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**Contacts**

delfino@unina.it

edoardo.ales@uniparthenope.it

CONTATTI

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Editoriale Scientifica s.r.l.
Via San Biagio dei Librai, 39 – 80138 Napoli
Tel. 081.5800459
info@editorialescientifica.com
www.editorialescientifica.com

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**Donato Greco**

# Multinational Enterprises and Labour Standards in International Investment Law and Arbitration

Summary: **1.** Introduction. **2.** The Traditional Asymmetry of International Investment Law. **3.** The Development of International Labour Standards and Corporate Social Responsibility. **4.** Solutions Aimed at Protecting Non-Investment Related Interests at the Substantive Level. **4.1.** The 'In Accordance with Host State Law' Clause. **4.2.** The 'Right to Regulate' Doctrine. **4.3.** The Principle of Proportionality. **5.** Solutions Aimed at Protecting Non-Investment Related Interests at the Procedural Level: Counterclaims. **6.** Towards a New Deal in the Policy-Making of International Investment Agreements? **7.** Final Remarks.

## 1. *Introduction*

This inquiry aims at assessing whether international law and investment arbitration can represent a legal system capable of promoting and guaranteeing compliance with labour standards by multinational enterprises (MNEs).

In this respect, it should be stressed here that the point is not whether MNEs have labour standards obligations in general; they certainly do as a matter of domestic law as well as under different treaty regimes[1], or even

[1] For example, at the universal level the eight fundamental International Labour Organization (ILO) Conventions: 1. Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87); 2. Right to Organise and Collective Bargaining Convention, 1949 (No. 98); 3. Forced Labour Convention, 1930 (No. 29) (and its 2014 Protocol); 4. Abolition of Forced Labour Convention, 1957 (No. 105); 5. Minimum Age Convention, 1973 (No. 138); 6. Worst Forms of Child Labour Convention, 1999 (No. 182); 7. Equal Remuneration Convention, 1951 (No. 100); 8. Discrimination (Employment and Occupation) Convention, 1958 (No. 111). As regards the United Nations (UN), it is worth mentioning arts. 23-24 of the

under customary international law. Rather, the question is whether international investment law and arbitration, as such, promote multinational enterprises' compliance with labour standards. To answer this question, the analysis will focus on both substantive and procedural law.

The protection of labour rights seems particularly crucial at present. The outbreak of the COVID-19 pandemic has caused incalculable economic damages and social costs. The result has been an unprecedented recession that only finds comparable historical precedents in the 1929 Great Depression and the Great Recession of 2007-2013. Against this backdrop, States will likely try to improve their capacity to attract foreign investment in order to encourage recovery and relieve their economies. In this respect, one should be aware that supply chains and markets are strictly integrated in a globalized world. This means that MNEs represent the primary economic non-State actor.

From this perspective, international investment law and arbitration represent an effective regulatory system which satisfies States' desire to increase their investments attractiveness, enabling them to ensure adequate substantive and judicial protection for foreign investors. For the sake of clarity, it is worth briefly recalling here that international investment law is a branch of the international legal order aimed at regulating the relationships between foreign investors and host States. In this field, the primary legal source is bilateral investment treaties (BITs), which grant investors substantive treatment standards and access to Investor-State Dispute Settlement (ISDS) mechanisms.

On the other hand, the ongoing pandemic notably increases the reasons for promoting MNEs' compliance with human rights, especially regarding labour standards. This need – the satisfaction of which cannot be taken for granted at all – poses a double challenge. In the first place, States and other international organisations such as the EU or economic institutions like the

Universal Declaration of Human Rights, UNGA Res. 217 A (III) of 10 December 1948 and the International Covenant on Economic, Social and Cultural Rights (ICESCR), UNGA Res. 2200A (XXI) of 16 December 1966, in force 3 January 1976, in *UNTS*, vol. 1976, 993, p. 3 ff.; certain Conventions aimed at protecting (or prohibiting the discrimination against) traditionally vulnerable categories such as children or women. At the European regional level, the European Social Charter, signed at Turin on 18 October 1961, in force 26 February 1965, in *ETS*, No. 35; (revised) Strasbourg 3 May 1996, in force 1 July 1999, in *ETS*, No. 163; as well as much of the European Union (EU) legislation.

International Monetary Fund (IMF) and the World Bank (WB) strongly support the necessity of public investments. In this context, there are serious risks that direct benefits from the recovery will be narrowly distributed among only a few groups. Indeed, the latter may result in an increase in social inequalities worldwide if it is not accompanied by a concerted effort to make investment law not only an efficient system but also a 'fair' one. In the second place, shoring up MNEs' compliance with labour rights represents a fundamental condition for this branch of international law to survive. In recent decades, this matter has already given rise to significant controversies, which have undermined the social legitimacy of international investment law. In fact, from a substantive point of view, the system provides for obligations exclusively for States, which are called upon to guarantee substantial standards of treatment in favour of foreign investors. From a procedural point of view, investment arbitration arouses mistrust for the structural asymmetry that characterizes it, as only investors are entitled to file a legal claim. Therefore, States increasingly perceive international investment law as an investor-biased system and suffer undue pressure because of the fear of being involved in expensive arbitration procedures. The result is a 'chilling effect' that deters them from introducing measures to protect public interests[2].

The legitimacy crisis of international investment law could even worsen in the present situation, where States are compelled to heavily intervene in the economy to correct the adverse effects produced by the pandemic. Following the saying (very familiar to internationalists) "never miss a good crisis", it is perhaps time to intervene to ensure greater coherence among the various branches of international law so that investment law becomes more sensitive to the protection of non-economic interests. Indeed, it is worth underlining that although scholarship has focused its attention on the shortcomings of international investment law for quite some time, it has generally analysed compliance with labour standards in the broader context of the protection of human rights[3]. While this approach may seem fully

[2] TIENHAARA, *Regulatory chill and the threat of arbitration: A view from political science*, in BROWN, MILES (eds.), *Evolution in Investment Treaty Law and Arbitration*, Cambridge University Press, 2011, pp. 606-628; LAVRANOS, *After Philip Morris II: The "regulatory chill" argument failed – yet again*, in *Kluwer Arb. Blog*, 18 August 2016.

[3] Among the others, see DUPUY, FRANCIONI, PETERSMANN (eds.), *Human Rights in International Investment Law and Arbitration*, Oxford University Press, 2009; PUMA, *Human Rights*

justified by the fact that there is indeed an overlap between the two sectors, this trend has ended up dispersing the autonomy of labour law concerns.

In light of the above, this inquiry will first outline the asymmetric character of international investment law (Section 2). Secondly, it will turn to the claim for a change by analysing the most relevant labour standards, particularly as regards their origin and nature (Section 3). Thirdly, it will address the legal solutions that international policy-makers and adjudicators have shaped over time to meet the necessities of protection of non-economic concerns at both substantive and procedural levels (Sections 4 and 5). Lastly, attention will be drawn to how States have exercised their treaty-making power in the last generation of international investment agreements (IIAs) to promote the protection of labour standards and make corporations accountable for the social impact of their activities (Section 6). By way of conclusion, the paper will provide an assessment of whether international investment law and arbitration, in their current status of development, are effectively able to ensure MNEs' compliance with labour standards (Section 7).

