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## From soft law to hard law? The evolution of corporate social responsibility in International Investment Law

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**UNIVERSITÉ  
DE GENÈVE**

**FACULTÉ DE DROIT**

Master's Thesis

**From Soft Law to Hard Law? The Evolution of Corporate Social  
Responsibility in International Investment Law**

Kalia TSIMARATOS

Within the framework of the seminar  
“Droit international des investissements”

Under the supervision of Professor CIMA

January 2024

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Directive (EU) 2022/2464 Of The European Parliament And Of The Council of 14 December 2022 amending Regulation (EU) No 537/2014

Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting

Paris Climate Accords (2015).

Vienna Convention on Law of Treaties, concluded in Vienna, on 23 May 1969 (VCLT).

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<sup>1</sup> Note that the NAFTA is no longer in force, the USMCA substituted it, and entered into force on July 1, 2020.

## Cases :

*Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008, (Biwater v. Tanzania).

*Continental Casualty Company v. The Argentine Republic*, ICSID Case No. ARB/03/9, Award, 5 September 2008, (Continental Casualty v. Argentina).

*EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award, 8 October 2009, (EDF v. Romania).

*L. F. H. Neer and Pauline Neer (USA) v. United Mexican States, United States–Mexico Claims Commission*, Decision of 15 October 1926, in *Reports of International Arbitral Awards*, United Nations, 2006, Vol. IV, pp. 6.

*Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002, (Marvin Feldman v. Mexico).

*Occidental Exploration and Production Company v. Republic of Ecuador*, LCIA Case No UN 3467, Award, 1 July 2004, Rep 59 para. 176, (Occidental v. Ecuador).

*Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007, (Parkerings v. Lithuania).

*Perenco Ecuador Ltd v. Republic of Ecuador and Empresa Estatal Petroleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/08/6, Interim Decision on the Environmental Counterclaim, 11 August 2015, (Perenco v. Ecuador).

*Pope & Talbot Inc. v. The Government of Canada*, UNCITRAL (1976), Award on the Merits of Phase 2, 10 April 2001, (Pope & Talbot v. Canada).

*Saluka Investments B.V (The Netherlands) v. The Czech Republic*, UNCITRAL, Partial Award, Permanent Court of Arbitration, 17 March 2006, (Saluka v. Czech Republic).

*S.D. Myers, Inc. v. The Government of Canada*, UNCITRAL (1976), Partial Award, 13 November 2000, (S.D. Myers, Inc. v. Canada).

*Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. (formerly Aguas Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A.) v. The Argentine Republic (II)*, ICSID Case No. ARB/03/19, 9 April 2015, (Vivendi v. Argentina II).

*Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003, (Tecmed v. Mexico).

*Urbaser and Consorcio de Aguas Bilbao v. Argentina*, ICSID Case No. ARB/07/26, Award, December 8, 2016 (Urbaser v. Argentina).

**Abbreviations :**

|          |  |
|----------|--|
| ASEAN    | Association of Southeast Asian Nations                     |
| BIT      | Bilateral Investment Treaty                                |
| CETA     | Comprehensive Economic and Trade Agreement                 |
| COMESA   | Common Market for Eastern and Southern Africa              |
| CSR      | Corporate Social Responsibility                            |
| FCN      | Friendship, Commerce and Navigation                        |
| FDI      | Foreign Direct Investment                                  |
| FET      | Fair and Equitable Treatment                               |
| FTA      | Free Trade Agreement                                       |
| ICSID    | International Centre for Settlement of Investment Disputes |
| IIA      | International Investment Agreement                         |
| IIL      | International Investment Law                               |
| ILO      | International Labor Organization                           |
| MAI      | Multilateral Agreement on Investment                       |
| MERCOSUR | Southern Common Market                                     |
| MFN      | Most Favored Nation  |
| MNE      | Multinational Enterprises                                  |
| MST      | Minimum Standard of Treatment                              |
| NGO      | Non-Governmental Organization                              |
| NT       | National Treatment   |
| OECD     | Organization for Economic Co-Operation and Development     |
| PAIC     | Pan African Investment Code                                |
| SADC     | South African Development Community                        |
| SME      | Small and Medium Sized Enterprises                         |

|        |  |
|--------|--|
| UN     | United Nations                                     |
| UNCTAD | United Nations Conference on Trade and Development |
| VCLT   | Vienna Convention on the Law of Treaties           |

## I. INTRODUCTION

The promotion and protection of investors and their foreign investments have been the focus of the International Investment Law (IIL) regime since its foundation – it has been its *raison d'être*. This is reflected in the vast majority of traditional International Investment Agreements (IIAs) which contain substantive protections for investors such as the most-favoured nation treatment, national treatment, fair and equitable treatment, the requirement to compensate for expropriation, and the guarantee of free transfers of capital<sup>2</sup>, whilst only imposing obligations on the States<sup>3</sup>. This asymmetry has been in centre of the crisis of IIL as will be discussed further in this Paper.

Whilst foreign direct investments (FDIs) have mostly been booming in the past years<sup>4</sup>, they have a long history, the first known examples of FDIs being those of the Phoenicians, a civilization that existed from 1500 BC<sup>5</sup>. Over the decades, through the Colonial period (15th century and onwards), to the Post-Colonialism and Gunboat Diplomacy, and finally to the late 20th Century, FDIs continued to expand with their primary tool being to bring capital to developing countries with the aim of increasing their economic growth by creating employment and reducing poverty<sup>6</sup>. Moreover, host States started affording special protection to foreign investors, as means to attract investments<sup>7</sup>. As a matter of fact, the 19<sup>th</sup> century was full of abuse of alien rights, in particular against their property. Thus, the elaboration of measures to protect their property was necessary<sup>8</sup>.

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<sup>2</sup> BUENO Nicolas/VASTARDIS YILMAZ Anna/DJEUGA NGUEULEU Isidore, “Investor Human Rights and Environmental Obligations: The Need to Redesign Corporate Social Responsibility Clauses”, *Brill*, Brill Nijhoff, 2023, p. 179.

<sup>3</sup> BOISSON DE CHAZOURNES Laurence, in EL GHADBAN Tarek/MAZUY Charles-Maurice/SENEGACNIK Alexandre, *La Protection Des Investissements Étrangers: Vers Une Réaffirmation de l'état? = the Protection of Foreign Investments: A Reaffirmation of the State?: Actes Du Colloque Du 2 Juin 2017*. Éditions Pedone, 2018, p.83; BJORKLUND, Andrea K. "The Role of Counterclaims in Rebalancing Investment Law." *Lewis & Clark Law Review*, vol. 17, no. 2, 2013, pp. 461-480.

<sup>4</sup> Note, however, that there has been a 2% decrease in FDIs in 2023 - UNCTAD, World Investment Report 2024, Investment Facilitation and Digital Government, UNCTAD/WIR/2024, United Nations, 2024, p. 10.

<sup>5</sup> COLLINS David, *An Introduction to International Investment Law*, Cambridge University Press, Cambridge, 2023, p. 6.

<sup>6</sup> *Ibid.*, p. 13.

<sup>7</sup> *Ibid.*, p. 15.

<sup>8</sup> *Ibid.*, p. 17.

On the economic side, multinational enterprises (MNEs) are significant drivers of FDIs conducting the most of them<sup>9</sup>, which can foster economic growth in both the State where they are established or registered (home State) and the States where they invest (host States)<sup>10</sup>. Given the economic impact of FDIs and the political risks that foreign investors often face, the framework of IIL to safeguard foreign investments was established<sup>11</sup>. As of today, this framework consists of 3'306 IIAs, including 2'834 bilateral investment treaties and 472 treaties with investment provisions<sup>12</sup>. However, there is also a social dimension to regulating MNEs, which is far from being as complete. In fact, in the past years, there has been an increasing recognition of the role they play in guaranteeing the social welfare of the host State's population. MNEs have a responsibility towards society regarding labor standards, human rights and the environment<sup>13</sup>. This responsibility coupled with the increase in asymmetry/imbalance between investors' rights and States' obligations has led to a wide spread crisis within IIL, a crisis that has not yet been resolved with increasing calls for more accountability on the investors, leading to a corporate social responsibility (CSR) movement<sup>14</sup>.

This Paper seeks to determine whether a balance between investors' rights and States' obligations can be achieved through the use of CSR clauses. It questions whether the concept of CSR can/has evolved from soft law to hard law through the increasing incorporation of CSR clauses and other indirect means in IIAs.

With this in mind, this Paper first addresses the concept of CSR as a corporate governance notion to its development within IIL. Secondly, it shows that CSR originated in international soft law frameworks, which have laid the groundwork for the development of binding CSR obligations in IIL. Third, this Paper analyses the evolution of CSR clauses within IIAs (BITs and FTAs), by demonstrating the absence of CSR in *first generation* IIAs, and the conflicts between the traditional drafting of standards of protection and treatment clauses and CSR

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<sup>9</sup> COLLINS, *op. cit.*, p. 19.

<sup>10</sup> BISHOP R. Doak/CRAWFORD James/REISMAN Michael, *Foreign Investment Disputes: Cases, Materials, and Commentary*, Kluwer Law International, 2005, p. 7.

<sup>11</sup> ZHU Ying, "Corporate Social Responsibility and International Investment Law: Tension and Reconciliation" *Nordic Journal of Commercial Law*", No.1, 2017, p. 92.

<sup>12</sup> "IIA Navigator." *International Investment Agreements Navigator | UNCTAD Investment Policy Hub*, [investmentpolicy.unctad.org/international-investment-agreements/model-agreements](https://investmentpolicy.unctad.org/international-investment-agreements/model-agreements).

<sup>13</sup> BELENGAR Francis Maïnkade, "Corporate Human Rights Obligations of Investors in Recent Investment Agreements: The Progressive Hardening Process of CSR Clauses", 2023, p. 2.

<sup>14</sup> DE JONGE Alice, *Transnational Corporations and International Law: Accountability in the Global Business Environment*, Edward Elgar Publishing, 2011, Chapters 1-2.

accountability. It then tackles *second generation* IIAs, aiming to see whether CSR has developed within them. It then identifies indirect and direct ways to hold investors accountable, notably through counterclaims. Finally, it tackles the *third generation* IIAs, providing a look into the future – investigating whether new drafting methods could help to hold investors liable for their irresponsible social conduct. It concludes by demonstrating that although there has been an important evolution in reaching a balance within IIAs between investors’ rights and States’ obligations, with the increasing integration of CSR clauses and other indirect means, challenges persist as the enforceability of these clauses remain an issue.

## II. CORPORATE SOCIAL RESPONSIBILITY IN CONTEXT

### A. Concept of CSR

CSR is the concept that businesses should operate in ways that positively impact both the society and the environment<sup>15</sup>. It encourages companies to consider the broader effects of their actions, not just their financial objectives<sup>16</sup>. Beyond simply complying with legal requirements, CSR involves voluntarily adopting ethical, sustainable, and socially responsible practices. This approach aims to provide value not only to shareholders but also to consumers, employees, and society as a whole<sup>17</sup>. This relates to the stakeholder model theory developed by Ed FREEMAN which starts with the idea that the corporation is created by the government and, therefore has a social function. Thus, directors should consider not only shareholder returns but also all other constituencies that have a stake in the corporation<sup>18</sup>. We can see that CSR has its origins in corporate governance and ethical business practices, but over the past decades, it has gradually expanded into international law, including IIL, focusing on its voluntary and soft law status.

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<sup>15</sup> MCGRATH Amanda/JONKER Alexandra, “What Is Corporate Social Responsibility”, 2024.

<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid.*

<sup>18</sup> FREDERICK H. Alexander, *Benefit Corporation Law and Governance: Pursuing Profit with Purpose*, Berrett-Koehler Publishers, 2018.

## B. CSR in International Investment Law

As mentioned above, it is now widely accepted and recognized that MNEs play a pivotal role in safeguarding the environment, labor standards, human rights, and the overall social welfare of the host State's territory, particularly through their foreign investments. The main issue is that IIAs have traditionally overlooked investors' obligations<sup>19</sup>. In response, recent efforts in the *new generation* IIAs (*second and third generations*) seek to establish a fairer balance between investors' rights and obligations, aiming to make foreign investments more sustainable, and in line with global development goals<sup>20</sup>. According to UNCTAD<sup>21</sup>,

*“New generation” investment policies are characterized by (i) a recognition of the role of investment as a primary driver of economic growth and development and the consequent realization that investment policies are a central part of development strategies; and (ii) a desire to pursue sustainable development through responsible investment, placing social and environmental goals on the same footing as economic growth and development objectives. Furthermore, (iii) a shared recognition of the need to improve the effectiveness of policies to promote and facilitate investment”.*

We can take from this statement that the new IIAs should aim at maximizing the positive effects of investments while minimizing their negative impacts on society.

This context has led CSR clauses to be designed and increasingly included in IIAs as it is argued that CSR can be used as a global governance mechanism, linking it to sustainable development, human rights, and environmental protection. The promotion of CSR has mainly been led by non-governmental organizations (NGOs) with their influence in the IIL world becoming particularly observable during negotiations for the Multilateral Agreement on Investment (MAI)<sup>22</sup>. NGOs argued that the draft MAI heavily favored investors' protection, notably, lacking provisions for CSR<sup>23</sup>. As a result of NGOs efforts, issues such as

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<sup>19</sup> BUENO/VASTARDIS/DJEUGA NGUEULEU, *op. cit.*, p. 2.

<sup>20</sup> *Ibid.*

<sup>21</sup> UNCTAD, Investment Policy Framework for Sustainable Development, UNCTAD/DIAE/PCB/2015/5, *United Nations*, 2015, p. 17.

<sup>22</sup> COLLINS, *op. cit.*, p. 61.

<sup>23</sup> MUCHLINSKI Peter, “Corporate Social Responsibility” in MUCHLINSKI Peter/ORTINO Federico/SCHREUER Christoph (eds), *The Oxford Handbook of International Investment Law*, Oxford Handbooks Online, 2008, p. 642.

environmental protection and labor rights were incorporated into the draft text. Although the agreement was never finalized due to the breakdown of negotiations in 1998<sup>24</sup>, this was an important step forward towards the shift we are witnessing.

However, there is a debate on whether the incorporation of CSR provisions within IIAs weakens their main objective – the protection of investments<sup>25</sup>. On the one hand, such provisions which include environment and social aspects may improve a country's stability by guaranteeing society's rights and promoting foreign investment and trade<sup>26</sup>. On the other hand, critics of integrating human rights and social and environmental standards into IIAs argue that CSR falls outside the scope of such treaties and could potentially disrupt MNEs competitiveness<sup>27</sup>. This goes in line with Milton FRIEDMAN'S famous shareholder theory; a company's sole obligation is to maximize shareholder profits<sup>28</sup>.

This Paper argues that, foreign investors cannot have a “*carte blanche*” when operating in a host State. Profits is not what it is all about, on the contrary, we are society made up of different values and important interests to safeguard. Knowing that foreign investors, most typically, MNEs play such a big role in promoting these interests, it is necessary to establish a regime that ensures they contribute positively to the host State's sustainable development goals, respect local laws and labor standards, and operate in an environmentally and socially responsible manner, through the inclusion of CSR within IIL.

Note that the terms CSR clauses or provisions are here defined as clauses in IIAs that refer to “*certain obligations imposed on foreign investors in relation to human rights, environmental, and labor standards either directly or indirectly by contracting States*”<sup>29</sup>.

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<sup>24</sup> MUCHLINSKI Peter, *International Corporate Social Responsibility And International*, British Institute of International and Comparative Law (BIICL), 2011, p. 20.

