chapter IV, I reflected upon the potential role CSR development in new generation IIAs can play in future investment arbitration.

First, these provisions might create an arbitration chill as result of the uncertainty to investors around how arbitral tribunals might apply and interpret IIAs in the light of CSR developments.

Second, when IIA provisions create a pathway for judiciary remediation in home states, in case of human rights breach, this might create a deterrent for investors breaching human rights, and in the same time encourage investors to incorporate or amend CSR policies.

Third, CSR provisions can constitute a base for allowing counterclaims by states in case of investors' failure to comply with CSR guidelines and standards.

Fourth, CSR provisions can support *amici curiae* submissions when investors' conduct fails to comply with due diligence impact assessment on affected population in its scope of activity.

Fifth, preambles acknowledging CSR in IIAs have the potential to affect the overall interpretation of the purpose of the relevant IIA.

Sixth, CSR provisions may lead to investment arbitration tribunals to narrow the investors' legitimate expectations frame, to exclude the state's obligation to human rights obligations.

Seventh, as demonstrated in Chapter IV.E, arbitration tribunals have considered and imposed due diligence obligations both on investors and states. Therefore, CSR provisions in IIAs complement this trend and strengthen it.

Eighth, finally, CSR provision, may lead arbitration tribunals to count the investor's failure to comply with CSR requirements while calculating the state's compensation.

In the light of the abovementioned recent developments in CSR and its implications on investment law, given the low percentage of new generation IIAs which include CSR provisions, and given the fact that investment arbitration tribunals have not yet discussed disputes arising from these IIAs, it is early to assess whether these developments will change the logic underlying investment-based BIT law as a protector of investors and raising investment flows. Nevertheless, in the interrelation between recent developments in CSR and investment law, CSR has been shown to have had implications on investment law capable of turning investment law into a potentially powerful tool for the promotion of CSR and human rights.

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