## 2. *The Traditional Asymmetry of International Investment Law*

As already recalled, international investment law and arbitration have long been impervious to labour law issues as is fully confirmed by the fact that on this specific matter there is very little (if any) case law[4]. This is for

*Law and Investment Law: Attempts at Harmonization through a Difficult Dialogue between Arbitrators and Human Rights Tribunals*, in Arcari, Balmond (eds.), *Judicial Dialogue in the International Legal Order: Between Pluralism and Legal Certainty*, Editoriale Scientifica, 2014, pp. 193-243; Balcerzak, *Investor-State Arbitration and Human Rights*, Brill Nijhoff, 2017; Radi (ed.), *Research Handbook on Human Rights and Investment*, Elgar, 2018; Buscemi *et al.* (eds.), *Legal Sources in Business and Human Rights: Evolving Dynamics in International and European Law*, Brill Nijhoff, 2020; Chiussi Curzi, *General Principles for Business and Human Rights in International Law*, Brill Nijhoff, 2020.

[4] Two interesting arbitral proceedings which explicitly dealt with labour law issues are *Piero Foresti, Laura de Carli & Others v. The Republic of South Africa*, ICSID Case No. ARB(AF)/07/01, Award, 4 August 2010 and *Veolia Propreté v. Arab Republic of Egypt*, ICSID Case No. ARB/12/15, Award, 25 May 2018. As regards the former, the Complainants challenged two measures adopted by South Africa, which allegedly amounted to expropriation and were therefore in breach of the BITs with both Italy and Luxemburg. Indeed, the twin operation of

more than one reason. In the first place, States usually grant investors a series of substantive standards of treatment but do not impose any kind of obligation upon them. Indeed, one of the structural characteristics of international investment law is the well-known asymmetric relationship between host States and investors. This regulatory gap is due to a race to the bottom among States in the protection of non-investment concerns. In the second place, labour standards obligations deriving from other fields of the international legal order cannot be automatically imported into international investment law, as international law is fragmented in a plurality of branches that are quite autonomous from one another. Last but not least, even if there were a common legal framework, the problem is that most international treaty regimes introduce human rights and labour standards obligations essentially upon States and bind individual legal persons only indirectly. This substantial asymmetry is reflected, at a procedural level, in the exclusive right of investors to bring claims before the competent international arbitral tribunals[5]. The situation just described has caused a severe legitimacy crisis of international investment law, which is perceived as overly protective of investment interests to the detriment of non-economic concerns, while at the same time it has fuelled a claim for change and rebalancing[6].

the Mining Charter and the Mineral and Petroleum Resources Development Act pursued a Black Economic Empowerment (BEE) by introducing equity divestiture requirements. Foreign investors, in particular, were requested to sell 26% of their shares in relevant mining companies to 'historically disadvantaged South Africans' (HDSAs). Unfortunately for those who foster theoretical interests, all the claims were dismissed as the Claimants sought a discontinuance of the arbitral proceedings. The latter arbitration originated from the fact that the Governorate of Alexandria enacted a new labour legislation aimed at raising and stabilizing the minimum wage. As a reaction, Veolia, a French utility company operating in waste management services, filed a claim against Egypt for 175 million euros in compensation, based on the 1974 Egypt-France BIT. On 25 May 2018, the tribunal decided in favour of the State, but sadly enough the award is confidential.

[5] In this respect, it is worth mentioning Koskenniemi, *It's not the Cases, it's the System:* [Book Review] *M. Sornarajah, Resistance and Change in the International Law on Foreign Investment. Cambridge: Cambridge University Press, 2015*, in *JWI&T*, 2017, 18(2), pp. 343-353, p. 351, where the author notes that: "[w]hen one of the parties and only *one of them*, may say to the other 'if you do not agree with my conditions, then see you in court', then the balance of power has shifted decisively in favour of that party".

[6] Sauvant, *Multinational Enterprises and the Global Investment Regime: Toward Balancing Rights and Responsibilities*, in Chaisse, Choukroune, Jusoh (eds.), *Handbook of International Investment Law and Policy*, Springer, 2021, pp. 1783-1829.

### 3. *The Development of International Labour Standards and Corporate Social Responsibility*

Against this backdrop, the adoption of several international soft law instruments marked a turning point, to the extent that they established new international labour standards[7]. The latter were mainly adopted by (or within) different international organisations and authorities acting in the fields of international labour law, human rights, or in matters of economic cooperation. They provide a decisive contribution in filling the gap left by a State-centric conception of international relations by developing a number of principles directly addressing individuals' obligations, especially those of MNEs[8].

In this respect, it is worth starting with the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (1977)[9]. Adopted under the auspices of the ILO, it constitutes the outcome of a long-standing claim for social justice supported by developing countries since the 1960s. The ILO Declaration deals with training, wages, benefits and conditions of work or with employment issues such as social security, elimination of forced or compulsory labour as well as the abolition of child labour. Under the section on industrial relations, it enshrines the freedom of association, the right to organise and that to collective bargaining as a way to find agreed solutions between workers' representatives and their counterparts[10]. Later, it was complemented by the ILO Declaration on Fundamental Principles and Rights at Work (1998), which enshrines some

[7] KAUFMANN, *Trade and Labour Standards*, in *MPEPIL*, July 2014; ADDO, *Core Labour Standards and International Trade: Lessons from the Regional Context*, Springer, 2015; GÖTT *Labour Standards in International Economic Law*, Springer, 2018.

[8] As regards the limits of the State-centric model in making MNEs responsible for human rights violations, see MUCHLINSKI, *The Regulatory Framework of Multinational Enterprises*, in BANTEKAS, STEIN (eds.), *The Cambridge Companion to Business and Human Rights Law*, Cambridge University Press, 2021, pp. 173-194.

[9] ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, adopted by the Governing Body of the International Labour Office at its 204th Session (Geneva, November 1977) and amended at its 279th (November 2000), 295th (March 2006) and 329th (March 2017) Sessions.

[10] MUCHLINSKI, *Part II. Substantive Issues, Ch. 17. Corporate Social Responsibility*, in ID. ET AL. (eds.), *The Oxford Handbook of International Investment Law*, Oxford University Press, 2008, pp. 637-684, p. 646 ff.

'core labour standards' as it affirms that all ILO State parties, "even if they have not ratified the [ILO Conventions …], have an obligation arising from the very fact of membership in the Organization to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions"[11].

Other significant instruments with the same universal scope of application are those adopted in the context of the UN. We are referring to the UN Global Compact of 1999 (principles 3-6)[12], the Guiding Principles on Business and Human Rights (2011)[13] and, more recently, the 2030 Agenda for Sustainable Development (2015)[14]. At the regional level, one should mention the Guidelines for Multinational Enterprises that were adopted within the framework of the Organisation for Economic Co-operation and Development (OECD) in 1976 and then revised on several occasions[15]. In

[11] ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up, adopted by the International Labour Conference at its Eighty-Sixth Session, Geneva, 18 June 1998 (Annex revised 15 June 2010).

[12] UN Global Compact, World Economic Forum, Davos, 1999, which deals with the freedom of association and the right to collective bargaining, the abolition of forced labour and child labour, the elimination of discrimination in respect of employment and occupation.