<sup>25</sup> BELENGAR, *op. cit.*, p. 3.

<sup>26</sup> PETERSMANN Ernst-Ulric, *Time for a United Nations “global Compact” for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration*, Oxford Academic, Oxford, 2002, pp. 621–650.

<sup>27</sup> *Ibid.*

<sup>28</sup> FRIEDMAN Milton, *The Social Responsibility of Business Is to Increase Its Profits* in ZIMMERLI W.C/HOLZINGER Marcus/RICHTER Klaus (eds), *Corporate Ethics and Corporate Governance*, Springer, Berlin, Heidelberg, 2007, pp. 173-178.

<sup>29</sup> LEVASHOVA Yulia, *The Accountability and Corporate Social Responsibility of Multinational Corporations for Transgressions in Host States Through International Investment Law*, *Utrecht Law Review*, Vol. 14, No. 2, 2018, p. 40-55.

### III. THE SOFT LAW FRAMEWORK

This section starts by presenting the soft law framework governing CSR developed in the past years. Next, it analyzes whether this framework has influenced the development of hard law CSR obligations imposed on investors.

#### A. International Soft Law Mechanisms

Soft law is characterized by its voluntary nature and non-binding legal obligations<sup>30</sup>. A strict definition of soft law does not exist, it is an evolving concept that has different meanings according to different authors. However, this Paper aligns itself with the following definition given by GUZMAN and MEYER, “*soft law can be defined as those nonbinding rules or instruments that interpret or inform our understanding of binding legal rules or represent promises that in turn create expectations about future conduct*”<sup>31</sup>. From this definition, it is inferred that soft law principles have the ability to create standards of expectation and general and accepted values.

In the field of CSR, soft law has various advantages. First, it is more accepted and upheld by MNEs. In fact, often, they voluntarily adopt CSR commitments<sup>32</sup>, primarily to safeguard their reputation<sup>33</sup>. As mentioned, CSR involves, amongst other aspects, respecting labor standards, the environment and human rights. A corporation that shows to the public it does so, on a voluntary basis, presents itself as a good corporation, one that people want to follow. Additionally, being a company with ethical standards and leadership embracing important societal values is linked with positive growth of the corporation, in terms of business but also in terms of overall success. They have to take on their responsibility as powerful tools for economic and social development – they have a responsibility towards the people and the planet, especially when conducting FDIs. Secondly, as soft law is flexible<sup>34</sup>, corporations can

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<sup>30</sup> GUZMAN Andrew T/MEYER Timothy L, “International Common Law: The Soft Law of International Tribunals”, Chicago Unbound, 2009, accessed on 23 October 2024, available at : [chicagounbound.uchicago.edu/cjil/vol9/iss2/7/](http://chicagounbound.uchicago.edu/cjil/vol9/iss2/7/), N 3.

<sup>31</sup> *Ibid.*, N 7.

<sup>32</sup> CASTILLO Y, “*The Appeal to Human Rights in Arbitration and International Investment Agreements*”, Anuario Mexicano de Derecho Internacional, Vol. XII, 2012, p. 55.

<sup>33</sup> *Ibid.*, pp. 56-58.

<sup>34</sup> BJORKLUND Andrea, “*Assessing the Effectiveness of Soft Law Instruments in International Law*” in BJORKLUND Andrea/REINISCH August (eds), *International Investment Law and Soft Law*, Edward Elgar Publishing Limited, 2012, p. 60.

choose which standards they want to follow or not. However, this can also be negative as they are left with the hard task of self-regulating their practice, cherry picking which item they want to incorporate within their practices. This could damage their reputation and ultimately their overall profits, as it will be a clear indication that they are not yet ready to be fully socially responsible.

Additionally, there is a risk of greenwashing by MNEs voluntarily adhering to soft law standards. There is no uniform definition of greenwashing but this Paper aligns itself with the following one, “*greenwashing is about claiming or creating the perception that activities, products and services are more environmentally friendly or sustainable than they actually are*”<sup>35</sup>. By selectively complying with CSR soft law standards, MNEs can voluntarily adopt these measures to appear favorable in the eyes of society, even when their actual practices fail to align with the standards in any meaningful way<sup>36</sup>. This is problematic as it is a way for MNEs to circumvent their obligations under the standards they decide to adopt whilst still enjoying the benefits that come with portraying themselves as “good” to society. Faced with this growing risk, in January 2024, the European Parliament approved a new greenwashing directive, which requires Member States to implement more stringent rules regarding the use of environmental claims by companies<sup>37</sup>. The US has less advanced regulations but is still taking measures to combat greenwashing<sup>38</sup>. CSR shifting from soft law to hard law could be a way to reduce the risk of greenwashing, as it would no longer be standards MNEs can selectively and voluntarily adopt but ones they have an obligation to follow. Effectively, greenwashing thrives in environments where there is a lack of accountability or oversight. Mandatory CSR standards with legal obligations and consequences for non-compliance would

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<sup>35</sup> PEARS Peter/BAINES Tim/WILLIAMS Oliver, “*Greenwashing: Navigating the Risk*”, The Harvard Law School Forum on Corporate Governance, 2023, accessed on 22 December 2024, available at: [corpgov.law.harvard.edu/2023/07/24/greenwashing-navigating-the-risk/](http://corpgov.law.harvard.edu/2023/07/24/greenwashing-navigating-the-risk/).

<sup>36</sup> MU Honglei/YOUNGCHAN Lee, “*Greenwashing in Corporate Social Responsibility: A Dual-Faceted Analysis of Its Impact on Employee Trust and Identification*”, MDPI, Multidisciplinary Digital Publishing Institute, 2023, accessed on 22 December 2024, available at: [www.mdpi.com/2071-1050/15/22/15693#:~:text=Greenwashing%20in%20secondary%2Dstakeholder%2Doriented%20CSR%20is%20defined%20as%20a,secondary%2Dstakeholder%2Doriented%20CSR](http://www.mdpi.com/2071-1050/15/22/15693#:~:text=Greenwashing%20in%20secondary%2Dstakeholder%2Doriented%20CSR%20is%20defined%20as%20a,secondary%2Dstakeholder%2Doriented%20CSR).

<sup>37</sup> RIORDAN Eve O, “*The EU Greenwashing Directive, Explained*”, Earth.Org, 2024, accessed on 22 December 2024, available at: [earth.org/all-you-need-to-know-about-the-eus-new-greenwashing-directive/](http://earth.org/all-you-need-to-know-about-the-eus-new-greenwashing-directive/).

<sup>38</sup> FILE Curtis, “*Global Greenwashing Regulations: How the World Is Cracking down on Misleading Sustainability Claims*”, Sustainalytics.Com, 2023, accessed on 22 December 2024, available at: [www.sustainalytics.com/esg-research/resource/investors-esg-blog/global-greenwashing-regulations--how-the-world-is-cracking-down-on-misleading-sustainability-claims](http://www.sustainalytics.com/esg-research/resource/investors-esg-blog/global-greenwashing-regulations--how-the-world-is-cracking-down-on-misleading-sustainability-claims).

reduce the ability of companies to make exaggerated or false claims about their socially responsible conducts without facing consequences.

Finally, whilst soft law cannot be enforced, it remains a useful instrument as it provides a common basis for the future development of hard law and serves as a gap-filling tool in hard law<sup>39</sup>.

The codification of soft law is the “*formulation of legal rules on the basis of already established or at least emerging custom but in non-binding form*”<sup>40</sup>. Many organizations have created, for MNEs, voluntary codes of conduct incentivizing them to respect human rights, environmental protection and labor standards. These guidelines have a voluntary nature, hence are not binding but as shown above soft law can create standards of expectations. This Paper argues that, particularly in the field of IIL, the existence of such standards and their gradual inclusion in IIAs is a way to indirectly incentivize foreign investors to act socially responsibly in the host State’s territory.

This section will now expose the most important soft law instruments developed by the international community regarding the CSR of MNEs. These instruments have been chosen because of their important relevance in the field of CSR and IIL as 1) they apply transversally to all MNEs and, 2) cover the most important corporate regulations, conducts, and standards that need to be complied with on a general basis. However, it is important to keep in mind that many other soft law instruments exist, guiding MNEs’ operations in specific sectors.

#### **a. OECD Guidelines on Multinational Enterprises**

The OECD Guidelines on MNEs<sup>41</sup> were created in 1976 in response to an increasing demand to control MNEs by OECD Countries. These guidelines incorporate ethics recommendations in regards the conditions of employment of workers, human rights, environmental protection,

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<sup>39</sup> BJORKLUND Andrea, *op. cit.*, pp. 54-55; developed further.

<sup>40</sup> REINISCH August/BJORKLUND Andrea, "Soft Codification of International Investment Law," Chapters, *in*: BJORKLUND, Andrea/REINISCH August (ed.), *International Investment Law and Soft Law*, chapter 11, Edward Elgar Publishing, 2012, p. 311.

<sup>41</sup> “MNE Guidelines - Organization for Economic Co-Operation and Development.” *MNE Guidelines - Organisation for Economic Co-Operation and Development*, [mneguidelines.oecd.org/mneguidelines/](http://mneguidelines.oecd.org/mneguidelines/).

information disclosure and transparency as well as the prevention of bribery<sup>42</sup>. In 2023, the environmental standards were updated to include climate change standards<sup>43</sup>. Since the elaboration of these guidelines, the OECD has published recommendations that are jointly addressed to MNEs by governments. As these Guidelines fall under the soft law framework, they are not legally binding<sup>44</sup>.

We reproduce in full the section on “*General Policies*” as it is deemed to be a widespread consensus on the social obligations of MNEs<sup>45</sup> :

*“Enterprises should take fully into account established policies in the countries in which they operate, and consider the views of other stakeholders. In this regard, enterprises should:*

- 1. Contribute to economic, social and environmental progress with a view to achieving sustainable development.*
- 2. Respect the human rights of those affected by their activities consistent with the host government's international obligations and commitments.*
- 3. Encourage local capacity building through close co-operation with the local community, including business interests, as well as developing the enterprise's activities in domestic and foreign markets, consistent with the need for sound commercial practice.*
- 4. Encourage human capital formation, in particular by creating employment opportunities and facilitating training opportunities for employees.*
- 5. Refrain from seeking or accepting exemptions not contemplated in the statutory or regulatory framework related to environmental, health, safety, labour, taxation, financial incentives, or other issues.*
- 6. Support and uphold good corporate governance principles and develop and apply good corporate governance practices.*

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<sup>42</sup> COLLINS, *op. cit.*, p. 293.

<sup>43</sup> OECD, Ministerial Council Meeting, ‘Declaration on International Investment and Multinational Enterprises’ (2023) Annex 1 ; SCHACHERER Stefanie, *Building Responsible and Sustainable Supply Chain Frameworks: Limits of International Investment Law and the CSR Initiatives Taken by the EU and China*, 2024, p. 5.

<sup>44</sup> DI FEO Vanessa, “*Corporate Social Responsibility and Accountability: A New Theoretical Foundation for Regulating CSR - International Journal of Corporate Social Responsibility*”, SpringerOpen, Springer International Publishing, 2020, accessed on 28 October 2024, available at: [jcsr.springeropen.com/articles/10.1186/s40991-019-0045-8](https://jcsr.springeropen.com/articles/10.1186/s40991-019-0045-8), p. 13

<sup>45</sup> MUCHLINSKI Peter, “*Corporate Social Responsibility*”, *op. cit.*, p. 643.

*7. 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.*

*8. Promote employee awareness of, and compliance with, company policies through appropriate dissemination of these policies, including through training programmes.*

*9. Refrain from discriminatory or disciplinary action against employees who make bona de reports to management or, as appropriate, to the competent authorities, on practices that contravene the law, the Guidelines or the enterprise's policies.*

*10. Encourage, where practicable, business partners, including suppliers and sub-contractors, to apply principles of corporate conduct compatible with the Guidelines.*

*11. Abstain from any improper involvement in local political activities”.*

We can see that the OECD guidelines mention all aspects of corporate regulations which makes it difficult to precisely clarify CSR standards. We will see that the UN Global Compact contains a more specific set of standards, although remaining general and transversal.

## **b. UN Global Compact**

The UN’s Global Compact was established in 1999 and is another central CSR instrument. It sets out ten key principles addressed to MNEs with international activities<sup>46</sup>. These enterprises are asked to respect the principles of sustainable development, including respect for human rights, labor, the environment and anti-corruption, and also to take positive actions to advance the social objectives found in the UN’s Sustainable Development Goals<sup>47</sup>. Although the UN Global Compact directly addresses MNEs, there is no enforcement mechanism - the UN Global Compact secretariat consists of the only monitoring by creating lists of companies and progress reports to show their commitment in the implementation of the principles<sup>48</sup>.

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<sup>46</sup> DI FEO, *op. cit.*, p. 14.

<sup>47</sup> COLLINS, *op. cit.*, p. 294.

<sup>48</sup> “Homepage: UN Global Compact.” *Homepage | UN Global Compact*, [unglobalcompact.org/](http://unglobalcompact.org/).

### **c. UN Guiding Principles on Business and Human Rights**

The UN Guiding Principles on Business and Human Rights<sup>49</sup> are another key instrument in CSR regulation. They establish the obligations of both States and businesses to respect, protect, and address human rights violations within corporate activities. They emphasize that companies have a duty to respect these rights and should develop policies to ensure compliance, which includes performing due diligence to identify, manage, and mitigate potential risks<sup>50</sup>. The UNGPs also stress that human rights due diligence should be a continuous, proactive process for businesses, reinforcing the corporate responsibility to uphold human rights across their operations. However, once again, they are not legally enforceable<sup>51</sup>.

### **d. Tripartite Declaration of Principles for Multinational Enterprises and Social Policy of the ILO**

The Tripartite Declaration of Principles for Multinational Enterprises and Social Policy of the ILO<sup>52</sup> gives good practices and guidance regarding socially oriented principles for MNEs. The principles at the base of this instrument are the ones found in international labor conventions and recommendations, including non-discrimination in employment<sup>53</sup>.

### **e. UNCTAD – Investment Policy Framework For Sustainable Development**

In 2012, the Investment Policy Framework for Sustainable Development (IPFSD) was developed by the United Nations Conference on Trade and Development. It was updated in 2015<sup>54</sup>. The principles for investment policymaking are established in this document. Additionally, it lays down guidelines for national policies as well as specific guidance for policymakers treating the different stages of the drafting process, and the specific clauses of IIAs. An important guidance given to States is on how to “*balance State commitments with*

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<sup>49</sup> *Guiding Principles on Business and Human ...*, [www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr\\_en.pdf](http://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf).

<sup>50</sup> SCHACHERER, *op. cit.*, p. 6.

<sup>51</sup> *Ibid.*

<sup>52</sup> ILO, ‘Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy’ (1977 revised 2022).

<sup>53</sup> SCHACHERER, *op. cit.*, p. 7.

<sup>54</sup> UNCTAD, Investment Policy Framework for Sustainable Development, UNCTAD/DIAE/PCB/2015/5, United Nations, 2015.

*investor obligations and promoting responsible investment*”<sup>55</sup>. It suggests that “IIAs could refer to commonly recognized international standards and support the spread of CSR standards”<sup>56</sup>. Additionally, States are encouraged to include investor liability clauses in IIAs for breaches of domestic or international law<sup>57</sup>. Finally, the IPFSD lays down propositions on the way policymakers should formulate and incorporate CSR clauses in IIAs and in national investment laws and policies<sup>58</sup>.