[13] UN Human Rights Council, Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie (A/HRC/17/31, 21 March 2011). As regards this instrument, see KARP, *Business and Responsibility for Human Rights in Global Governance*, in HANSEN-MAGNUSSON, VETTERLEIN (eds.), *The Routledge Handbook on Responsibility in International Relations*, Routledge, 2021, pp. 318-330, p. 323 ff.; DEVA, *The UN Guiding Principles on Business and Human Rights and Its Predecessors. Progress at a Snail's Pace?*, in BANTEKAS, STEIN, *op. cit.*, pp. 145-172; ID., *International Investment Agreements and Human Rights: Assessing the Role of the UN's Business and Human Rights Regulatory Initiatives*, in CHAISSE, CHOUKROUNE, JUSOH, *op.cit.*, pp. 1733-1758.

[14] Transforming our World: The 2030 Agenda for Sustainable Development, UNGA Res. 70/1, 21 October 2015.

[15] OECD, Guidelines for Multinational Enterprises, adopted 21 June 1976 and revised in 1979, 1982, 1984, 1991, 2000 and 2011 (OECD Pub 2011). See also the OECD Due Diligence Guidance for Responsible Business Conduct (OECD, 2018). Scholarship highlighted the importance of this instrument: among others, see ACCONCI, *The Promotion of Responsible Business Conduct and the New Text of the OECD Guidelines for Multinational Enterprises*, in *JWI&T*, 2001, 2(1), pp. 123-149; BUCHHOLTZ, *Social and Labour Standards in the OECD Guidelines: Enforcement Mechanisms*, in *IntlOrgLRev*, 2020, 17(1), pp. 133-152. More recently, RASCHE, *The UN Global Compact and the OECD Guidelines for Multinational Enterprises and Their Enforcement Mechanisms*, in BANTEKAS, STEIN, *op. cit.*, pp. 195-214.

this context, it is also worth highlighting that more recently, on 10 March 2021, the European Parliament adopted a resolution under art. 225 of the Treaty on the Functioning of the European Union (TFEU)[16], by which it has requested the Commission to submit a proposal of Directive on Corporate Due Diligence and Corporate Liability. Interestingly enough, para. 3 of the resolution "[c]alls on the Commission to always include, in the external policy activities, including in trade and investment agreements, provisions, and discussions on the protection of human rights"[17].

All these instruments gradually shaped international corporate social responsibility (ICSR) to the extent that they are explicitly addressed to MNEs and promote a socially sound approach to the communities where companies carry out their own business[18]. They are some of the most important vehicles for the establishment of an international horizontal responsibility (*Drittwirkung*)of corporations as they deal with the relations among individuals, in particular those between workers and MNEs, upon which they pose due diligence obligations.

These codes of conduct produce some of the typical effects of soft law sources[19]. Firstly, they provide an authoritative interpretation on the exiting obligations under treaty regimes and even customary international law. Secondly, they contribute to establishing a general consensus in the international community as regards the minimum standards of treatment in matters of labour rights. Thirdly, they complement existing IIAs as long as ICSR clauses or labour standards clauses are introduced in the latter's text[20]. This incorporation results in a 'hardening' process.

Against this backdrop, once more, soft law proves to be a valuable tool

[16] Consolidated version of the Treaty on the Functioning of the European Union, in *OJ*, 7.6.2016, C 202/3, pp. 47-199.

[17] Corporate due diligence and corporate accountability. European Parliament resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability (2020/2129(INL)).

[18] Muchlinski, *op.cit.*, pp. 643-645; Mbengue, *Les obligations des investisseurs*, in Société Française pour le Droit International, *Colloque de Paris 8 Vincennes - Saint Denis*, *L'entreprise multinationale et le droit international*, edited by Dubin *et al.*, Pedone, 2017, pp. 295-339.

[19] Blanpain, Colucci, *The Globalization of Labour Standards. The Soft Law Track*, Kluwer Law International, 2004; Alvarez, *Reviewing the Use of "Soft Law" in Investment Arbitration*, in *Eur. Int'l Arb. Rev.*, 2018, 7(2), pp. 149-200.

[20] van der Zee, *Incorporating the OECD Guidelines in International Investment Agreements: Turning a Soft Law Obligation into Hard Law?*, in *LIEconI*, 2013, 40(1), pp. 33-73.

to overcome the boundaries of treaty regimes and thus an antidote to the fragmentation of the international legal system, as long as it is able to progressively harmonise normative systems otherwise destined to remain hermetically separated from each other. However, labour standards also share some shortcomings with this kind of normative source; since their application remains mainly voluntary, they do not raise binding obligations and, therefore, are not judicially enforceable.

## 4. *Solutions Aimed at Protecting Non-Investment Related Interests at the Substantive Level*

In the last decade, IIA policy-makers, scholarship and international adjudicators have made a valuable effort to amend the asymmetries traditionally affecting international investment law. Hereafter, the inquiry will present and discuss possible remedies at the substantive level.

### *4.1. The 'In Accordance with Host State Law' Clause*

Today, a number of BITs contain a provision which sets forth that investment shall be made in accordance with the host State law. Based on this clause, arbitral tribunals have denied their jurisdiction over claims related to illegal investments[21]. This practice is essentially aimed at countering corruption, by preventing investors from taking advantage of their own illegal acts and from benefiting from the protection of BITs. Some authors support the idea that this approach ought to be generalised[22] so that the clause may apply to cases where investments are in violation of human rights treaties incorporated in the legislation of the host State.

Indeed, as expressly underlined by the tribunal in *Phoenix Action Ltd. v. Czech Republic* (2009), "ICSID Convention's jurisdictional requirements – as well as those of the BIT – cannot be read and interpreted in isolation from public international law, and its general principles. [...N]obody would

[21] *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26A, Award, 2 August 2006. On this matter, see CARLEVARIS, *The Conformity of Investments with the Law of the Host State and the Jurisdiction of International Tribunals*, in *JWI&T*, 2008, 9(1), pp. 5-34.

[22] ZARRA, *International Investment Treaties as a Source of Human Rights Obligations for Investors*, in BUSCEMI *ET AL.*, *op. cit.*, p. 52-73, p. 57.

suggest that ICSID protection should be granted to investments made in violation of the most fundamental rules of protection of human rights, like investments […] in support of slavery"[23]. In addition, it is worth noting here that some tribunals have affirmed that the 'in accordance with host State' requirement stems directly from the good faith principle as enshrined in arts. 26 and 31 of the 1969 Vienna Convention of the Law of Treaties (VCLT)[24]. It follows that, being the latter a pillar of the law of treaties, it precludes the legitimate invocation of BITs'protection even in absence of a written clause[25].

The same logic may hold true with breaches of fundamental labour standards such as the prohibition of child, forced or compulsory labour. Nonetheless, a significant limitation here consists in that the 'in Accordance with Host State Law' rule has been interpreted as only addressing cases where the violation of domestic law occurs in the phase of investment establishment. If this requirement may more easily be met in cases of corruption or fraud, it can hardly encompass breaches of labour law.

A possible solution may be found, *de iure condendo*, in clauses drafted with a wider scope of application by requiring that investments are made in compliance with the host State law not only in the phase of establishment but for their whole duration. In this respect, an example is art. 2, para. 2, of the 2009 China-Malta BIT, which provides for that "[i]nvestments of either Contracting Party shall be made, and shall, for their whole duration, continuously be in line with the respective domestic laws".

[23] *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, p. 30, para. 78.