Through these five instruments, a clear consensus emerges: MNEs can no longer invest without regards for the potential negative impacts their investments may have on the host State's territory. They have a duty to ensure that their investments generate positive social outcomes. As said many times, these instruments are not binding but this Paper strongly argues that they are necessary to achieve the long awaited shift in IIL.

## **B. Soft Law as a Precursor to Hard Law**

International investment law is limited in its capacity to proactively command the conduct of an investor in regards to its “*support of recognized public interest/sustainability norms*”<sup>59</sup>. This is due to the fact that foreign investors are private actors, therefore, they are not obliged to ensure that international law including IIAs’ commitments are upheld as they are not truly subject of international law<sup>60</sup>. As shown, this led to the development of international soft law instruments which reflect a world-wise consensus that MNEs should, regardless of their private actor status, be held accountable for their actions and actively contribute to the social welfare of different communities. This Paper questions whether these soft law instruments serve as a precursor to hard law obligations—whether they have the potential to shape or directly influence the establishment of binding CSR obligations governing the conduct of foreign investors. BJORKLUND has written that soft law instruments may actually be useful for the

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<sup>55</sup> UNCTAD, *Investment Policy Framework for Sustainable Development*, *op. cit.*, p. 8.

<sup>56</sup> *Ibid.*

<sup>57</sup> *Ibid.*, p. 19.

<sup>58</sup> UNCTAD, *Investment Policy Framework for Sustainable Development*, *op. cit.*, p. 35ss ; LEVASHOVA, *op. cit.*, p. 44.

<sup>59</sup> BROWNLIE, *Principles of Public International Law*, Oxford University Press, Oxford, 2008, p. 65.

<sup>60</sup> *Ibid.*

development of IIL<sup>61</sup> ; she believes that soft law can fill in the gaps within hard law and help in its interpretation as well as in answering questions that arise out of hard law issues<sup>62</sup>.

Moreover, she states that even if it is not legally binding, soft law can still have an impact on the strengthening of hard law which can be seen through the continuous development and evolution of IIL and the drafting of treaties with the guidance of soft law principles<sup>63</sup>.

This Paper aligns itself with this view, arguing that soft law instruments often serve as a foundation for the development of binding obligations. Soft law's growing influence can slowly shape international treaties, including IIAs, leading to the inclusion of CSR related clauses, or innovative drafting solutions rooted in CSR concepts.

The following section highlights the *first generation* IIAs, whose main characteristic is the lack of any reference to CSR concepts, with the sole purpose of protecting foreign investors. This Paper aims to show the issues that have arisen due to this absence.

Before diving into the attributes of *first generation* IIAs, and subsequent generations, it is important to clarify the concept of “*generations*” in this context. This term refers to the chronological evolution of IIAs, each characterized by distinct features and, in the case of the *second* and *third generations*, an increasing focus on the integration of CSR concepts. However, these generations are not mutually exclusive, they can co-exist. In fact, the general trend to more CSR integration in *second* and *third generations* IIAs that has been detected, does not exclude the possibility that recently adopted treaties still decide to follow the *first generation* approach.

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<sup>61</sup> BJORKLUND, “Assessing the Effectiveness of Soft Law Instruments in International Law”, *op. cit.*, p. 51.

<sup>62</sup> *Ibid.*

<sup>63</sup> *Ibid.*

#### IV. FIRST GENERATION IIAS : EARLY IIAS AND THE ABSENCE OF CSR

A BIT is a bilateral treaty between two States that provides guarantees for investments/investors from one State in the territory of the other<sup>64</sup>. These treaties are divided into three parts: preamble and definition; standards of treatment and protection of foreign investments; and dispute settlement clauses (investment arbitration)<sup>65</sup>.

BITs have as their predecessor Friendship, Commerce and Navigation (FCN) agreements. The latter were concluded in the eighteenth century by the major colonial powers as well as the US<sup>66</sup>. The obligations found in the FCN treaties had for purpose the policy of protection of overseas investments, with no reference to social benefits of the host States<sup>67</sup>. The modern era of BITs began in 1959 due to the increase in foreign investments after the Second World War, which demanded more regulation<sup>68</sup>. The first BIT is the one between Germany and Pakistan, which entered into force in 1962<sup>69</sup>.

On top of BITs, there are Free Trade Agreements (FTAs). The latter are agreements between two or more countries in which the parties agree on certain trade in goods and service obligations, as well as the protections for investors<sup>70</sup>. The investment chapters in these treaties tend to be longer than classic BITs<sup>71</sup>.

As mentioned, traditional BITs and FTAs often overlook investors' obligations, leading to an asymmetry between investors' rights and States' obligations<sup>72</sup>. In part, due to this imbalance, IIL has often been criticized for its "*chilling effect*" on the right of the host State to regulate foreign investments in light of public interests<sup>73</sup>.

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<sup>64</sup> KUIJPER Pieter Jan, Part I: Study on investment protection agreements as instruments of international economic law, *In Investor-state dispute settlement (ISDS) provisions in the EU's international investment agreements. - Volume 2: Studies*, Brussels: European Parliament, Directorate-General for External Policies, Policy Department, Vol.2, p.13 ; COLLINS, *op. cit.*, p. 40.

<sup>65</sup> KUIJPER, *op. cit.*, p. 13 ; COLLINS, *op. cit.*, p. 40.

<sup>66</sup> COLLINS, *op. cit.*, p. 35.

<sup>67</sup> ZHU, "Corporate Social Responsibility and International Investment Law", *op. cit.*, p. 95.

<sup>68</sup> *Ibid.*

<sup>69</sup> COLLINS, *op. cit.*, p. 35 ; Treaty between the Federal Republic of Germany and Pakistan for the Promotion and Protection of Investment (Germany – Pakistan BIT (1962)).

<sup>70</sup> COLLINS, *op. cit.*, p. 41.

<sup>71</sup> *Ibid.*

<sup>72</sup> BOISSON DE CHAZOURNES Laurence, *in EL GHADBAN, op. cit.*, p. 83.

<sup>73</sup> ZHU, "Corporate Social Responsibility and International Investment Law", *op. cit.*, p. 97.

This section will begin by highlighting the issues with the preambles found in traditional IIAs. Next, it aims to demonstrate the tension between CSR obligations imposed on investors and the current status of the standards of treatment and protection granted to these investors.

### A. Preambles

The preamble explains the purpose, goal and spirit of the treaty<sup>74</sup>. An example of a traditional preamble - one that is very protective of foreign investments - is found in the German Model BIT (2008)<sup>75</sup>. The preamble reads as follows :

*“desiring to intensify economic co-operation between the two States,  
intending to create favorable conditions for investments by investors of either State in  
the territory of the other State,  
recognizing that the encouragement and contractual protection of such investments are  
apt to stimulate private business initiative and to increase the prosperity of both  
nations”.*

Examples of BITs concluded containing the same or similar preambles are the Germany-Argentina BIT (1991)<sup>76</sup>, China-Egypt BIT (1994)<sup>77</sup>, Greece-Mexico BIT (2000)<sup>78</sup>, Germany-Jordan BIT (2007)<sup>79</sup>, and the Bahrain-Spain BIT (2008)<sup>80</sup>.

These preambles pose a number of problems. In fact, whilst preambles do not establish rights or obligations as to the substantive provisions of IIAs, they are an aid to interpreting the main body of the agreements<sup>81</sup>. According to the Vienna Convention<sup>82</sup>, when interpreting a treaty, one must take into account the object and purpose of the treaty, including its preamble and

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<sup>74</sup> KUIJPER, *op. cit.*, p. 14.

<sup>75</sup> German Model BIT (2008).

<sup>76</sup> Treaty between the Federal Republic of Germany and the Argentine Republic on the Promotion and Reciprocal Protection of Investments (1991) (Germany – Argentine BIT (1991)).

<sup>77</sup> Agreement between the Government of the Arab Republic of Egypt and the Government of the People’s Republic of China concerning the Encouragement and Reciprocal Protection of Investments, signed in 1994, and entered into force in 1996 (Egypt – China BIT (1994)).

<sup>78</sup> Agreement between the Government of the United Mexican States and the Government of The Hellenic Republic on the Promotion and Reciprocal Protection of Investments, signed in 2000 (Greece – Mexico 2000)).

<sup>79</sup> Germany – Jordan BIT (2007).

<sup>80</sup> Agreement Between the Kingdom of Spain and The Kingdom of Bahrain on the Promotion and Reciprocal Protection of Investments, signed in 2008 (Bahrain – Spain BIT (2008)).

<sup>81</sup> BJORKLUND Andrea, “Sustainable development and International Investment Law” in MILES Kate (ed.), *Research Handbook on Environment and Investment Law*, Edward Elgar Publishing, Northampton, 2019, p. 57.

<sup>82</sup> Vienna Convention on the Law of Treaties (1969)).

annexes<sup>83</sup>. Thus, courts have relied on such preambles (found in almost all traditional IIAs) to justify their extensive interpretations of investors' protections. In other words, courts will interpret the treaty in the light of the sole objective of the protection of investors. Hence, if a measure has a negative impact on foreign investments, it will be deemed to be a violation of the treaty, even though the measure in question is legitimate and necessary to achieve better social welfare.

This has been highly criticized and has led to a change of practice in various modern BITs, which now include a broader goal, including sustainable development and reference to CSR<sup>84</sup>.

## **B. Standards of Treatment and Protection**

Historically, IIAs consisted of broad and extensive standards of treatment and protection with no regards whatsoever to social, environmental, or human rights impacts. This Paper aims to demonstrate that this *status quo* poses fundamental issues with the host State's right to regulate, particularly in terms of socially responsible conduct of investors. To be sure, this Paper will argue that there is a relationship between the host State's right to regulate and CSR. In fact, if a host State cannot regulate for its public interests, risking to face an arbitration proceeding, it becomes very difficult to ensure investors act socially responsibly – as the State will lack the means to hold investors accountable. Moreover, the more a host State regulates in line with its legitimate interests, the more it encourages investors to act responsibly. Investors will recognize that by aligning with these interests, they are less likely to be affected by future regulations, as their actions will already comply with the goals of any new measures. This relationship – between the host State right to regulate and CSR – is used throughout the whole Paper.

As a side note, it should be mentioned that traditional IIAs have always incorporated obligations on investors to comply with the host State's domestic laws and regulations<sup>85</sup>. This has been done through the use of provisions requiring that investments are made “*in accordance with the law*”. By doing so, IIAs prevent investors from invoking treaty protections

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<sup>83</sup> Art. 31 al.1, Vienna Convention ; « *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*”.

<sup>84</sup> Cf. next section (Morocco – Nigeria BIT (2016)) ; (Model Canada BIT (2021)).

<sup>85</sup> COLLINS, *op. cit.*, p. 74.

if their investments are found non-compliant with domestic laws. Although this is important and partially safeguards the sovereignty of the State in terms of its legislations, it has demonstrated not to be enough to ensure that foreign investors comply with environmental practice, labor standards and human rights. This is due to the fact that most countries have not had domestic legislations on these matters in the past, and that the broad protections given to investors, allowed them to circumvent this obligation.

This Paper now turns to the main standards of protection and treatment found in IIAs.

#### **a. National Treatment and Most-Favored Nation Treatment**

National Treatment (NT) and Most-Favored Nation (MFN) clauses have traditionally aimed to ensure that foreign investors receive treatment no less favorable than domestic investors (NT)<sup>86</sup> and investors from third countries (MFN)<sup>87</sup>. They are non-discrimination standards. The drafting of these clauses vary depending on the IIAs, and each clause must be interpreted in its own context<sup>88</sup>.

Some traditional IIAs contain clauses with a very open wording, protecting investors to the fullest. Others have added the concept of “*like circumstances*” as a condition to the application of these non-discrimination standards. In the latter situation, a key issue relates to the interpretation of “*like circumstances*” as this concept is not defined within BITs themselves. In this section, this Paper focuses on open-worded clauses as well as the traditional interpretations of “*like circumstances*”. The most recent and innovative development regarding the interpretation of this notion will be discussed in a further section<sup>89</sup>.

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<sup>86</sup> VINUESA Raúl Emilio, Max Planck Encyclopedia of Public international Law - *National Treatment, Principle*, Oxford Public International Law, Oxford, 2011, N 55-56.

<sup>87</sup> BROWN Chester/MILES Kate (eds.), *Evolution in Investment Treaty Law and Arbitration*, Cambridge University Press, Cambridge, 2011, p. 226.

<sup>88</sup> DOLZER in DOLZER Rudolf/KRIEBAUM Ursula/SCHREUER Christoph, *Principles of International Investment Law*, 3<sup>rd</sup> ed., Oxford University Press, Oxford, 2022, p. 268.

<sup>89</sup> Cf. section VI (A).

## i. Open-Worded Clauses

An example of an open-worded clause is found in the German Model BIT (2008)<sup>90</sup> that contains at its Article III (1) the NT and MFN principles which provides that :

*“Neither Contracting State shall in its territory subject investments owned or controlled by investors of the other Contracting State to treatment less favorable than it accords to investments of its own investors or to investments of investors of any third State”*<sup>91</sup>.

The wording of this clause is extremely open, broad and protective. There are no limitations, exceptions or bases for comparison. As a result, host States can never differentiate. This can be very dangerous, especially for developing States. In fact, let’s imagine host State A that decides to, on the basis of the 2015 Paris Agreement<sup>92</sup>, promote the electricity sector linked to renewable energies by granting subsidies for electricity producers using renewable resources. At the same time, there is a foreign investor that is operating through combustible resources in host State A, who, in this scenario, cannot benefit from the subsidies granted by this host State. The risk is that the foreign investor invokes the non-discrimination standards provided in the BIT between host State A and its home State. As the clause is so wide, the tribunal will judge that the host State has violated its non-discrimination obligation, treating two investors differently. We can clearly see the issue here : it limits the State’s possibility to regulate to safeguard important public interests and it does not limit the investor’s conduct in any way. In fact, a foreign investor does not have to be socially responsible to be protected.

## ii. “Like Circumstances”

An example of a clause incorporating the concept of “*like circumstances*” is found in Article 1103 of the NAFTA (1992) (MFN clause)<sup>93</sup> which provides that :

*“Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in **like circumstances**, to investors of any other Party or of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments”*.

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<sup>90</sup> German Model BIT (2008).

<sup>91</sup> Art. III (1), German Model BIT (2008).

<sup>92</sup> Paris Agreement 2015, accessed on : [https://unfccc.int/sites/default/files/english\\_paris\\_agreement.pdf](https://unfccc.int/sites/default/files/english_paris_agreement.pdf).

<sup>93</sup> North American Free Trade Agreement, Canada – United States – Mexico (1992).

And in Article 1102 of the NAFTA (1992) (NT clause) :

“Each Party shall accord to investors of another Party treatment no less favorable than that it accords, **in like circumstances**, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments”<sup>94</sup>.

The interpretation of “*like circumstances*” is very different depending on the tribunals. One common approach is the “*same business or economic sector*” interpretation – two investors are in *like situations* if they operate in the same economic sector, in the same business<sup>95</sup>. This was the approach taken in *Feldman v. Mexico*<sup>96</sup>, *Pope & Talbot INC v. Canada*<sup>97</sup>, and *S.D. Myer, Inc v. Canada*<sup>98</sup>.

In another case<sup>99</sup> the tribunal did not follow the same business or economic sector approach, but stated that “*in like situations*” required the tribunal to compare the foreign investor in the oil exporting sector to all domestic exporters, including flower exporters<sup>100</sup>.

Finally, and quite surprisingly, the tribunal in *Methanex Corp v. United States of America*<sup>101</sup> judged that only identical foreign and domestic investments should be compared<sup>102</sup>.

The issues with these interpretations are that 1) they are not related to the conduct of the foreign investor, and 2) most States’ regulations on CSR use different points of comparison. Usually, the size or the conduct of the investor will determine whether or not a regulation on CSR applies

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<sup>94</sup> Art. 1102, NAFTA.

<sup>95</sup> LIM C.L/HO Jean/PAPARINSKIS Martins, *International Investment Law and Arbitration: Commentary, Awards, and Other Materials*, Cambridge University Press, Cambridge, 2021, p. 375.

<sup>96</sup> Marvin Roy Feldman Karpa v. United Mexican States, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002, (Marvin Feldman v Mexico), paras. 170ss.

<sup>97</sup> Pope & Talbot Inc. v. The Government of Canada, UNCITRAL (1976), Award on the Merits of Phase 2, 10 April 2001 (Pope & Talbot v Canada), paras. 73-104.

<sup>98</sup> S.D. Myers, Inc. v. The Government of Canada, UNCITRAL (1976), Partial Award, 13 November 2000 (S.D. Myers, Inc. v. Canada), paras. 243-257.

<sup>99</sup> Occidental Exploration and Production Company v Republic of Ecuador, LCIA Case No UN 3467, Award, 1 July 2004, Rep 59 (Occidental v Ecuador), paras. 171- 176.

<sup>100</sup> LIM/HO/PAPARINSKIS, *op. cit.*, p. 375.

<sup>101</sup> Methanex Corp. v. US, UNCITRAL, Final Award on Jurisdiction and Merits, 3 August 2005, paras 37ss.

<sup>102</sup> LIM/HO/PAPARINSKIS, *op. cit.*, p. 375.

to them. As an example, we can state the European Directive<sup>103</sup> which requires “*all large companies and all listed companies (except listed micro-enterprises) to disclose information on what they see as the risks and opportunities arising from social and environmental issues, and on the impact of their activities on people and the environment*”<sup>104</sup>. Note that in 2023, the Corporate Sustainability Reporting Directive<sup>105</sup> entered into force which requires a broader set of large companies, as well as listed small and medium enterprises (SMEs), to report on sustainability<sup>106</sup>. This is also the case for Switzerland through the Responsible Business Initiative which differentiates the reporting obligations based on the size of the companies<sup>107</sup>.

As shown above, the size and conduct of enterprises are not a basis for comparison in the likeness assessment under the principle of non-discrimination in IIL. Thus, a foreign investor may initiate an arbitration against the host State, stating that its new measure, which uses such distinctions, constitutes a breach of the non-discrimination standards due to differential treatment of investors “*in like situations*”.

For example, consider two investors operating in the same sector; mining. Investor A disregards labor standards, while Investor B, complies fully, employing only of-age workers and providing fair wages. If the host State regulates with the goal of enforcing labor standards, which negatively impacts the investment of Investor A, the question arises : does this constitute a violation of the host State’s non-discrimination obligation, as the investors operate in the same economic sector? Or is the host State regulating for its legitimate interest, here, workers’ rights?

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<sup>103</sup> Directive (EU) 2022/2464 of The European Parliament And Of The Council of 14 December 2022 amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting.

<sup>104</sup> “Corporate Sustainability Reporting.” *Finance*, [finance.ec.europa.eu/capital-markets-union-and-financial-markets/company-reporting-and-auditing/company-reporting/corporate-sustainability-reporting\\_en#:~:text=EU%20law%20requires%20all%20large,on%20people%20and%20the%20environment](https://finance.ec.europa.eu/capital-markets-union-and-financial-markets/company-reporting-and-auditing/company-reporting/corporate-sustainability-reporting_en#:~:text=EU%20law%20requires%20all%20large,on%20people%20and%20the%20environment).

<sup>105</sup> Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022 amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting (Text with EEA relevance).

<sup>106</sup> Corporate Sustainability Reporting.” *Finance*, [finance.ec.europa.eu/capital-markets-union-and-financial-markets/company-reporting-and-auditing/company-reporting/corporate-sustainability-reporting\\_en#:~:text=EU%20law%20requires%20all%20large,on%20people%20and%20the%20environment](https://finance.ec.europa.eu/capital-markets-union-and-financial-markets/company-reporting-and-auditing/company-reporting/corporate-sustainability-reporting_en#:~:text=EU%20law%20requires%20all%20large,on%20people%20and%20the%20environment).

<sup>107</sup> PricewaterhouseCoopers. “Swiss Sustainability Reporting Requirements.” *PwC*, [www.pwc.ch/en/insights/sustainability/swiss-sustainability-reporting-requirements.html#:~:text=Swiss%20sustainability%20regulations,-In%20December%202021&text=From%20the%202023%20financial%20year%20onwards%2C%20public%20companies%2C%20banks%2C,publicly%20on%20non%2Dfinancial%20matters](https://www.pwc.ch/en/insights/sustainability/swiss-sustainability-reporting-requirements.html#:~:text=Swiss%20sustainability%20regulations,-In%20December%202021&text=From%20the%202023%20financial%20year%20onwards%2C%20public%20companies%2C%20banks%2C,publicly%20on%20non%2Dfinancial%20matters).

This scenario demonstrates the broader challenge of the non-discrimination standards in their current form. Foreign investors can easily claim that they are being discriminated due to a State's social, labor, human rights, or environmental new measure as the likeness assessment as interpreted by tribunals is highly in their favor.

This can be tackled by using a broader interpretation of this notion, taking into consideration other factors such as the socially responsible conduct of the foreign investors. This will be developed in section VI (A).

## **b. Fair and Equitable Treatment**

This section aims to provide an overview of the notion of the Fair and Equitable Treatment (FET) standard, exposing the difficulties in defining “fair” and “equitable”. Next, it demonstrates that the legitimate expectations of foreign investors, as a fundamental aspect of the FET standard, is in conflict with their accountability in cases involving breaches of CSR obligations.

### **i. Notion**

The FET standard is provided for in most BITs and in some FTAs such as NAFTA and the Energy Charter Treaty (ECT)<sup>108</sup>. The FET standard clauses are drafted differently but generally require “*fair and equitable*” treatment of foreign investors by the host State without defining the meaning of these terms<sup>109</sup>.

In fact, traditionally, it has been observed that FET standard clauses consist of very minimalistic wording with no clear meaning. As a result, tribunals have no interpretative lines to follow leading to very broad interpretations<sup>110</sup>. This issue is increased by the lack of clear

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<sup>108</sup> KLAGER Roland, “Fair and Equitable Treatment” in *International Investment Law*, Cambridge University Press, Cambridge, 2011, p. 436 ; Article 1105 (1) NAFTA and Article 10 (1) ECT.

<sup>109</sup> COLLINS, *op. cit.*, p. 133.

<sup>110</sup> ZHU Ying, “*Fair and Equitable Treatment of Foreign Investors in an Era of Sustainable Development*”, *Natural Resources Journal*, Vol. 58, No. 2, 2018, pp. 319-364, p. 325 ; LEVASHOVA Yulia, “Fair and Equitable Treatment and the Protection of the Environment: Recent Trends in Investment Treaties and Investment Cases”, in LEVASHOVA Yulia/LAMBOUY Tineke Ige Dekker (eds.), *Bridging the Gap Between International Investment Law and the Environment*, Eleven International Publishing, The Hague, 2016, pp. 58-59.

legal test of FET – each tribunal decides on a case by a case basis whether or not, in its view, the investor has been treated “fairly” and “equally”<sup>111</sup>.

There are four main approaches that have been identified in the formulation of FET standard clauses.

First, a recent trend consists of deleting these clauses. This is mostly the case in Singapore’s IIAs<sup>112</sup>. However, tribunals have guaranteed the FET standard to investors through MFN clauses and the international minimum standard of treatment in customary law (MST)<sup>113</sup>.

Second, we have “unqualified FET formulations”<sup>114</sup> such as the one found in the Germany-Thailand BIT (2002)<sup>115</sup> :

*“Each Contracting Party shall in its territory in any case accord such investments by investors of the other Contracting Party and their returns fair and equitable treatment and full protection”<sup>116</sup>.*

Another example is found in the China-Switzerland BIT (2009)<sup>117</sup> :

*“Investments and returns of investors of either Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party”<sup>118</sup>.*

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<sup>111</sup> UNCTAD, Fair and Equitable Treatment, UNCTAD Series on Issues in International Investment Agreements II, United Nations, 2012, p. 11.

<sup>112</sup> Cf. Amongst others, Singapore-Australia Free Trade Agreement, entered into force in 2003 (SAFTA).

<sup>113</sup> UNCTAD, Fair and Equitable Treatment II, *op. cit.*, p. 18.

<sup>114</sup> UNCTAD, Fair and Equitable Treatment II, *op. cit.*, p. 21.

<sup>115</sup> Treaty between the Kingdom of Thailand and the Federal Republic of Germany concerning the Encouragement and Reciprocal Protection of Investments, signed in 2002, and entered into force in 2004 (Germany – Thailand BIT (2002)).

<sup>116</sup> Art. 2 (3), Germany – Thailand BIT (2002).

<sup>117</sup> Agreement between the Swiss Federal Council and the Government of the People's Republic of China on the Promotion and Reciprocal Protection of Investments, signed in 2009, and entered into force in 2010 (Switzerland – China BIT (2009)).

<sup>118</sup> Art. 4, China-Switzerland BIT (2009).

With these unqualified clauses, the main debate is around whether they constitute, or not, an autonomous broad standard distinct from the MST of aliens under customary law<sup>119</sup>. It has been seen that most arbitral tribunals have interpreted the FET standard as an autonomous one, as self-standing<sup>120</sup>. This broad interpretation limits the host State's possibility to regulate on the corporate social responsible conduct of foreign investors, as it sets out a low-liability threshold – determining that the host State has violated the FET standard not only for very serious breaches but simply when the State's measure in question was unfair to the investor. In other words, any and all regulation or measure could be considered a violation of the FET standard<sup>121</sup>.

Thirdly, some IIAs link the FET standard to international law. This is notably found in Article 1105 (1) of the NAFTA (1992):

*“Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security”*<sup>122</sup>.

The Croatia-Oman BIT (2004)<sup>123</sup> also adopts this approach, providing at its Article 3 (2) that :

*“Investments or returns of investors of either Contracting Party in the territory of the other Contracting Party shall be accorded fair and equitable treatment in accordance with international law and provisions of this Agreement”*.

Another example is found in the Article 8 of the Canada Model BIT (2021)<sup>124</sup>:

*“Each Party shall accord in its territory to a covered investment of the other Party and to an investor with respect to their covered investment treatment in accordance with the customary international law minimum standard of treatment of aliens...”*.

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<sup>119</sup> UNCTAD, Fair and Equitable Treatment, *op. cit.*, p. 6; DOLZER in DOLZER /KRIEBAUM/SCHREUER, *op. cit.*, p. 199; VALENTI Mara, The Protection of general interests of Host States in the application of the fair and equitable treatment standard in SACERDOTI, Giorgio, et al. *General Interests of Host States in International Investment Law*, Cambridge University Press, Cambridge, 2014, p. 29.

<sup>120</sup> UNCTAD, Fair and Equitable Treatment, *op. cit.*, p. 6.

<sup>121</sup> *Ibid.*

<sup>122</sup> Art. 1105 (1), NAFTA.

<sup>123</sup> Agreement Between the Government of the Republic of Croatia and the Government of the Sultanate of Oman on the Promotion and Reciprocal Protections of Investments, signed in 2004 (Croatia – Oman BIT (2004)).

<sup>124</sup> Canada Model BIT (2021).

This drafting method has for purpose to avoid a strict literal interpretation of the FET standard, encouraging an interpretation that applies principles of international law including, but in some cases not limited to, the MST of aliens under customary law<sup>125</sup>. In *Neer v. Mexico*, the Commission stated that the violation of the MST “*should amount to an outrage, to bad faith, to willful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency*”<sup>126</sup>.

This approach is already more favorable than the ones presented above as it sets a higher liability threshold, with the goal of limiting the interpretation of the standard by arbitrators<sup>127</sup>. In fact, IIAs incorporating such clauses are clear on the fact that they do not want arbitrators to go beyond the content of the MST as established by customary law<sup>128</sup>. An issue is that there is no consensus on what exactly this MST constitutes leading to unpredictability and various interpretative lines<sup>129</sup>.

Finally, a recent trend has been to add substantive content to the FET standard provisions with the aim of being more precise allowing for more predictability in their interpretation<sup>130</sup>. This was notably done in the Morocco-Nigeria BIT (2016)<sup>131</sup> and in the Canada Model BIT (2021)<sup>132</sup>. This will be developed in section VI (B).

Here, this Paper has shown the difficulty with the FET standard, being formulated in different ways along different IIAs, with no clear meaning on what is “fair” and “equitable”. The issue arises from broad and ambiguous drafting, which leads to wide-ranging and unpredictable interpretations. In turn, this results in low liability thresholds that restrict the host State's ability to legislate in favor of its public interests, and hence, to hold investors accountable for their irresponsible social conduct. This limits the “hardening” of CSR obligations in IIL, but is only

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<sup>125</sup> UNCTAD, Fair and Equitable Treatment, *op. cit.*, pp. 22-23 ; DOLZER in DOLZER/KRIEBAUM/SCHREUER, *op. cit.*, p. 200 ; LIM/HO/PAPARINSKIS, *op. cit.*, p. 311.

<sup>126</sup> L. F. H. Neer and Pauline Neer (USA) v. United Mexican States, United States–Mexico Claims Commission, Decision of 15 October 1926, in Reports of International Arbitral Awards, United Nations, 2006, Vol. IV, pp. 61-62.

<sup>127</sup> COLLINS, *op. cit.*, p. 144.

<sup>128</sup> *Ibid.*

<sup>129</sup> *Ibid.*

<sup>130</sup> UNCTAD, Fair and Equitable Treatment, *op. cit.*, p. 29.

<sup>131</sup> Art. 10, Morocco- Nigeria BIT (2016).

<sup>132</sup> Art. 8(1), second sentence, Canada Model BIT (2021).

one of the issues. It is essential to tackle another one ; the legitimate expectations of investors arising out of the FET standard, which this Paper analyzes in the following section.

## ii. Legitimate Expectations

Another main tension between CSR obligations and the FET standard arises from the fact that an investor's legitimate expectations are a central element of this standard<sup>133</sup>. This includes the respect of the promises and obligations given to the investor which he relied upon<sup>134</sup>. Interestingly, changes in administrative policy but also new regulations and legislations are prone to being a violation of the FET standard<sup>135</sup>. What matters is the stability of the host State's environment; of the general legal framework<sup>136</sup>. In fact, before investing, foreign investors will undergo an investigation of the host State's environment. They will look at its legal framework and any undertaking taken by the State in their regards or in regards investors in similar situations. This will allow the investors to decide 1) if they will invest and 2) how to invest if they decide to do so. We can see the issue here : let's imagine that after the start of their investment, the host State decides to change its laws, for instance, by enacting a new legislation or revoking an investor's license, with the aim to protect the environment. This would constitute a violation of the FET standard as it would frustrate the investor's initial expectations. We can see the tension between the right to regulate of the host State and the quest for stability of the investors<sup>137</sup>.

This legitimate expectations doctrine was established by the arbitral tribunal in the famous case, *Tecmed v. Mexico*<sup>138</sup>. In the latter, the tribunal considered that the host State had violated the FET standard when revoking a license that had been granted to the investor as it was

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<sup>133</sup> KLAGER, *op. cit.*, p. 441 ; DOLZER in DOLZER/KRIEBAUM/SCHREUER, *op. cit.*, p. 206 ; VALENTI in SACERDOTI, *op. cit.*, p. 39.