[24] It is worth highlighting that, based on international arbitral case law, some scholars have addressed whether the systemic integration under art. 31, para. 3, let. c), VCLT may represent an effective tool to harmonise different branches of the international legal system. In this respect, see, among others, Dupuy, *Unification Rather Than Fragmentation of International Law? The Case of International Investment Law and Human Rights Law*, in Dupuy, Petersmann, Francioni (eds.), *Human Rights in International Investment Law and Arbitration*, Oxford University Press, 2009, pp. 45-62; Rosentreter, *Article 31(3)(c) of the Vienna Convention on the Law of Treaties and the Principle of Systemic Integration in International Investment Law and Arbitration*, Nomos, 2015, p. 363 ff.; Ascensio, *Article 31 of the Vienna Conventions on the Law of Treaties and International Investment Law*, in *ICSID Rev.*, 2016, 31(2), pp. 366-387.

[25] In this vein, see *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008, pp. 39-40, paras. 138-139; *Phoenix v. Czech Republic*, cit., pp. 39-40, para. 101; *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, 18 June 2010, p. 36, para. 123.

If this remedy does not establish MNEs' responsibility at the international level, it at least allows arbitral tribunals to deny their jurisdiction so that investors acting illicitly cannot enjoy the protection of international investment law in accordance with the general principles *ex iniuria ius non horitur* and *nemo commodum capere potest de iniuria sua propria*.

### *4.2. The 'Right to Regulate' Doctrine*

Host States hold the power to adopt measures interfering with investors' rights to ensure that investments are carried out respecting general interests such as labour rights and standards, provided that these measures are non-discriminatory, reasonable and proportionate (the latter principle will be specifically addressed in the following Section).

This doctrine, named 'power/right to regulate', is provided for under both conventional and customary international law. As regards the former, it should be noted that many IIAs contain so-called 'non-precluded measures' (NPMs) clauses, which allow States to act in a way that would otherwise be inconsistent with the treaty, when the action is taken to pursue certain fundamental objectives such as the maintenance of public order or international peace and security, or the protection of security interests[26]. Some of these provisions expressly refer to labour laws: in this respect, one could mention art. 228 of the Association Agreement between the EU and Georgia[27], or art. 10, para. 1, of the Colombia-United Arab Emirates BIT[28]. A provision on the right to regulate for social and

[26] On NPMs clauses in general, see BURKE-WHITE, VON STADEN, *Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures provisions in Bilateral Investment Treaties*, in *VaJIntlL*, 2008, 48(2), pp. 307-410; WANG, *The Non-Precluded Measure Type Clause in International Investment Agreements: Significances, Challenges, and Reactions*, in *ICSID Rev.*, 2017, 32(2), pp. 447-456; PATHIRANA, MCLAUGHLIN, *Non-precluded Measures Clauses: Regime, Trends, and Practice*, in CHAISSE, CHOUKROUNE, JUSOH, *op. cit.*, pp. 484-505.

[27] Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part, 27 June 2014, into force 1 July 2016, available at https://eur-lex.europa.eu/legal-content/EN/-ALL/?uri=CELEX:22014A0830(02).

[28] "Subject to the requirement that such measures are not applied in a manner that would constitute arbitrary or unjustifiable discrimination between investments or investors, nothing in this Agreement shall be construed to prevent a Contracting Party from adopting, maintaining, or enforcing any measure that it considers appropriate to ensure that an investment activity in

economic objectives is contained in art. 23 of the 2016 Morocco-Nigeria BIT[29]. In other cases, such as art. 10 of Argentina-Qatar BIT[30] or art. 9, para. 1, of the Rwanda-United Arab Emirates BIT[31], the relevant clause reads in more broad terms.

If provisions of such a kind go way back in the treaty practice[32], they nonetheless represent the main symptom of the contemporary tendency of States to integrate non-investment concerns in IIAs. In this respect, even more significant is their inclusion in Model BITs[33]. It was precisely this practice which led several arbitral tribunals to affirm that the host State's right to regulate is today part of general international law[34]. In this vein,

its territory is undertaken in accordance with the applicable environmental and labour law of the Contracting Party": art. 10, para. 1, of the Bilateral Agreement for the Promotion and Protection of Investments Between the Government of the Republic of Colombia and the Government of the United Arab Emirates, 12 November 2017, not yet in force, available at https://investment-policy.unctad.org/international-investment-agreements/treaty-files/5728/download.

[29] Reciprocal Investment Promotion and Protection Agreement Between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria, 3 December 2016, not yet in force, available at https://investmentpolicy.unctad.org/-international-investment-agreements/treaty-files/5409/download.

[30] Reciprocal Promotion and Protection of Investments between the Argentine Republic and the State of Qatar, 6 November 2016, not yet in force, available at https://-investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5383/download.

[31] "Nothing in this Agreement shall be construed to prevent a Contracting Party from adopting, maintaining, or enforcing any measure that it considers appropriate to ensure that an investment activity in its territory is undertaken in accordance with the applicable public health, security, environmental and labour law of the Contracting Party, such measures should not be applied in a manner that would constitute arbitrary or unjustifiable discrimination between investments or investors": art. 9, para. 1, of the Agreement between the Republic of Rwanda and the United Arab Emirates on the Promotion and Reciprocal Protection of Investments, 1 November 2017, not yet in force, available at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5722/download.

[32] An example of NPMs clause could be found in the 1959 Germany-Pakistan BIT, 25 November 1959, in force 28 April 1962, replaced by the 2009 Germany-Pakistan BIT.

[33] See, *e.g.*, art. 33, para. 1, nn. (ii-iii), of the India Model BIT, available at https://dea.gov.in/sites/default/files/ModelBIT_Annex_0.pdf; art. 12 of the 2012 US Model BIT available at https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20-Meeting.pdf; art. 15 of the Belgium-Luxembourg Economic Union Model BIT, 28 March 2019, available at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5854/download.

[34] In this vein, see the case law of the Iran-US Claims Tribunal in *Sedco, Inc v. National Iranian Oil Company and The Islamic Republic of Iran*, IUSCT Case Nos. 128 and 129,

should an NPMs clause be lacking in the relevant investment agreement, recourse could be had to the power to regulate (or police powers) doctrine under customary international law. The power to regulate can be defined as "the legal right exceptionally permitting the host state to regulate in derogation of international commitments it has undertaken by means of an investment agreement without incurring a duty to compensate"[35].

A relatively recent example of application of the doctrine can easily be found in the 2016 *Philip Morris v. Uruguay* award. The complainant companies alleged an indirect expropriation in violation of art. 5 of the Switzerland-Uruguay BIT as Uruguay had imposed certain restrictive measures on the trade of tobacco, by preventing manufacturers from marketing more than one variant of cigarettes per brand and by increasing the size of health warnings appearing on cigarette packages. However, the ICSID tribunal acknowledged that Uruguay acted to protect the health of its population and the measure at issue represented an exercise of police power as it was proportionate and non-discriminatory[36]. In greater detail, the tribunal

Interlocutory Award No. ITL 55-129-3, 17 September 1985, in *Iran-US Claims Trib. Rep.*, vol. 1985, 9, p. 248 ff., para. 90; *Emanuel Too v. Greater Modesto Insurance Associates and The United States of America*, IUSCT Case No. 880, Award No. 460-880-2, 29 December 1989, in *Iran-US Claims Trib. Rep.*, vol. 1989, 23, p. 378 ff., p. 387, para. 26. As regards ICSID arbitral jurisprudence, see *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002, p. 37, para. 103; *TécnicasMedioambientalesTecmed, SA v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003, pp. 45-46, para. 119; *LG&E Energy Corp, LG&E Capital Corp, and LG&E International, Inc v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 25 July 2007, pp. 58-59, paras. 194-197. As for UNCITRAL, see *Ronald S Lauder v. The Czech Republic*, UNCITRAL, Final Award, 3 September 2001, p. 42, para. 198; *Methanex Corporation v. United States of America*, NAFTA/UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005, Part IV, Chapter D, p. 4, para. 7; *Saluka Investment B.V. v. The Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, p. 52, para. 254 ff.; *Chemtura Corporation v. Government of Canada*, NAFTA/UNCITRAL, Award, 2 August 2010, p. 78, para. 266.

[35] Titi, *The Right to Regulate in International Investment Law*, Nomos, 2014, p. 33. In the same vein, see Levashova, *The Right of States to Regulate in International Investment Law: The Search for Balance between Public Interest and Fair and Equitable Treatment*, Wolters Kluwer, 2019; Acconci, *The Integration of Non-Investment Concerns as an Opportunity for the Modernization of International Investment Law: Is a Multilateral Approach Desirable?*, in Sacerdoti *et al.* (eds.), *General Interests of Host States in International Investment Law*, Cambridge University Press, 2014, p. 163-193, p. 178.

[36] *Philip Morris Brands Sàrl, Philip Morris Products SA and Abal Hermanos SA v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award, 8 July 2016, p. 81, para. 287 ff.

derived the customary nature of the doctrine from art. 10, para. 5, of the Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens[37] and the US Third Restatement of the Law of Foreign Relations[38]. In addition, it relied on a 2004 OECD working paper on "'Indirect Expropriation' and the 'Right to Regulate' in International Investment Law"[39]. Lastly, the tribunal noted that the doctrine is today mentioned in a number of model investment agreements and IIAs, such as the 2012 US Model BIT[40], the 2004 Canada Model BIT[41], the Free Trade Agreement between the EU and Singapore[42] and the Comprehensive Economic and Trade Agreement between the EU and Canada[43].

### *4.3. The Principle of Proportionality*

The principle of proportionality represents a general principle of international law[44]. In a nutshell, under this principle a measure can be considered proportionate if it satisfies a three-tier test: *i*) first, it must actually be suitable to contribute to the achievement of a certain objective (suitability); *ii*) it must be – among all the potential alternative measures – the least harmful for the investor (necessity); and *iii*) it has to be intended to

[37] "An uncompensated taking of an alien property or a deprivation of the use or enjoyment of property of an alien which results from the execution of tax laws; from a general change in the value of currency; from the action of the competent authorities of the State in the maintenance of public order, health or morality; or from the valid exercise of belligerent rights or otherwise incidental to the normal operation of the laws of the State shall not be considered wrongful", *Draft Convention on the International Responsibility of States for Injuries to Aliens*, prepared by the Harvard Law School, edited by SOHN, BAXTER, in *AJIL*, 1961, 55(3), p. 548-584, p. 554; cf. *Philip Morris v. Uruguay*, cit., p. 83, para. 292.

[38] *Restatement of the Law Third. Foreign Relations Law of the United States*, 2 voll., American Law Institute, 1987, vol. I, para. 712, comment (g); cf. *Philip Morris v. Uruguay*, cit., p. 83, para. 293.

[39] OECD, *"Indirect Expropriation" and the "Right to Regulate" in International Investment Law*, in *OECD Work. Pap. on Int. Invest.*, 2004, 4, p. 5, nt. 10.

[40] Annex B "Expropriation", art. 4, let. b); cf. *Philip Morris v. Uruguay*, cit., pp. 85-86, para. 300.

[41] Annex B, art. 13, para. 1, let. c); cf. *Philip Morris v. Uruguay*, cit., pp. 85-86, para. 300.

[42] Annex 1, art. 2; cf. *Philip Morris v. Uruguay*, cit., pp. 85-86, para. 300.

[43] Annex 8-A "Expropriation", art. 3; cf. *Philip Morris v. Uruguay*, cit., pp. 85-86, para. 300.

[44] CANNIZZARO, *Il principio della proporzionalità nell'ordinamento internazionale*, Giuffrè, 2000; PALOMBINO, *Fair and Equitable Treatment and the Fabric of General Principles*, Asser, 2018, p. 124 ff.

pursue an objective which, balancing the different interests at stake, has to prevail for its importance (proportionality *stricto sensu*).

In the latter context, proportionality serves to assess the legitimacy of State conduct in relation to the right of ownership of investors[45]. In the absence of proportionality, if a State initiative leads to deprivation (in law or fact) of the right of ownership it can be qualified as expropriation (direct or indirect), while if investors suffer *minoris generis* injuries, it may result in a violation of fair and equitable treatment (FET).

As regards expropriation, as pointed out in the previous sub-section, proportionality can provide a parameter to assess the legitimacy of the concrete exercise of the right to regulate by host States. In this case, if there is a taking originating from the need to protect public interests, proportionality excludes that State action can be qualified as expropriation, with the consequence that no compensation is due[46]. Some authors support an alternative solution. According to their view, proportionality can be used as a criterion for reducing the amount due by way of compensation in the presence of measures that, according to the 'sole effects' doctrine, can be qualified as expropriation in all respects[47]. Therefore, in this case the importance of the public interests at the basis of the State action only affects the quantum due.

As far as FET is concerned, it is today accepted that proportionality is an element of this standard[48]. Therefore, arbitral tribunals are always called upon to evaluate whether a measure interfering with investors' rights can be justified by a relevant host State's interest. In the words of the arbitral tribunal in the *El Paso v. Argentina* case, "it is inconceivable that any State would accept that, because it has entered into BITs, it can no longer modify

[45] For a comprehensive analysis, see VADI, *Proportionality, Reasonableness and Standards of Review in International Investment Law and Arbitration*, Elgar, 2018.

[46] *Tecmed v. Mexico*, cit., pp. 46-47, para. 122; *Marfin Investment Group v. The Republic of Cyprus*, ICSID Case No. ARB/13/27, Award, 26 July 2018, pp. 242-243, paras. 981-985. As regards scholarship, see ZARRA, *Right to Regulate, Margin of Appreciation and Proportionality: Current Status in Investment Arbitration in Light of* Philip Morris v. Uruguay, in *BJIL*, 2017, 14(2), p. 94-120, p. 107.

[47] KRIEBAUM, *Regulatory Takings: Balancing the Interests of the Investor and the State*, in *JWI&T*, 2007, 8(5), p. 717-744, p. 743. More recently, FACCIO, *Indirect Expropriation in International Investment Law. Between State Regulatory Powers and Investor Protection*, Editoriale Scientifica, 2020, p. 228 ff.

[48] PALOMBINO, *op. cit.*, p. 134 ff.

pieces of legislation which might have a negative impact on foreign investors, in order to deal with modified economic conditions and must guarantee absolute legal stability"[49]. FET is "a standard entailing reasonableness and proportionality. It ensures that the foreign investor is not unjustly treated, with due regard to all surrounding circumstances. FET is a means to guarantee justice to foreign investors"[50]. Thus, arbitral case law has long confirmed that the existence of an obligation upon the host State to grant fair and equitable treatment in no way prevents the State from enacting proportionate regulatory actions[51].