<sup>134</sup> KLAGER, *op. cit.*, p. 441, LIM/HO/PAPARINSKIS, *op. cit.*, p. 340 ; UNCTAD, Fair and Equitable Treatment, *op. cit.*, p. 67.

<sup>135</sup> KLAGER, *op. cit.*, p. 441 ; DOLZER in DOLZER/KRIEBAUM/SCHREUER, *op. cit.*, p. 206 ; UNCTAD, Fair and Equitable Treatment, *op. cit.*, p. 11.

<sup>136</sup> KLAGER, *op. cit.*, p. 436.

<sup>137</sup> KLAGER, *op. cit.*, p. 436 ; Biwater Gauff v. Tanzania (2008) ICSID Case No. ARB/05/22, Award (602) ; SPEARS Suzanne A, Making way for the public interest in international investment agreements, in BROWN Chester/MILES Kate (eds.), *Evolution in Investment Treaty Law and Arbitration*, Cambridge University Press, Cambridge, 2011, p. 276.

<sup>138</sup> Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003, (*Tecmed v. Mexico*).

infringing the investor's legitimate expectations<sup>139</sup>. It gave one of the largest interpretation of the FET standard, interpretation that is the most widely used outside the NAFTA context<sup>140</sup>:

*“The Arbitral Tribunal considers that this provision of the Agreement, in light of the good faith principle established by international law, **requires the Contracting Parties to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment.** The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations”<sup>141</sup>.*

As we can see, the broad interpretations of the FET standard by arbitral tribunals, overly protecting the investors' legitimate expectations is an issue<sup>142</sup>. It increases the risks that a large range of States' regulations or measures are deemed violations the FET standard, including those that have a legitimate public purpose<sup>143</sup>. In simple words : historically, when foreign investors started operating economically in host States, regulations concerning the environment, human rights, labor standards, and social conducts by MNEs, were often absent, or incomplete. Consequently, these issues were not part of the investors' legitimate expectations at the time they decided to invest. Additionally, existing regulations on these issues constantly need to change according to the evolving landscape and society we live in. As a result, if a new regulation on these matters is adopted or changed, which frustrates the investors' legitimate expectations, they can simply file an arbitration claim against the host State arguing that there has been a violation of the FET standard. Given the high probability of the tribunal ruling in their favor, host States end up not adopting such regulations, leading to harmful conducts by foreign investors being left unchecked.

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<sup>139</sup> COLLINS, *op. cit.*, p. 139.

<sup>140</sup> CIMA Elena, Within the Seminar “Droit international des investissements”.

<sup>141</sup> Tecmed v. Mexico, *op. cit.*, para. 154.

<sup>142</sup> ZHU, "Fair and Equitable Treatment of Foreign Investors in an Era of Sustainable Development", *op. cit.*, p. 323 ; UNCTAD, Fair and Equitable Treatment, *op. cit.*, p. 11.

<sup>143</sup> VALENTI in SACERDOTI, *op. cit.*, p. 41.

We will see in section VI (B) how this issue can be tackled, promoting MNEs to act in a socially responsible way, through a new interpretive line (the balanced approach) and innovative drafting solutions in *new generations* IIAs.

### **c. Indirect Expropriation**

This section gives an overview of the notion of expropriation. Next, it tackles problematic drafting methods and their interpretations by tribunals.

#### **i. Notion**

The protection against expropriation has been a key component of IIL since its foundation. Expropriation is considered the most severe form of infringement of property rights<sup>144</sup>. Under modern IIAs, States have the right to expropriate foreign investments in their territory, under the four following conditions : 1) the expropriation must be done for a public purpose, 2) it must be non-arbitrary and non-discriminatory, 3) it must be done in due process, and 4) it must be accompanied by prompt, adequate and effective compensation<sup>145</sup>. There are two types of expropriation, indirect expropriation and direct expropriation<sup>146</sup>. Direct expropriations, which dispossess the investor from his investment's ownership through an official act<sup>147</sup>, have become an extremely rare practice as States fear to put at risk their investment environment. In fact, States directly expropriating will probably expose themselves to a bad reputation for foreign investments. Therefore, it is indirect expropriations that interest us. The latter removes the possibility for the investor to use its investment in a meaningful way, it causes almost complete loss of value of the investment<sup>148</sup>.

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<sup>144</sup> DOLZER *in* DOLZER/KRIEBAUM/SCHREUER, *op. cit.*, p. 147 ; COLLINS, *op. cit.*, p. 165.

<sup>145</sup> DOLZER *in* DOLZER/KRIEBAUM/SCHREUER, *op. cit.*, p. 183 ; SPEARS, *op. cit.*, p. 276.

<sup>146</sup> DE LUCA Anna, Indirect expropriation and regulatory takings : what role for the "legitimate expectations of foreign investors", in SACERDOTI, *op. cit.*, p. 59 ; ZHU Ying, "Do Clarified Indirect Expropriation Clauses in International Investment Treaties Preserve Environmental Regulatory Space?", Harvard International Law Journal, Vol. 60, No.2, 2019, p. 380.

<sup>147</sup> DE LUCA, *op. cit.*, p. 59.

<sup>148</sup> DOLZER *in* DOLZER/KRIEBAUM/SCHREUER, *op. cit.*, p. 184.

## ii. Problematic Interpretations of Indirect Expropriation Clauses

The concept of indirect expropriation can be found in most IIAs<sup>149</sup>, however, a difficulty arises: the differentiation between the right of an investor to receive compensation from a host State due to expropriation and the right of the host State to regulate within its territory.

Connecting this to CSR, it is problematic as, if a State regulates to promote responsible social and business conduct which impacts the value of the investment; the following question is raised : is it an indirect expropriation with the obligation to pay a compensation or did the State make use of its right to regulate for its legitimate interests?

Tribunals have tackled this question through three different approaches<sup>150</sup>. Firstly, there is the “*sole effect doctrine*” in which tribunals consider that there is indirect expropriation solely on the basis of the effects of a governmental measure on the investment allegedly expropriated, without taking into consideration the objective underlying the measure<sup>151</sup>. Let’s apply this approach to a case involving CSR ; a State measure adopted to promote or enforce CSR will lead to an obligation of compensation if the measure has substantially deprived the investors from utilizing their investments, creating a *chilling effect* on the host State to regulate. This restricts its ability to legislate effectively, limiting investors’ accountability for their irresponsible social conduct. Secondly, there is the “*police powers doctrine*”<sup>152</sup> which provides that a State’s measure that aims at promoting public welfare interests will not give rise to an obligation to compensate as long as it is not discriminatory nor arbitrary<sup>153</sup>. This approach is more in line with the idea of imposing CSR obligations on foreign investors’ conduct. In fact, the host State’s right to regulate is not affected, allowing it to regulate to enforce corporate social responsibility even if this reduces the investment’s utility for the investor, without requiring compensation. However, there is a difficulty in distinguishing the exercise of police powers, and an exercise of “*eminent domain*” for which a compensation is due<sup>154</sup>. Lastly, there

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<sup>149</sup> French Model BIT (2006) ; German Model BIT (2008) ; NAFTA (1992) ; ECT (1994).

<sup>150</sup> DE NANTEUIL Arnaud, Recent Development in Expropriation Law : Towards A Better Protection Of State’s Sovereign Interests? in EL GADHABN, *op. cit.*, p. 10.

<sup>151</sup> *Ibid.*, p. 20.

<sup>152</sup> Marvin Feldman v. Mexico, *op. cit.*, para. 103.

<sup>153</sup> BROWNLIE, *op. cit.*, p. 532 ; DE NANTEUIL, *op. cit.*, p. 10.

<sup>154</sup> ZHU, “Do Clarified Indirect Expropriation Clauses in International Investment Treaties Preserve Environmental Regulatory Space?”, *op. cit.*, p. 386.

is the *proportionality test* approach<sup>155</sup>. Here, the tribunals look at the relationship between the goal of the host State's measure and the restriction caused on the investment<sup>156</sup>. This approach also allows host States to regulate to promote social responsibility to a certain extent – it aims to strike a balance between the interests of the investor and the ones of the host States.

Whilst the second and third approaches allow for better consideration of the host State's right to regulate, and can encourage responsible social and business conduct by foreign investors, tribunals are not bound by these interpretations, as there is no rule of precedence in IIL<sup>157</sup>, leading to insecurity and unpredictability. Furthermore, the drafting of indirect expropriation clauses in most IIAs remain problematic, being very wide, addressing any measure that results in or directly or indirectly causes a total or partial permanent loss of the investment. We can see this in the French Model BIT (2006) which provides that: "*Neither Contracting Party shall take any measures of expropriation or nationalization or any other measures having the effect of dispossession, direct or indirect, of nationals or companies of the other Contracting Party of their investments*"<sup>158</sup>. This is also the case in Article 4(2)<sup>159</sup> of the German Model BIT (2008).

A better drafting of these clauses is addressed in section VI (C), indirectly incentivizing foreign investors to act responsibly when investing in a host State.

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<sup>155</sup> REINISCH, "Expropriation" in MUCHLINSKI/ORTINO/SCHREUER, *op. cit.*, p. 407-458.

<sup>156</sup> DE NANTEUIL, *op. cit.*, p. 11 ; ZHU, "Do Clarified Indirect Expropriation Clauses in International Investment Treaties Preserve Environmental Regulatory Space?", *op. cit.*, p. 387.

<sup>157</sup> GAZZINI Tarcisio, *Interpretation of International Investment Treaties*, Bloomsbury Publishing, 2016, p. 292.

<sup>158</sup> Art. 5 (2), French Model BIT (2006).

<sup>159</sup> Art. 4 (2), German Model BIT (2008).

## V. SECOND GENERATION IIAS : THE GRADUAL INCLUSION OF CSR

The imbalance found in IIAs regarding investors' rights and States' obligations has led to a *new generation* of IIAs (*second generation IIAs*) which increasingly include CSR clauses. Several IIAs that have done so will be analysed, making a distinction between indirect CSR provisions that address the State, and direct CSR provisions that directly impose obligations on investors – a distinction that will be further explained below. This section also argues that although the integration of CSR clauses in IIAs constitutes a step forward in the quest for a more balanced IIL regime, these clauses have yet to show their full potential, remaining mostly unenforceable.

### A. Indirect Investor Obligations

Indirect obligations are those that are addressed directly to the State, expecting it to encourage investors to adopt a specific responsible conduct when they have invested in its territory<sup>160</sup>.

Canada's 2008 FTAs with Peru and Colombia illustrate such obligations, providing that:

*“Each Party should encourage enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate internationally recognized standards of corporate social responsibility in their internal policies, such as statements of principle that have been endorsed or are supported by the Parties ... The Parties remind those enterprises of the importance of incorporating such corporate social responsibility standards in their internal policies”*<sup>161</sup>.

Similarly, Article 16 of the Benin-Canada BIT (2013) provides that :

*“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 statements of principle that have been endorsed or are supported by the*

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<sup>160</sup> BUENO/VASTARDIS/DJEUGA NGUEULEU *op. cit.*, p. 185 ; NOWROT Karsten, ‘Obligations of Investors’, in BUNGENBERG Marc/GRIEBEL Jörn/HOBE Stephan/REINISCH August, *International Investment Law*, Nomos, Baden-Baden, 2015, p. 18.

<sup>161</sup> Art. 810, Free Trade Agreement Between Canada and The Republic of Peru, signed in 2008, and entered into force in 2009 (Canada-Peru FTA (2008)) ; Art. 816, Free Trade Agreement Between Canada Colombia, signed in 2008, and entered into force in 2011 (Canada-Colombia FTA (2008)).

*Contracting Parties. These principles address issues such as labor, the environment, human rights, community relations and anti-corruption*”<sup>162</sup>.

Another type of indirect investor obligations clauses are those that directly refer to at least one of the international soft law instruments discussed above. The main one that is referred to is the OECD Guidelines for MNEs which is illustrated by Article 146 NAFTA (1992):

*“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”*.

This has also been done by the Colombia Model BIT (2017)<sup>163</sup>, whose CSR clause directly refers to the OECD Guidelines for Multinational Enterprises. However, their incorporation is done *“on a voluntary basis”*<sup>164</sup>.

The provisions shown above impose an obligation on the States to promote responsible social and business conduct for investors that operate economically in their territory. Thus, they are clear examples of indirect obligations as the ones addressed by these clauses are States and not investors. The issue is that it is on the State to comply with CSR standards. In fact, it is up to the State, through its national laws and policies, to proactively ensure that investors comply with them. As a result, if the State does not promote nor encourage investors to uphold such standards, these clauses become void of utility - investors cannot be held accountable for the actions or lack of actions of States. Furthermore, these clauses are drafted with weak terminology, using terms like *“encourage”*, and *“voluntarily”*, making it hard for CSR to evolve into binding obligations.

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<sup>162</sup> Art.16, Benin-Canada BIT (2013). Note that this is based on the old 2004 Canada Model BIT. Article 16 of the new model, discussed below, now consists of direct obligations.

<sup>163</sup> Colombia Model BIT (2017).

<sup>164</sup> Art. [###], Colombia Model BIT (2017).

Consequently, although soft law has influenced the drafting of these clauses, especially those that directly refer to one of the soft law instruments, the clauses themselves remain non-enforceable and of voluntarily nature, lacking legal force and authoritative tone.

This Paper will now analyze direct investor obligations, aiming to demonstrate whether or not soft law has developed into hard law.

## **B. Direct Investor Obligations**

Direct obligations are those that directly address foreign investors, seeking to counterbalance the broad protections foreign investors benefit from with more concrete obligations<sup>165</sup>. Direct CSR clauses can be found in an increasing number of IIAs.

### **a. Preambles**

This section will start by briefly showing the evolution of preambles' contents in the *second generation* IIAs, which now include references to broader goals, including sustainable development and CSR, as opposed to having one sole objective - the protection and promotion of foreign investments<sup>166</sup>. A recent and interesting example is the Canada Model BIT (2021)<sup>167</sup> which includes in its preamble the following references to responsible business conduct, labour, the environment, etc.

*“Reaffirming the importance of promoting responsible business conduct, cultural identity and diversity, environmental protection and conservation, gender equality, the rights of Indigenous peoples, labor”.*

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<sup>165</sup> SCHACHERER, *op. cit.*, p. 11.

<sup>166</sup> SPEARS, *op. cit.*, p. 292.

<sup>167</sup> Canada Model BIT (2021).

This can also be found in the preambles of the : Georgia-Switzerland BIT (2014)<sup>168</sup>, Argentina-Japan BIT (2018)<sup>169</sup>, Hong Kong-Mexico BIT (2020)<sup>170</sup>, Angola-China BIT (2023)<sup>171</sup>, and EU-Kyrgyzstan EPCA (2024)<sup>172</sup>.

The Morocco-Nigeria BIT (2016)<sup>173</sup> goes one step further by including four references to sustainable development in its preamble, directly showing the larger goal and purpose of the treaty.

Additionally, for clarification, some preamble paragraphs may also refer to indirect obligations, not only direct ones.

Although the provisions found in the preamble do not constitute any legal binding obligations, the preamble itself does influence the interpretation by the court of the substantive obligations found in the agreements<sup>174</sup>, gradually leading to a more balanced regime<sup>175</sup>. A tribunal interpreting a case in light of these broader objectives, is more likely to conclude that the host State did not violate its obligations. Alternatively, the tribunal may reduce the compensation owed to the investors if their conduct conflicts with the mentioned objectives. This highlights the critical importance of preambles in treaty drafting, as they establish the overarching goals that guide the interpretation and application of the treaty's provisions. In sum, investors cannot be protected at all costs; foreign investments need to be sustainable, uphold human rights and respect environmental and labor standards.