Borrowing from the case law of the European Court of Human Rights (ECtHR), arbitral tribunals have sometimes also made reference to the 'margin of appreciation' doctrine, to justify measures directed to safeguard public interests while adversely affecting investors' expectations[52]. This approach has attracted the criticism of those who allege that "[t]he 'margin of appreciation' is a specific legal rule, developed and applied in a particular context, that cannot properly be transplanted to the BIT [...]. There are well-considered legal rules, already applicable to questions of fair and equitable treatment, which serve similar purposes to those of the 'margin of appreciation,' but in a more nuanced and balanced manner"[53].

However, what is important to stress here is the common approach followed by arbitral tribunals in acknowledging the host States' power to

[49] *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011, p. 126, para. 354.

[50] *Ibidem*, p. 134, para. 373.

[51] For a more recent case law, see *Copper Mesa Mining Corporation v. Republic of Ecuador*, PCA No. 2012-2, Award, 15 March 2016, para. 6.18; *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, ICSID Case No. ARB/14/3, Final Award, 27 December 2016, p. 112, para. 319; *Eiser Infrastructure Limited and Energía Solar Luxembourg S.àr.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Final Award, 4 May 2017, pp. 111-112, para. 362; *Hydro Energy 1 S.àr.l. and Hydroxana Sweden AB v. Kingdom of Spain*, ICSID Case No. ARB/15/42, Decision on Jurisdiction, Liability and Directions on Quantum, 9 March 2020, p. 169 ff., para. 550 ff.; *PL Holdings S.à.r.l. v. Republic of Poland*, SCC Arbitration No. V 2014/163, Partial Award, 28 June 2017, pp. 153-154, paras. 390-391.

[52] *Philip Morris v. Uruguay*, cit., p. 115, paras. 398-399.

[53] *Philip Morris v. Uruguay*, cit., Concurring and Dissenting Opinion of Co-Arbitrator Gary Born, 8 July 2016, p. 21, para. 87. In this vein, see Zarra (2017), *op. cit.*, p. 108 ff.; Palombino, Minervini, *Apropos of the External Precedent: Judicial Cross-Pollination Between Investment Tribunals and International Courts*, in Gourgourinis (ed.), *Transnational Actors in International Investment Law*, Springer, 2021, p. 133-150, p. 145.

limit investors' rights without incurring international liability. In this case, public interests (which certainly include the need to protect labour rights) may well justify measures that, in compliance with the principle of proportionality, limit investors' rights to a more or less invasive extent.

Lastly, it is worth noting that, as some authors have pointed out[54], in applying the proportionality test some arbitral tribunals took into account the specific conduct of the investor within the assessment of host State responsibility every time the former's wrongdoing may have led the latter to adopt measures aimed at protecting public interests while adversely affecting the investments[55]. In the context of the present inquiry, one could think to a situation of systematic violations of labour rights by the investor which leads the host State to adopt draconian measures. On this point, it suffices here to underline that the so-called 'contributory fault' approach can play a role both when ascertaining host State responsibility (*i.e.*, when the proportionality of the State measure is assessed *strict sensu*) as well as when assessing the amount of damages to be compensated.

## 5. *Solutions Aimed at Protecting Non-Investment Related Interests at the Procedural Level: Counterclaims*

International arbitral tribunals have proved to be responsive to the claim of a need for change and have tried to strike a new balance between different social needs[56]. At the procedural level, therefore, they tried to extend their jurisdiction over counterclaims filed by host States alleging violations of non-

[54] See FACCIO, *op. cit.*, pp. 242-245.

[55] "The Tribunal agrees that an award of damages may be reduced if the claiming party also committed a fault which contributed to the prejudice it suffered and for which the trier of facts, in the exercise of its discretion, considers the claiming party should bear some responsibility": *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Award, 5 October 2012, p. 264, para. 678. In the same vein, see *Hulley Enterprises Limited (Cyprus) v. The Russian Federation*, UNCITRAL, PCA Case No. 2005-03/AA226, Final Award, 18 July 2014, pp. 509-510, paras. 1633-1637; *Copper Mesa Mining Corporation v. Republic of Ecuador*, PCA No. 2012-2, Award, 15 March 2016, paras. 6.100-6.102.

[56] As regards the different grounds which could justify the invocation of human rights in investor-State arbitration, see PETERSMANN, *Human Rights in International Investment Law and Adjudication: Legal Methodology Questions*, in CHAISSE, CHOUKROUNE, JUSOH, *op. cit.*, p. 1707-1732, p. 1718 ff.

investment concerns. To achieve this objective, they affirmed that international investment law should not be seen in a vacuum, and BITs should be interpreted within the broad context of public international law as provided for by art. 31, para. 3, let. c), VCLT.

The apex of this trend is represented by two arbitral awards which recognised a new function to counterclaims[57]. In *Urbaser v. Argentina* (2016), the dispute originated from the concession for the supply of water and sewerage services in the Province of Buenos Aires to a company of which Urbaser was a shareholder[58]. When the Province terminated the concession, Urbaser initiated an ICSID arbitral proceeding against Argentina under art. X of the Argentina-Spain BIT[59]. Argentina, for its part, filed a counterclaim, alleging that the concessionaire's failure to provide the necessary level of investment in supply services negatively affected the local population's human right to water.

In the end, the arbitral Tribunal came to affirm its jurisdiction over Argentina's counterclaim[60]. It interpreted the arbitration clause extensively and considered that when an arbitration clause is drafted in broad terms and refers to disputes "relating to an investment" or "arising from an investment", then arbitrators have "a wider margine of manouvre"[61]. The Tribunal based its reasoning on soft law instruments[62] such as, *inter alia*, the aforementioned ILO Tripartite Declaration on Principles concerning Multinational Enterprises and Social Policy and the UN Guiding Principles on Business and Human Rights.

[57] On counterclaims in general, see LALIVE, HALONEN, *On the Availability of Counterclaims in Investment Treaty Arbitration*, in *CYBIL*, 2011, 2, pp. 141-156; HOFFMANN, *Counterclaims in Investment Arbitration*, in *ICSID Rev.*, 2013, 28(2), pp. 438-453; DUDAS, *Treaty Counterclaims under the ICSID Convention*, in BALTAG (ed.), *ICSID Convention after 50 Years: Unsettled Issues*, Kluwer Law International, 2017, pp. 385-405; LAMPO, *Le domande riconvenzionali*, in MANTUCCI (ed.), *Trattato di diritto dell'arbitrato*, vol. XIII. *L'arbitrato negli investimenti internazionali*, Edizioni Scientifiche Italiane, 2020, pp. 439-463; ANNING, *Counterclaims Admissibility in Investment Arbitration. The Case of Environmental Disputes*, in CHAISSE, CHOUKROUNE, JUSOH, *op. cit.*, pp. 1277-1325.

[58] *Urbaser SA and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoav. Argentina*, ICSID Case No. ARB/07/26, Award, 8 December 2016.

[59] Agreement on the Reciprocal Promotion and Protection of Investments between the Argentine Republic and the Kingdom of Spain, 3 October 1991, in force 28 September 1992, in *UNTS*, 1992, 1699, p. 202 ff.

[60] *Urbaser v. Argentina*, cit., paras. 1151, 1155.

[61] ZARRA (2020), *op. cit.*, p. 69.

[62] *Urbaserv. Argentina*, cit., paras. 1195-1198.