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<sup>168</sup> Agreement between the Swiss Confederation and Georgia on the Promotion and Reciprocal Protection of Investments, signed in 2014 and, entered into force in 2015 (Georgia – Switzerland BIT (2014)).

<sup>169</sup> Agreement between the Argentine Republic and Japan for the Promotion and Reciprocal Protection of Investments, signed in 2018 (Argentina – Japan BIT (2018)).

<sup>170</sup> Agreement between the Government of the Hong Kong Special Region of the People's Republic of China and the United Mexican States for the Promotion and Reciprocal Protection of Investments, signed in 2020 and, entered into force in 2021 (Hong Kong, China SAR – Mexico BIT (2020)).

<sup>171</sup> Agreement between the Government of The Republic of Angola and the People's Republic of China on the Promotion and Reciprocal Protection of Investments, signed in 2023, and entered into force in 2024 (Angola-China BIT (2023)).

<sup>172</sup> EU - Kyrgyzstan Enhanced Partnership and Cooperation Agreement, signed in 2024 (EU – Kyrgyzstan EPCA (2024)).

<sup>173</sup> Reciprocal Investment Promotion and Protection Agreement between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria, signed on 3 December 2016 (Morocco – Nigeria BIT (2016)).

<sup>174</sup> Cf. p. 15.

<sup>175</sup> MANN Howard, “*Reconceptualizing International Investment Law: Its Role in Sustainable Development*”, Lewis & Clark Review, Vol. 17, 2013, p. 537.

## **b. Substantive Obligations**

This section will show through various examples that substantive obligations found in treaties are no longer only imposed on States, but also on investors which include specific CSR obligations. However, the effect of the incorporation of these clauses is yet to be shown.

### **i. Weak Stipulations and no references to Internationally Recognized Standards**

To begin, in its chapter named “Investor obligations”, the India-Taiwan BIT (2018) includes a CSR clause that provides that :

*“Investors and their enterprises operating within each territory 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 authorities of the territories”<sup>176</sup>.*

Here, we can see that there is a weak stipulation that the parties must make efforts to “voluntarily” incorporate internationally recognized standards of CSR with no reference to any specific one. Interestingly (and unfortunately), this clause juxtaposes the authoritative tone of “shall” which is promising as it conveys a sense of direct obligation, with the weaker terms “endeavor” and “voluntarily”, ultimately undermining the provision’s enforceability and impact. Hence, the clause does not impose any clear and hard obligations on investors, which, on the other hand, it does for (amongst others) the obligation to uphold domestic laws in the field of anti-corruption and taxation<sup>177</sup>.

Another way of approaching CSR obligations can be seen through the IIAs adopted by Brazil<sup>178</sup>. Most of them contain more specific, detailed and precise obligations but also rely on voluntary principles and standards provided in the BITs themselves.

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<sup>176</sup> Art. 2, India-Taiwan BIT (2018).

<sup>177</sup> Art. 11, India-Taiwan BIT (2018).

<sup>178</sup> BUENO/VASTARDIS /DJEUGA NGUEULEU, *op. cit.*, p. 188.

For instance, the Brazil-India BIT (2020)<sup>179</sup>, uses stronger language with a long list of investor responsibilities and obligations<sup>180</sup>

*“12.1 Investors and their investments 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 this Article and internal policies, such as statements of principle that have been endorsed or are supported by the Parties.*

*12.2 The investors and their investments shall endeavor to comply with the following voluntary principles and standards for a responsible business conduct and consistent with the laws adopted by the Host State:*

- 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 corporate governance practices, including anti-corruption measures;*
- 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 their operations are conducted;*

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<sup>179</sup> Investment Corporation and Facilitation Treaty Between the Federative Republic of Brazil and the Republic of India, signed in 2020 (Brazil- India BIT 2020)).

<sup>180</sup> Art.12, Brazil – India BIT (2020).

- h) promote the knowledge of and the adherence, by workers, to the corporate policy, through appropriate dissemination of this policy, including professional training programs
- 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<sup>181</sup>.

While these obligations are more detailed, they remain voluntary, and no specific international instruments are cited to guide investors.

However, some IIAs, such as the Brazil-Chile BIT (2015)<sup>182</sup>, Brazil-Ethiopia BIT (2018)<sup>183</sup> and the Brazil-United Arab Emirates BIT (2019)<sup>184</sup> do make explicit reference to internationally recognized standards (specifically the OECD Guidelines for MNEs).

These examples show an evolution, with the inclusion of direct CSR obligations imposed on investors. However, the vague language used and the absence of references to specific international instruments, weaken the practical effect of these clauses<sup>185</sup>.

## ii. Stronger obligations with references to Internationally Recognized Standards

This section will now tackle another type of the *second generation* IIAs<sup>186</sup>, whose main feature is the inclusion of more positive obligations on investors.

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<sup>181</sup> Art.12, Brazil-India BIT (2020).

<sup>182</sup> Article 15 (2) of the Agreement on the Cooperation and Facilitation of Investments between the Federative Republic of Brazil and the Republic of Chile, signed in 2015, and entered into force in 2002, (Brazil – Chile BIT (2015)).

<sup>183</sup> Article 14 (1) of the Agreement between the Federative Republic of Brazil and the Democratic Republic of Ethiopia on Investment Cooperation and Facilitation, signed in 2018 (Brazil – Ethiopia BIT (2018)).

<sup>184</sup> Article 15 (1) of the Cooperation and Facilitation Investment Agreement Between the Federative Republic of Brazil and the United Arab Emirates, signed in 2019, and entered into force in 2023 (Brazil – UAE (2019)).

<sup>185</sup> Cf. p. 39.

<sup>186</sup> BRIERCLIFFE Naomi/OWCZAREK Olga, “*Human-Rights-Based Claims by States and “New-Generation” International Investment Agreements*”, Kluwer Arbitration Blog, 2018 ; BOISSON DE CHAZOURNES, in EL GHADBAN, *op. cit.*, p. 87.

First, out of its many innovative provisions, the Morocco-Nigeria BIT (2016) includes an explicit CSR provision directly addressed to investors<sup>187</sup>, pre-establishment obligations requiring investors to conduct environmental and social impact assessments and to apply the precautionary principle<sup>188</sup>, investor obligations to abstain from corruption practices<sup>189</sup>, post-establishment obligations requiring investors to comply with environmental and labor standards<sup>190</sup>, as well as a provision on investor liability<sup>191</sup>.

Specifically, Article 24 (1) Morocco-Nigeria BIT (2016) named Corporate Social Responsibility provides the following :

*“In addition to the obligation to comply with all applicable laws and regulations of the Host State and the obligations in this Agreement, and in accordance with the size, capacities and nature of an investments, and taking into account the development plans and priorities of the Host State and the Sustainable Development Goals of the United Nations, investors and their investments should strive to make the maximum feasible contributions to the sustainable development of the Host State and local community through high levels of socially responsible practices”.*

Article 24(2) Morocco-Nigeria BIT (2016) specifies that *“Investors 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”.*

Article 18 Morocco-Nigeria BIT (2016) further complements these obligations by requiring investors to *“maintain an environmental management system’ such as the ISO 1400<sup>192</sup>; to “uphold the human rights in the host state and to act in accordance with core labor standards required by the ILO Declaration on Fundamental principles and Rights of Work, 1998”<sup>193</sup> and, “to not manage or operate the investments in a manner that circumvents international*

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<sup>187</sup> Art. 24, Morocco-Nigeria BIT (2016).

<sup>188</sup> Art.14, Morocco-Nigeria BIT (2016).

<sup>189</sup> Art.17, Morocco – Nigeria BIT (2016).

<sup>190</sup> Art. 18, Morocco -Nigeria BIT (2016).

<sup>191</sup> Art. 20, Morocco – Nigeria BIT (2016).

<sup>192</sup> Article 18(1), Morocco – Nigeria BIT (2016).

<sup>193</sup> Article 18(2), Morocco – Nigeria BIT (2016).

*environmental, labor and human rights obligations to which the host state and/or home state are Parties*<sup>194</sup>.

The SADC Model BIT (2012)<sup>195</sup> takes a similar approach providing at its Article 15 (1) that :

*“Investors and their investments have a duty to respect human rights in the workplace and in the community and State in which they are located. Investors and their investments shall not undertake or cause to be undertaken acts that breach such human rights. Investors and their investments shall not assist in, or be complicit in, the violation of the human rights by others in the Host State, including by public authorities or during civil strife”.*

This article also imposes an obligation on investors to adhere to *“core labor standards as required by the ILO Declaration on Fundamental Principles and Rights of Work, 1998”*<sup>196</sup> and to *“not [establish,] manage or operate Investments in a manner inconsistent with international environmental, labor, and human rights obligations binding on the Host State or the Home State, whichever obligations are higher”*<sup>197</sup>.

Additionally, the Draft PAI Code (2016) contains a specific chapter named “Investor’s Obligations” with many interesting provisions. First, it imposes an obligation on investors to uphold socio-political obligations, including labor rights<sup>198</sup>. It also contains an express clause on CSR<sup>199</sup>. Finally, it provides principles such as support and respect to the protection of internationally recognized human rights, that should govern the conduct of investors<sup>200</sup>.

The movement of aligning investors’ obligations with international benchmarks is evident in these provisions, promoting the accountability of investors in terms of CSR.

Innovative Model BITs such as the Netherlands Model BIT (2019)<sup>201</sup> and the Canada Model BIT (2021) further illustrate this shift. The Netherlands Model BIT (2019) includes a hard-law

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<sup>194</sup> Article 18(3), Morocco – Nigeria BIT (2016).

<sup>195</sup> SADC Model Bilateral Investment Treaty With Commentary, signed in 2012 (South African Development Community (SADC Model BIT (2012))).

<sup>196</sup> Art. 15 (2), SADC Model BIT (2012).

<sup>197</sup> Art. 15 (3), SADC Model BIT (2012).

<sup>198</sup> Art. 20, PAIC Draft (2016).

<sup>199</sup> Art. 22, PAIC Draft (2016).

<sup>200</sup> Art. 24, PAIC Draft (2016)

<sup>201</sup> Netherland Model Investment Agreement (Netherland Model BIT 2009).

CSR obligation requiring investors to “*comply with domestic laws and regulations of the host state, including laws and regulations on human rights, environmental protection and labor laws*”<sup>202</sup>. It also expressly mentions, amongst others, the OECD Guidelines for Multinational Enterprises, and the United Nations Guiding Principles on Business and Human Rights<sup>203</sup>. Although their incorporation is voluntary, this BIT also includes a liability provision, holding investors accountable for damages, injuries or loss of life caused by their investments<sup>204</sup>.

The Canada Model BIT (2021) demonstrates a similar evolution. Its Article 16 reaffirms “*that investors and their investments shall comply with domestic laws and regulations of the host State, including laws and regulations on human rights, the rights of Indigenous peoples, gender equality, environmental protection and labor*”<sup>205</sup>. Similarly to the Netherlands Model (2019), it also mentions the OECD Guidelines for Multinational Enterprises and the United Nations Guiding Principles on Business and Human Rights<sup>206</sup>.

Through the IIAs analyzed, an important trend can be observed : they all at least refer to one of the internationally recognized standards for responsible business conduct, moving beyond a weak reference to voluntarily guidelines provided in the BITs themselves. This reduces ambiguity, and encourages investors to more effectively uphold these norms as it aligns their responsibilities with globally acknowledged points of reference.

On the other hand, challenges remain as some of these provisions exist in model BITs rather than binding BITs. Moreover, there are no cases on the enforcement of such obligations, making it hard to evaluate their practice impact. For these provisions to be meaningful, they must be incorporated into enforceable BITs, with mechanisms for effective arbitral supervision.

In the following section, this Paper aims to provide a critical assessment of all the CSR clauses that have been tackled above.

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<sup>202</sup> Art. 7 (1), Netherland Model BIT (2019).

<sup>203</sup> Art. 7 (2), Netherland Model BIT (2019).

<sup>204</sup> Art. 7 (4), Netherland Model BIT (2019).

<sup>205</sup> Art. 16 (1), Canada Model BIT (2021).

<sup>206</sup> For information, the Trans-Pacific Partnership (TPP) the Comprehensive Economic and Trade Agreement (CETA) negotiated between the EU and Canada, the EU-Vietnam Free Trade Agreement, the Canada-Burkina Faso Foreign Investment Promotion and Protection Agreement (FIPA), and the 2019 Morocco BIT also make explicit reference to CSR.

### C. Critical Assessment of the CSR Clauses Analyzed

Firstly, most of the CSR clauses found in the IIAs discussed continue employing hortatory language instead of mandatory language, using the word “*should*” instead of “*shall*”. Although some do use the word “*shall*”, they then use the word “*voluntary*” when dictating the conduct of foreign investors, as explained above. The author believes that this shows that the shift to hard law is not yet complete.

Secondly, the lack of reference to specific international standards, hence, the lack of a clear definition of CSR obligations in most IIAs leads to challenges with the interpretation of CSR norms. In fact, investors are left with no clear mandate, making it hard for tribunals to assess, whether or not, investors have complied with their CSR obligations. However, as demonstrated above, an increasing number of IIAs use a more clear CSR approach, directly referencing specific CSR international standards within their clauses. This provides more guidance for both investors and tribunals. Indeed, a tribunal analyzing a case can more easily determine whether or not an investor has complied with its duty – if it has followed the specific standards incorporated in the IIA itself. Hence, the author recommends that IIAs follow this trend of including specific international standards within their CSR clauses.

Thirdly, an important issue with CSR clauses in IIAs is enforcement as most of them do not currently allow a host State to directly initiate an arbitration against investors for breaching CSR obligations<sup>207</sup>. A potential solution to this issue is to use domestic courts to enforce investor obligations, a solution that is provided in both the SADC Model BIT (2012) and the Morocco-Nigeria BIT (2016). In fact, they both provide that investors may be held liable for “*significant damage, personal injuries or loss of life in a host state*” before the courts of the home state<sup>208</sup>. This Paper does not tackle whether this is a viable option.

Overall, the integration of CSR into IIL is still in its early stages, with promising innovations already emerging. This Paper expects it to continue evolving until it eventually becomes a formalized and binding part of IIL. In fact, this Paper argues that soft law is gradually influencing the drafting of CSR direct clauses found in hard law agreements for the following reasons: 1) the references to internationally recognized soft law standards show their growing

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<sup>207</sup> BUENO/VASTARDIS/DJEUGA NGUEULEU, *op. cit.*, p. 204 ; Art.23, Brazil–Colombia BIT (2015).

<sup>208</sup> Art. 20, Morocco-Nigeria BIT (2016) ; Art. 17, SADC Model (2012).

influence on defining investor obligations; and 2) these standards being referenced in legally binding treaties imply that non-compliance **could** lead to legal consequences for investors that do not act socially responsible.

This Paper now turns to other methods that could be used to hold investors accountable for their irresponsible social conduct.

#### **D. Indirect and Direct Liability Methods in IIAs**

##### **a. Indirect liability**

Eventual methods to hold investors accountable for their irresponsible social conduct are 1) tribunals taking into account the conduct of the investor when determining its compensation and, 2) conditioning access to arbitration on investors' conduct.