Turning to the second case, it is worth noting that in *David Aven v. Costa Rica* (2018)[63] US citizens initiated a proceeding against Costa Rica under Chapter 10 of the Central America-Dominican Republic-United States Free Trade Agreement[64]. The claimants alleged that Costa Rica breached its obligations when it illegitimately revoked the construction permits that they had obtained from the municipal authorities and prevented them from developing a real estate project in Esterillos Oeste, where they had a concession. On the other side, the respondent State affirmed that it had acted to protect the local environment, as there were wetlands and forests within the project site, and that its right to pursue such environmental policy was acknowledged under the FTA. In addition, Costa Rica filed a counterclaim alleging that the works carried out by the claimants negatively affected the environment in the project site.

At the end of the proceedings, the arbitral tribunal affirmed its jurisdiction over the counterclaim and acknowledged that, in general, investors are under the obligation to perform their investment in compliance with the protection of the environment.

In both cases, arbitral tribunals interpreted arbitration clauses extensively in order to establish their jurisdiction on counterclaims filed by respondent host States, which act as procedural remedies to challenge violations of human rights by investors. Moreover, they acknowledged that "it can no longer be admitted that companies operating internationally are immune from becoming subjects of international law" and that, if corporations may hold rights under international law, they may also "be subjects to international law obligations"[65]. These awards represent a significant judicial effort to interpret existing sources of international investment law in a way that allows the striking of a new balance between investors and States interests, between investment-related aspects and non-economic concerns[66].

[63] *David Aven et al. v. The Republic of Costa Rica*, ICSID Case No. UNCT/15/3, Award, 18 September 2018.

[64] Central America-Dominican Republic-United States Free Trade Agreement (DR-CAFTA), Washington 5 August 2004.

[65] *Urbaser v. Argentina*, cit., paras. 1194-1195.

[66] On counterclaims as a tool to rebalance investment and non-investment concerns, see Bjorklund, *The Role of Counterclaims in Rebalancing Investment Law*, in *LCLR*, 2013, 17(2), pp. 461-480; Abel, *Counterclaims Based on International Human Rights Obligations of Investors in International Investment Arbitration. Fallacies and Potentials of the 2016 ICSID* Urbaser v. Argentina

Today, after long doctrinal and jurisprudential debates the right to file counterclaims is generally admitted, even in cases where the relevant instrument does not provide for it. This notwithstanding, for reasons of legal certainty several IIAs expressly set forth such right[67].

Nonetheless, this approach has more than one shortcoming, as it moves in a normative framework which is substantially unchanged. The main problem is that investors keep being under no substantive obligation of compliance with human rights and labour standards *under international investment law* when BITs do not outline them explicitly. Even if substantive obligations were to be found in other branches of international law, their incorporation by virtue of systemic integration is anything but obvious. It follows that there would bea concrete risk of incoherence as arbitral tribunals must rely on uncertain interpretative solutions to establish their jurisdiction on counterclaims.

## 6. *Towards a New Deal in the Policy-Making of International Investment Agreements?*

Turning to the last part of the analysis, it should be noted that to date, although praiseworthy, the mentioned remedies have given rise to a rather isolated practice and still unsatisfactory outcomes. Nevertheless, soft law instruments and arbitral tribunals' commitment certainly contributed to initiating a new deal of hard law policy-making. In fact, it is worth highlighting that in the most recent practice a new 'new-generation' of IIAs and Model BITs include ICSR, labour standards and the right to regulate, at the substantive level, as well as the host State right to file counterclaims, at the procedural one[68]. The OECD itself has recently

*Award*, in *BOL-IJ*, 2018, 1, pp. 61-90; ISHIKAWA, *Counterclaims and the Rule of Law in Investment Arbitration*, in *AJIL Unbound*, 2019, 113, pp. 33-37.

[67] Under art. 28, para. 9, of the Common Market for Eastern and Southern Africa "A Member State against whom a claim is brought by a COMESA investor under this Article may assert as a defence, counterclaim, right of set off or other similar claim, that the COMESA investor bringing the claim has not fulfilled its obligations under this Agreement, including the obligations to comply with all applicable domestic measures or that it has not taken all reasonable steps to mitigate possible damages". In the same vein, see art. 14, para. 11 of the Indian Model BIT.

[68] As regards human rights-related provisions in IIAs, see CHOUDHURY, *Human Rights in*

welcomed this trend[69]. If some references to the conventional practice related to the right to regulate and that to file counterclaims have been indicated above (Sections 4.2. and 5 respectively), hereafter the inquiry will address the current practice concerning ICSR and labour standards.

As regards the former, an example is art. 12 of the Argentina-Qatar BIT, which provides that "[i]nvestors operating in the territory of the host Contracting Party should make efforts to voluntarily incorporate internationally recognised standards of corporate social responsibility into their business policies and practices"[70].

As regards labour standards, art. 17.2, of the United States-Colombia Trade Promotion Agreement represents an outstanding example as it states that "1. Each Party shall adopt and maintain in its statutes and regulations, and practices there under, the following rights, as stated in the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-

*International Investment Law*, in *EYIEL*, 2020, 11, pp. 175-194; Seif, *Business and Human Rights in International Investment Law: Empirical Evidence*, in Chaisse, Choukroune, Jusoh, *op. cit.*, pp. 1759-1782, p. 1764 ff. On ICSR clauses in IIAs or models, see Monebhurrun, *Mapping the Duties of Private Companies in International Investment Law*, in *BJIL*, 2017, 14(2), pp. 50-71; Bernasconi-Osterwalder, *Inclusion of Investor Obligations and Corporate Accountability Provisions in Investment Agreements*, in Chaisse, Choukroune, Jusoh, *op. cit.*, pp. 464-482. As regards labour provisions, see Boie, *Labour related provisions in international investment agreements*, in *ILO Employment Work. Pap.*, 2012, 126; Prislan, Zandvliet, *Labor Provisions in International Investment Agreements: Prospects for Sustainable Development*, in *YBIntInvestL&Pol*, 2012-2013, pp. 377-411; Agustí-Panareda, Puig, *Labor Protection and Investment Regulation: Promoting a Virtuous Circle*, in *StanJIntlL*, 2015, 51, pp. 105-117; Bolle, *Overview of Labor Enforcement Issues in Free Trade Agreements*, Congressional Research Service, 2016; Araujo, *Labour Provisions in EU and US Mega-Regional Trade Agreements: Rhetoric and Reality*, in *ICLQ*, 2018, 67(1), pp. 233-253.

[69] OECD, *The future of investment treaties Background note on potential avenues for future policies*, 6th Annual Conference on Investment Treaties, 29 March 2021, p. 8, available at https://www.oecd.org/daf/inv/investment-policy/Note-on-possible-directions-for-the-future-of-investment-treaties.pdf.

[70] Argentina-Qatar BIT, cit. In the same vein, see art. 810 of the Canada-Peru Free Trade Agreement, 29 May 2008, in force 1 August 2009, available at https://www.international.gc.ca/-trade-commerce/trade-agreements-accords-commerciaux/agr-acc/peru-perou/fta-ale/08.aspx?lang=eng. In even more detailed worlds, see art. 9 of the Investment Cooperation and Facilitation Agreement Between the Federative Republic of Brazil and the Republic of Malawi, 25 June 2015, not yet in force, available at https://investmentpolicy.unctad.org/-international-investment-agreements/treaty-files/4715/download and art. 12, para. 2, of the Brazil-India Investment Cooperation and Facilitation Treaty, 25 January 2020, not yet in force, available at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5912/-download.