##### **i. Conditioning Access to Arbitration on an Investor's Conduct**

Holding investors accountable for breaches of their obligations, including CSR obligations can be done by conditioning their access to arbitration based on their conduct<sup>209</sup>.

The Colombian Model BIT (2017), amongst others, explicitly provides, as a pre-condition to the access to arbitration, the investors compliance with CSR, human rights and environmental obligations under international law, as seen in the clause below.

Article [##]-investors' social responsibility.

*"2. Claimant Investors shall respect the prohibitions established in international instruments, to which any Contracting Party is or becomes a party, pertaining to human rights and the environment. A Claimant Investor shall accept the prohibitions mentioned above as mandatory throughout the making of its investment and its operation in the Host Party's Territory in order to submit a claim to a Court or an Arbitral Tribunal pursuant to SECTION [DD]- INVESTOR-STATE DISPUTE SETTLEMENT".*

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<sup>209</sup> MARTIN/PUIG/RATNER, "Towards Greater Investor Accountability: Indirect Actions, Direct Actions by States and Direct Actions by Individuals", Max Planck Institute for Comparative Public Law and International Law, Journal of International Dispute Settlement, Vol 14, 2023, p. 262.

This can also be found in the Iran-Slovakia BIT (2016)<sup>210</sup>, and in the Canada-EU Comprehensive Economic and Trade Agreement (CETA 2017)<sup>211</sup>.

This Paper is not convinced that this method is very effective at holding investors accountable as they could find a way to circumvent their liability if the clauses are drafted too broadly. However, an investor will take seriously the fact that he might be limited in initiating an arbitration against a State as it is his only way to claim protection for his investment and obtain compensation. In turn, this pushes him to follow the prescribed standards, hence, to act socially responsibly, if not he may find himself limited in his rights. This shows that the incorporation of soft law standards in IIAs combined with conditioning access to arbitration to an investor's adherence to these standards has the potential of making soft law slowly develop into hard law.

## **ii. Reduction of the Investor's Compensation**

In the past, compensation to investors has been reduced due to their contributory fault in the damage<sup>212</sup>. Usually, this is due to the investors breach of the host State's law, however, we can imagine this becoming the case if an investor fails to comply with his CSR obligations<sup>213</sup>.

In fact, interestingly, Article 23 of the Netherlands Model BIT (2019) provides the following :

*“Without prejudice to national administrative or criminal law procedures, a Tribunal, in deciding on the amount of compensation, is expected to take into account non-compliance by the investor with its commitments under the UN Guiding Principles on Business and Human Rights, and the OECD Guidelines for Multinational Enterprises”.*

The incorporation of these soft law instruments, making their compliance a factor in the compensation given to investors is another example of how soft is gradually developing into hard law. In fact, it allows tribunal to reduce awards to investors, hence, indirectly, encourage them to comply with the relevant standards in the first place.

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<sup>210</sup> Article 14 (2), Agreement Between the Slovak Republic and the Islamic Republic of Iran for the Promotion and Reciprocal Protection of Investments, signed in 2016, and entered into force in 2018) (Slovakia-Iran BIT (2016)).

<sup>211</sup> Art. 8.18 (2), Comprehensive Economic and Trade Agreement (CETA) (Canada-EU) (entered into force 21 September 2017)).

<sup>212</sup> MARTIN/PUIG/RATNER, *op. cit.*, p. 266.

<sup>213</sup> *Ibid.*

## **b. Direct Liability**

There are doctrinal propositions on direct actions against investors by States which can be treaty-based or contract based<sup>214</sup>. While these are not yet established in IIL, a growing movement over time has been working towards making them a reality<sup>215</sup>. This Paper has decided not to analyze these potential direct actions.

## **E. States' Counterclaims**

In this section, this Paper seeks to demonstrate that CSR could be used as a ground for States' counterclaims. First, it gives an overview of counterclaims, then it shows the difficulty to bring them due to stringent conditions. Next, it goes through an analysis of three important counterclaim cases. Finally, it will argue that CSR clauses can be leveraged for counterclaims.

### **a. Counterclaims in IIL**

A counterclaim will be filed by the respondent party and not the party initiating the proceedings<sup>216</sup>. As a general rule, a host State cannot bring counterclaims against investors under IIAs due, mostly to the asymmetry found in these agreements<sup>217</sup>. In fact, a host State cannot bring a counterclaim for a violation by the investor of an obligation found in the treaty, as traditionally, there were simply no obligations imposed on investors<sup>218</sup>. Although this depends on the drafting of the IIA regarding the scope of the investor-state dispute settlement clause<sup>219</sup>, a very broad one allowing counterclaims may be void of utility with this absence of investor obligations. However, with the *second generation* IIAs increasingly imposing obligations on investors, including CSR obligations as demonstrated all along this Paper, and

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<sup>214</sup> MARTIN/PUIG/RATNER, *op. cit.*, p. 269.

<sup>215</sup> *Ibid.*

<sup>216</sup> SCHREUER Christoph/MALINTOPPI Loretta/REINISCH August/SINCLAIR Anthony, *The ICSID Convention: A Commentary on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, Cambridge University Press, New York, 2009, p. 750, N 64.

<sup>217</sup> BJORKLUND, "The Role of Counterclaims in Rebalancing Investment Law", *op. cit.*, pp. 461-480 ; LATTY Frank, L'état demandeur (reconventionnel) dans les procédures arbitrales : le gymkhanas de la réaffirmation de l'état, in EL GHADBAN, *op. cit.*, p. 161.

<sup>218</sup> BJORKLUND, "The Role of Counterclaims in Rebalancing Investment Law", *op. cit.*, pp. 461-480 ; BRENNINKMEIJER Mees/GÉLINAS Fabien, "Counterclaims in investment arbitration: Towards an integrated approach", *ICSID Review - Foreign Investment Law Journal*, 2023, accessed on 1 November 2024, available at : <https://doi.org/10.1093/icsidreview/siad014>, Vol. 38, No. 3, pp. 568.

<sup>219</sup> BJORKLUND, "The Role of Counterclaims in Rebalancing Investment Law", *op. cit.*, pp. 461-480 ; LATTY, *op. cit.*, p. 161.

a change in the drafting of the dispute settlement clauses, this Paper argues that counterclaims is developing into an indirect tool to hold investors accountable. In fact, it is thought that the possibility to file a counterclaim by a respondent State is a way to rebalance the nature of IIAs, allowing a direct claim to be filed against an investor in case of misconduct or violations, including irresponsible social conduct<sup>220</sup>.

### **b. Challenges with Counterclaims**

Despite their potential, counterclaims face important challenges in practice. To begin, they are mostly rejected due to jurisdictional or admissibility reasons<sup>221</sup>. Indeed, if we focus on cases decided under the International Centre for Settlement of Investment Dispute (ICSID) Convention, Art. 46 ICSID poses stringent conditions that have to be fulfilled for a counterclaim to be admitted by a tribunal<sup>222</sup>. First, the counterclaim must be connected with the claim; it needs to arise directly from the subject matter of the dispute, and directly out of the investment. For the latter condition to be realized, there needs to be a legal connection between the original claim and the counterclaim<sup>223</sup>. Second, the counterclaim needs to be within the consent of the parties. Third, the counterclaim needs to be within the jurisdiction of the tribunal<sup>224</sup>.

Additionally, only a few IIAs contain a possibility for counterclaims<sup>225</sup>. If we look at, amongst others, the Morocco-Nigeria BIT (2016), and the SADC Model BIT (2012), whilst being *new generation* IIAs, their dispute resolution clause only allows claims by investors<sup>226</sup>. The dispute resolution clause in the Draft PAI Code (2016) has a larger wording allowing any “*investment dispute between an investor and member State pursuant to this Code*”<sup>227</sup> to be resolved directly

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<sup>220</sup> BJORKLUND, "The Role of Counterclaims in Rebalancing Investment Law", *op. cit.*, pp. 461-480 ; SHAO Xuan, *Environmental and Human Rights Counterclaims in International Investment Arbitration: at the Crossroads of Domestic and International Law*, in *Journal of International Economic Law*, Vol. 24, No. 1, 2021, p. 158.

<sup>221</sup> HOFFMANN AK, 'Counterclaims' in KINNEAR Meg/FISCHER Geraldine R/ALMEIDA Minguez Jara/TORRES Fernanda Luisa/BIDEGAIN Uran Mairée (eds), *Building International Investment Law: The First 50 Years of ICSID*, Wolters Kluwer, 2016, p. 505.

<sup>222</sup> Art. 46 ICSID ; SCHREUER/MALINTOPPI/REINISCH/SINCLAIR, *op. cit.*, pp. 751ss, N 74ss.

<sup>223</sup> *Ibid.*

<sup>224</sup> *Ibid.*

<sup>225</sup> MBENGUE Moise M/SCHACHERER Stefanie, "The 'Africanization' of International Investment Law: The Pan-African Investment Code and the Reform of the International Investment Regime", *Journal of World and Investment & Trade*, No. 1, 2017, p. 444.

<sup>226</sup> Art. 27, Morocco – Nigeria BIT (2016) ; Art. 29.4, SADC Model (2012).

<sup>227</sup> Article 42(1), Draft PAI Code (2016).

between the investor and the State, but it only takes into consideration investor-State arbitration.

It can be seen that States are limited in their possibility to file a counterclaim, restricting their possibility to “justify” their action based on the investor’s irresponsible conduct. On the other hand, this Paper will now analyze three innovative cases, in two of which counterclaims have been admitted.

### **c. Case Analysis**

#### **i. Urbaser v. Argentina**

The *Urbaser v. Argentina*<sup>228</sup> case is a very important decision in counterclaims and CSR, more particularly concerning human rights. In this case, Argentina brought a counterclaim based on the investor’s breach of the human right to water<sup>229</sup>. It has always been admitted that the fundamental nature of international law does not allow host States’ obligations to be enforced on private parties<sup>230</sup>. However, here, the arbitral tribunal did accept that the investors bearded human rights obligations under international law and that CSR was of crucial importance :

*“International law accepts corporate social responsibility as a standard of crucial importance for companies operating in the field of international commerce...it can no longer be admitted that companies operating internationally are immune from becoming subjects of international law”*<sup>231</sup>.

In the author’s opinion, it is also interesting and promising that in examining whether corporations have an obligation regarding the right to access water, the tribunal analyzed various soft law instruments discussed above<sup>232</sup>. In fact, it referred to, amongst others, the UN Guiding Principles on Business and Human Rights, and the ILO’s Tripartite Declaration of

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<sup>228</sup> *Urbaser and Consorcio de Aguas Bilbao v. Argentina*, ICSID Case No. ARB/07/26, Award, December 8 2016 (Urbaser v. Argentina).

<sup>229</sup> *Urbaser*, *op. cit.*, para. 36.

<sup>230</sup> DEL BRUTTO, Oscar A, “*Strict Liability for Environmental Damage under Ecuadorian Law According to the Burlington and Perenco Decisions*”, International Bar Association, accessed on 24 October 2024, available at: [www.ibanet.org/article/ffbf0b45-1d07-4ee0-835f-a2a87dfad332](http://www.ibanet.org/article/ffbf0b45-1d07-4ee0-835f-a2a87dfad332) ; *Urbaser*, *op. cit.*, p. 1206 ; SHAO, *op. cit.*, p. 158.

<sup>231</sup> *Urbaser*, para. 1195.

<sup>232</sup> *Urbaser*, para. 1197-1198.

Principles concerning Multilateral Enterprises and Social Policy. This shows that soft law has gained influence within a tribunal's decision making process, which is promising for the hardening of CSR obligations.

Furthermore, after its analysis, the tribunal concluded the following : “*the human right for everyone's dignity and its right for 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*”<sup>233</sup>.

However, it dismissed this counterclaim for the following reasons. First, it observed that the BIT in question (the Spain – Argentina BIT (1991)<sup>234</sup>) did not contain any provision imposing an active obligation on investors, which is necessary to exist for the counterclaim to be admitted<sup>235</sup>. Second, it considered that the international human right to water was not a general principle of international law<sup>236</sup>.

Even though the claim was not admitted, this Paper argues that the reasoning of the tribunal is important and innovative, notably in the field of CSR. In fact, it recognizes international human rights obligations for investors which is a first. This also means that a violation by an investor of its obligation may fall within the jurisdiction of investment tribunals. As an increasing number IIAs include clear obligations on investors, including CSR obligations, the *Urbaser* case might have opened the gate for investors' accountability for irresponsible social conduct.

This Paper will now expose below two interesting cases in which a counterclaim **was admitted**; *Burlington v. Ecuador* and *Perenco v. Ecuador*.

## ii. **Burlington v. Ecuador and Perenco v. Ecuador**

*Burlington* and *Perenco* are two investment arbitrations based on the same facts and in which similar claims were made. *Burlington*, an American corporation, and *Perenco*, a French

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<sup>233</sup> *Urbaser*, para. 1199.

<sup>234</sup> Acuerdo para la promoción y la protección recíproca de inversiones entre el Reino de España y la República Argentina, 3 October 1991 (Spain-Argentina BIT (1991)).

<sup>235</sup> *Urbaser*, paras. 1206, 1207.

<sup>236</sup> *Ibid.*, para. 1207.

corporation, operated a joint venture for oil exploitation in the Amazon region of Ecuador between 2001 and 2009<sup>237</sup>. (Note that on demand of Ecuador, the tribunals accepted to undertake two different and distinct arbitration proceedings, regardless of the same facts and same legal issues present in both cases)<sup>238</sup>.

When global oil prices increased in the 2000s, Ecuador passed a law and decree imposing a 99% windfall profit tax on oil revenues, which affected *Perenco's* and *Burlington's* investments<sup>239</sup>. *Perenco* then initiated an ICSID arbitration in 2008, claiming violations of the FET standard and unlawful expropriation under the France–Ecuador BIT (1994)<sup>240</sup>. *Burlington* did the same citing violations under the US-Ecuador BIT (1993)<sup>241</sup>. Ecuador counterclaimed for environmental and infrastructure damage, arguing that the investor(s) caused environmental damage by polluting parts of the Amazon rainforest, requesting to be paid around USD 2.5 billion in compensation<sup>242</sup>. The counterclaim was based on a violation of Ecuadorian domestic law that concerned environmental protection<sup>243</sup>.

In *Burlington*, the arbitral tribunal admitted Ecuador's counterclaim and awarded damages for USD 41 million<sup>244</sup>. In *Perenco*, the arbitral tribunal condemned the company to pay USD 54 million in compensation<sup>245</sup>.

In these two cases, we see a tribunal admitting a counterclaim based on the violation of the host State's domestic law<sup>246</sup>, and not based on international obligations. However, these cases may be the beginning of a slow shift to the enforcement of CSR investor obligations through international proceedings<sup>247</sup>. In fact, host States' regulations are increasingly including CSR

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<sup>237</sup> DEL BRUTTO, *op. cit.*

<sup>238</sup> *Ibid.*

<sup>239</sup> RUDALL Jason, “*The Tribunal with a Toolbox: On Perenco v Ecuador, Black Gold and shades of Green*”, *Journal of International Dispute Settlement*, Vol. 11, No. 3, 2020, p. 486.

<sup>240</sup> *Ibid.*

<sup>241</sup> *Ibid.*

<sup>242</sup> *Ibid.*, p. 486 ; *Perenco Ecuador Ltd v. Republic of Ecuador and Empresa Estatal Petroleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/08/6, Interim Decision on the Environmental Counterclaim, 11 August 2015 (*Perenco v Ecuador*).

<sup>243</sup> *Perenco v Ecuador, op. cit.*, N 6, 70-114.