Up (1998) (ILO Declaration): (a) freedom of association; (b) the effective recognition of the right to collective bargaining; (c) the elimination of all forms of compulsory or forced labour; (d) the effective abolition of child labour and, for purposes of this Agreement, a prohibition on the worst forms of child labour; and (e) the elimination of discrimination in respect of employment and occupation"[71].

The same trend holds true if one considers model agreements. With respect to corporate social responsibility, art. 7 of the Netherlands Model Investment Agreement is satisfied to reaffirm "the importance of each Contracting Party to encourage investors operating within its territory or subject to its jurisdiction to voluntarily incorporate into their internal policies those internationally recognised standards, guidelines and principles of corporate social responsibility"[72], whereas art. 18 of the Belgium-Luxemburg Economic Union (BLEU) Model BIT is drafted with hard law terminology where it states that "[i]nvestors [… shall…] act in accordance with internationally accepted standards applicable to foreign investors to which the Contracting Parties are a party".

Turning to labour standards, the same Model BIT, under art. 16, provides for that "The Contracting Parties, in accordance with their obligations under relevant ILO instruments, recognise that the violation of fundamental principles and rights at work cannot be used as an encouragement for the establishment, acquisition, expansion and retention in their territories, of an investment".

An explicit reference to the 1998 ILO Declaration appears in art. 13 of the US Model BIT which reads "1. The Parties reaffirm their respective

[71] In a similar vein, see art. 10 of the Agreement between the Slovak Republic and the Islamic Republic of Iran for the Promotion and Reciprocal Protection of Investments (Slovakia-Iran), 19 January 2016, in force 30 August 2017.

[72] Netherlands Model Investment Agreement, 22 March 2019, available at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5832/download. In this vein, see also art. 22, para. 2, of the African Union Commission Economic Affairs Department, Draft Pan-African Investment Code, December 2016, Chapter 4, available at https://au.int/sites/default/files/documents/32844-doc-draft_pan-african_investment_code_december_2016_en.pdf; art. 16 of the Canada 2014 Model FIPA, available at https://www.italaw.com/si-tes/default/files/-files/italaw8236.pdf; art. 15, para. 1, of the Southern African Development Community, Model BIT Template, July 2012, available at https://www.iisd.org/itn/wp-content/-uploads/2012/10/sadcmodel-bit-template-final.pdf.

obligations as members of the International Labour Organization (ILO) and their commitments under the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-Up. 2. The Parties recognise that it is inappropriate to encourage investment by weakening or reducing the protections afforded in domestic labour laws".

As regards the European region, there is a settled practice relevant to both aspects. Indeed, it is worth underlining that in its implementing decisions on authorisations granted to EU Member States, the EU Commission strictly defines the boundaries of their power to negotiate BITs. Interestingly enough, the Commission systematically requests them to include clauses reflecting the following standards: "(h) prohibition of investment enhancement by lowering or relaxing domestic environmental or labour legislation and standards, or by failing to effectively enforce such legislation and standards; (i) reference to human rights and sustainable development and promotion of internationally recognised standards of corporate social responsibility, such as OECD Guidelines for Multinational Enterprises and the UN Guiding Principles on Business and Human Rights"[73].

To conclude this Section, the 2016 Morocco-Nigeria BIT should be mentioned[74], which, although not yet in force, represents one of the most advanced examples of IIA. Its art. 24, entitled "Corporate Social Responsibility", is drafted in a weak form and it only provides that "[i]nvestors *should* apply the ILO Tripartite Declaration on Multinational Investments and Social Policy as well as specific or sectorial standards of responsible practice where these exist" (emphasis added). However, art. 18, para. 3, expressly provides that "investors [...] *shall act* in accordance with core labour standards as required by the ILO Declaration on Fundamental Principles and Rights of Work, 1998" (emphasis added). It is worth highlighting that this obligation deals with investment post-establishment phase.

[73] See, *e.g.*, art. 2 of the Commission implementing decision authorising Hungary to open formal negotiations to amend a bilateral investment agreement with the State of Kuwait, Brussels 12.3.2020, C(2020) 1506 final; art. 2 of the Commission implementing decision authorising the Kingdom of Spain to open formal negotiations to conclude a bilateral investment agreement with the Republic of Cote d'Ivoire, Brussels, 29.5.2020, C(2020) 3400 final.

[74] See Reciprocal Investment Promotion and Protection Agreement Between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria, cit.

## 7. *Final Remarks*

By way of conclusion, it is possible to affirm that the analysis carried out so far shows that international investment law is at a turning point in its story. The promotion of MNEs' compliance with labour standards no longer seems to be exclusively left to soft law instruments, whose application is essentially voluntary. Indeed, policy-making as well as judicial and scholarly efforts contributed to the establishment of the institutions examined above. Even if with different nuances, nowadays the latter represent structural features of both international investment law and arbitration.

In this context, therefore, they may play a valuable role in progressively raising the level of labour protection worldwide to make globalization a 'globalization of rights'. Indeed, MNEs know that if they do not comply with labour laws and standards, they face one of the following situations, satisfied certain conditions. In the first place, they may risk being accorded no compensation (or a significantly reduced amount) when their investments would be adversely affected by a measure that the host State has introduced to safeguard labour protection in a proportionate, reasonable, and non-discriminatory manner. In addition, they may be found liable for damages by consequence of a counterclaim filed by the host State. In this respect, however, it should be acknowledged that while this scenario recently materialised for environmental law claims, *e.g.*, in the*Burlington v. Ecuador* award (2017)[75], it seems to be rather theoretical for labour law issues, at least at the present moment.

From this, follow at least three consequences. First, those institutions may promote compliance with labour standards in countries where labour protection (if any) is settled at a deficient level. Second, they make it possible to raise labour law issues in international investment proceedings and, in so doing, they mitigate the 'regulatory chill' which prevents countries desiring to increase their own level of protection of labour rights from doing so. Third, they prevent social dumping in countries traditionally more sensitive to labour rights, as long as they provide means to resist both unfair competition and market blackmail.

At the same time, whereas legal imagination is at work and may more

[75] *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Ecuador's Counterclaims, 7 February 2017, pp. 468-469, para. 1099.

easily run, there is no room here for false expectations. From a strictly realistic perspective, it must be stressed that a long road lies ahead. This inquiry was in essence aimed at presenting the few key features available for the purpose. Then, the challenge to shape the future of the global market is open. It is not (only) for legal scholars to manage this trajectory. As a way of paradox, a further step in this direction could hopefully be marked by the COVID-19 pandemic.

## Abstract

This inquiry aims at providing a comprehensive assessment of the effectiveness of the labour protection granted by both international investment law and arbitration. More in detail, it starts by retracing the long process which, progressively overcoming the traditional fragmentation of the international legal system, led to the development of legal solutions aimed at satisfying the claim for harmonisation between investment concerns, on the one hand, and labour protection, on the other. Against this backdrop, the analysis addresses institutions such as corporate social responsibility, the 'right to regulate' doctrine and the principle of proportionality, as well as – at the procedural level – the counterclaim. It concludes trying to outline a trend for the current evolution of conventional investment law practice.

## Keywords

Multinational enterprises, labour standards, international investment law and arbitration, corporate social responsibility, 'right to regulate' doctrine, proportionality, counterclaim.