<sup>244</sup> DEL BRUTTO, *op. cit.*; LATTY, *op. cit.*, p. 161.

<sup>245</sup> PÁEZ-SALGADO Daniela/ZULETA Daniela, “*Perenco v Ecuador: An Example of a ‘Lengthy, Complex, Multi-Faceted, Hard Fought and Very Expensive’ Investment Arbitration?*”, *Kluwer Arbitration Blog*, 2020.

<sup>246</sup> DEL BRUTTO, *op. cit.*; RUDALL, *op. cit.*, p. 486ss.

<sup>247</sup> “*Burlington v. Ecuador*” *Investment Treaty News*, 2018, accessed on 26 November 2024, available at [www.iisd.org/itn/en/2018/10/18/burlington-v-ecuador/](http://www.iisd.org/itn/en/2018/10/18/burlington-v-ecuador/).

obligations. As a result, the violation of domestic law by investors could be used as a hook to hold them accountable for conducting their operations in a manner that infringes CSR standards. For this to be possible, it is notably necessary that the dispute settlement clauses in IIAs include the possibility for States to bring counterclaims.

As an example, the 2007 COMESA Common Investment Area Agreement<sup>248</sup> provides at its Article 36.7 that :

*“A Member State against whom a claim is brought by a COMESA investor or its investment under this Article, may assert as a defense, counterclaim, right of set off or other similar claim, that the COMESA investor or its investment 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”.*

As mentioned explicitly in the clause, investors failing to comply with domestic laws may be subject to a counterclaim by the host State, which may potentially including CSR obligations.

This Paper expands on this idea of leveraging CSR clauses for counterclaims in the following section.

#### **d. Leveraging CSR Clauses for Counterclaims**

This Paper argues that CSR clauses in IIAs could serve as a valuable foundation for counterclaims, allowing host States to actively hold investors accountable for their irresponsible conduct.

Going back to the *Urbaser* case, the tribunal made the following interesting statement :

*“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”<sup>249</sup>.*

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<sup>248</sup> Investment Agreement for the Common Market for Eastern and Southern Africa Common Investment Area, signed on 23 May 2007 (COMESA Investment Agreement). Being signed in 2007, this IIA was ahead of its times.

<sup>249</sup> *Urbaser*, para. 1210.

On the basis of this statement, DUBIN suggests that CSR clauses, requiring investors to “endeavor” not to violate human rights or the environment, amongst others, could empower tribunals to recognize legally binding obligations for investors<sup>250</sup>. In fact, as stated by the tribunal, these types of obligations can be “of immediate application” also to individuals and other private parties.

If investors fear that a host State is able to successfully conduct a counterclaim invoking the violation of a CSR obligation, they might be dissuaded from initiating an arbitration where they would need to justify their own behavior. In turn, this could incentivize them to conduct their operations in a way that adheres to CSR obligations from the start, to be able to initiate arbitration proceedings, in case of negative consequences on their investments caused by the host State, with no fears of counterclaims on CSR matters.

Additionally, the *Urbaser* case, making direct reference to CSR obligations, and hopefully being the first of many cases to do so can be seen as a way to create a soft law to hard law transition. In fact, the more tribunals are willing to interpret CSR language as enforceable standards, the more it becomes hard law, and as a result, the more investors are encouraged to respect the environment, human and labor rights, fearing to be held liable if they do not so. Nonetheless, as noted, there is no rule of precedence in IIL, tribunals are created for a specific dispute and are not bound to follow past decisions<sup>251</sup>. Hence, it cannot be affirmed that this decision will create a precedent for the future.

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<sup>250</sup> DUBIN Laurence, “*Corporate Social Responsibility Clauses in Investment Treaties*”, Investment Treaty News, 2018, accessed on 12 November 2024, available at: [www.iisd.org/itn/en/2018/12/21/corporate-social-responsibility-clauses-in-investment-treaties-laurence-dubin/#\\_ftn8](http://www.iisd.org/itn/en/2018/12/21/corporate-social-responsibility-clauses-in-investment-treaties-laurence-dubin/#_ftn8).

<sup>251</sup> GAZZINI, *op. cit.*, p. 292.

## VI. THIRD GENERATION IIAS : RE-DRAFTING STANDARDS OF TREATMENT AND PROTECTION IN IIAS – A LOOK INTO THE FUTURE

A growing trend towards embedding responsible business and social conduct into traditional investors' standards of treatment and protection has been observed in the innovative drafting approaches of the *third generation* IIAs. This practice can notably be seen in new NT and MFN provisions, as well as in new FET standard and expropriation clauses. Before diving deep into these innovations, it is important to distinguish their different effects to understand their future implications in IIL. On the one hand, the reformulated NT and MFN provisions directly influence the conduct of foreign investors by redefining the criteria for "likeness". This redefinition incorporates environmental and social factors, directly encouraging MNEs to adopt greener and more responsible practices. By aligning themselves with these criteria, they can secure protection under the standards, making socially responsible conduct an imperative. On the other hand, the revisions to the FET standard (new interpretation approach and innovative drafting solutions) and indirect expropriation (more precise listing of criteria to determine whether there has been an indirect expropriation or not) operate more *indirectly*. These changes expand the regulatory latitude of host States, empowering them to implement and enforce CSR laws or regulations without fear of breaching their treaty obligations. This creates an environment where MNEs are indirectly incentivized to align with CSR regulations from the start, to mitigate risks associated with potential State actions.

### A. NT and MFN Clauses: Clarified "Like Circumstances"

In recent IIAs, the term "*like circumstances*" / "*like situations*" has evolved to allow for broader contextual interpretation when comparing investors/investments by taking into consideration non-economic factors such as the investment's social and environmental impacts. This more tailored language indirectly links investor protection to CSR, making socially responsible business conduct a precondition for the full enjoyment of the non-discrimination treatment.

This was notably done by the COMESA Investment Agreement (2007). In fact, its Article 17 (2) (NT) provides that the references to "*like circumstances*" "*requires an overall examination on a case by case basis of all the circumstances of an investment including, inter alia:*

- (a) *its effects on third persons and the local community; and*
- (b) *its effects on the local regional or national environment, including the*

*cumulative effects of all investments within a jurisdiction on the environment*<sup>252</sup>.

Similarly, the Turkey-United Arab Emirates BIT (2023)<sup>253</sup> provides in its MFN clause that :

*“It is understood that the reference to "like circumstances" in paragraph I requires a comprehensive examination, on a case-by-case basis, of all the circumstances of an investment, including, but not limited to: (a) its effects on third parties and the local community; (b) its effects on the local, regional, or national environment, including the cumulative effects of all investments in a jurisdiction on the environment; (c) the sector in which the investor is located; (d) the objective of the measure concerned; and (e) the regulatory process generally applied to the measure concerned”*<sup>254</sup>.

This was also done in, amongst others, Article 6.2 of the Morocco-Nigeria BIT (2016) and Article 5.2 of the Brazil – India BIT (2020).

This drafting method allows the tribunals to take into account the investor’s conduct when assessing nondiscrimination standards. Thus, an investment that goes against public interests, the environment, and/or the local community, can be discriminated against, as the clauses explicitly state that, for investors to be considered *in like situations*, the investment’s impact plays an important role. Let’s take an example focused on the environment. On the one hand, we have investor A that invests in host State A using nuclear energy which is deemed to damage the environment. On the other hand, we have investor B that operates in the same host State A, but using green and renewable energy, thereby not having a negative impact on the environment. Now, host State A imposes a new tax or other regulation only affecting investors using nuclear energy. In the past (on the basis of a traditional BIT), this would have been a violation of the non-discrimination principle (NT or MFN depending on the nationality of the investors) due to the different treatments accorded to investors “*in like circumstances*”. Now, with the above mentioned clauses, the tribunals will conclude that the investors cannot be considered “*in like circumstances*” as one investment has a negative impact on the

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<sup>252</sup> Art. 17 (2), COMESA Investment Agreement. Note that Article 6 (3) of the Morocco – Nigeria BIT (2016) contains the same language.

<sup>253</sup> Agreement Between the Government of the Republic of Turkey and the Government of the United Arab Emirates on the Promotion and Reciprocal Protection of Investments, signed on 19 July 2023, not in force yet (Turkey-UAE BIT 2023))

<sup>254</sup> Art. 4 (2), Turkey-UAE BIT (2023).

environment, and the other does not. In this example, we can see how this innovative drafting method indirectly pushes future investors to be socially responsible, environmental friendly, and in respect of human/labor rights in their operations, fearing to lose protection if that is not the case. Additionally, with this innovation, the *likeness assessment* in IIL now aligns more closely with the criteria used in CSR regulations adopted by countries, including those discussed earlier<sup>255</sup>.

Another interesting innovation is to subordinate the right of NT to a host State's domestic laws<sup>256</sup>. By doing so, a host State ensures that it can give better treatment to its domestic investors, as long as they comply with its national laws. Relating this to CSR, this approach allows host States to give priority to socially responsible conducts, even if this leads to differential treatments between foreign and domestic investors. For instance, if domestic laws rewards environmental friendly conducts, the State can give preferential treatment to domestic investors who comply with these laws as opposed to foreign investments that do not adhere to them, without breaching the NT standard. This Paper argues that this indirectly incentivizes foreign investors to invest in a way that adheres to the host State's social and environmental goals as to receive equal or favorable treatment, foreign investors would need to comply with the domestic CSR laws. This was notably done in Article 4.1 of the United Arab Emirates–Uruguay BIT (2018)<sup>257</sup> and in Article 5.1 of the Brazil–India BIT (2020).

Although it cannot be said with certainty that these new clauses will lead to a paradigm shift, this Paper argues that they are interesting ways of holding investors accountable without fundamentally changing the nature of IIL - a change that would be harder to implement and to be accepted by the international community.

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<sup>255</sup> Cf. p. 19.

<sup>256</sup> UNCTAD, International Investment Agreements Reform Accelerator, UNCTAD/DIAE/PCB/INF/2020/8, United Nations, 2020, p. 16.

<sup>257</sup> Agreement between the United Arab Emirates and The Eastern Republic of Uruguay for the Reciprocal Promotion and Protection of Investments, signed in 2018 (UAE – Uruguay BIT (2018)).

## B. FET standard and the Role of CSR

As shown above, the FET standard is prone to different interpretations by tribunals, which have traditionally adopted a very broad interpretative line, considering almost any and all new regulations or measures as being in violation of this standard. Additionally, the latter emphasizes the protection of investors' legitimate expectations, which conflicts with the host State's right to regulate, particularly regarding CSR, as it restricts the adoption and enforcement of new socially responsible conduct measures on investors. To balance CSR obligations with the FET standard, tribunals have adopted a different interpretive approach, and the drafting of an increasing number of IIAs has evolved accordingly.

### a. Balanced Interpretation Approach

Tribunals have increasingly started adopting the balanced approach. They have begun to balance the right to regulate of the host State and the right of the investor to benefit from the FET standard<sup>258</sup>. In sum, tribunals have suggested that the FET standard cannot be an obstacle to the host State acting in public interest even if it negatively impacts a foreign investment<sup>259</sup>. Cases favoring this approach emphasize that legitimate expectations are tempered by the host State's pursuit of CSR objectives, including environmental and social regulations. This is an important exception to the legitimate expectations approach discussed in section IV.

The balanced approach has its foundation in *Saluka v. Czech Republic*<sup>260</sup>. In this case, the tribunal acknowledged that the host State has the right to pass a legislation in the public interest, even if the changes have a negative impact on a foreign investor. If the government implements such conduct in a *bona fide* manner, it will not be considered as undermining investors' legitimate expectations and violating the FET standard<sup>261</sup>. More recently, in *Parkerings-Compagniet v. Lithuania*<sup>262</sup>, the tribunal concluded that each State has a right to exercise its sovereign legislative power, as long as it is done in a fair and reasonable way. It continued by

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<sup>258</sup> UNCTAD, FET, *op. cit.*, p. 73.

<sup>259</sup> *Ibid.*

<sup>260</sup> *Saluka Investments B.V (The Netherlands) v. The Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, (*Saluka v. Czech Republic*).

<sup>261</sup> UNCTAD, *op. cit.*, p. 74 ; LIM/HO/PAPARINSKIS, *op. cit.*, p. 343 ; VALENTI *in SACERDOTI*, *op. cit.*, p. 50.

<sup>262</sup> *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007, (*Parkerings v Lithuania*).

explaining that an investor needs to anticipate possible changes of circumstances. In turn, this means that the investments need to be structured in a way that allows their adaptation to the new legal environment of a host State<sup>263</sup>.

This approach was also taken in *Continental Casualty v. Argentina*<sup>264</sup>, in *Vivendi v. Argentina II*<sup>265</sup>, and in *EDF v. Romania*<sup>266</sup>.

This Paper argues that this shift reinforces the idea that investors must actively adapt to and respect a host State's legislative, regulatory or/and administrative changes aimed, notably, at CSR objectives. By allowing host States the regulatory flexibility to introduce or tighten CSR related measures without fear of breaching FET standard obligations, IIL is effectively becoming a regime where CSR is no longer merely aspirational. Instead, the obligation to adhere to these standards is becoming more present in binding tribunals decisions, contributing to the "hardening" of CSR in international legal obligations. This turning point reflects a global consensus on the importance of socially responsible business practices.

However, although the use of this *balanced approach* has increased, it is not a strict legal rule that has to be followed, as there is no rule of precedence in IIL<sup>267</sup>, leading to insecurity and uncertainty. As a result, this weakens the impact of CSR obligations on foreign investors. Therefore, in the past years, innovative drafting solutions have been developed within *third generation* IIAs.

## **b. Innovative Drafting Solutions**

There are various approaches taken by the *third generation* IIAs which make the FET standard more predictable both for the host States and the investors, and give more guidance to the tribunals in their interpretations.

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<sup>263</sup> VALENTI *in SACERDOTI*, *op. cit.*, p. 42.

<sup>264</sup> *Continental Casualty Company v. The Argentine Republic*, ICSID Case No. ARB/03/9, Award, 5 September 2008, (*Continental Casualty v Argentina*), paras. 258-261.

<sup>265</sup> *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. (formerly Aguas Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A.) v. Argentine Republic (II)*, ICSID Case No. ARB/03/19, 9 April 2015 (*Vivendi v Argentina*).

<sup>266</sup> *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award, 8 October 2009, (*EDF v Romania*), paras. 215-220.

<sup>267</sup> GAZZINI, *op. cit.*, p. 292.

To start, an increasing number of IIAs have started to add substantive content to their FET standard clause, with an exhaustive list of more specific obligations<sup>268</sup>. Examples of IIAs having done so are the following :

First, the CETA (2017)<sup>269</sup>, after promising FET in general terms, contains the following definition;

*“A Party breaches the obligation of fair and equitable treatment referenced in paragraph 1 if a measure or series of measures constitutes:*

- (a) denial of justice in criminal, civil or administrative proceedings;*
- (b) fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings;*
- (c) manifest arbitrariness;*
- (d) targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief;*
- (e) abusive treatment of investors, such as coercion, duress and harassment; or*
- (f) a breach of any further elements of the fair and equitable treatment obligation adopted by the Parties in accordance with paragraph 3 of this Article”.*

The Hungary–United Arab Emirates BIT (2021)<sup>270</sup> also clarifies what constitutes a breach of the FET standard by stating that :

*“With respect to the investments the following measures or series of measures constitute breach of the obligation of fair and equitable treatment:*

- a. Denial of justice in criminal, civil, or administrative proceedings; or*
- b. Fundamental breach of due process, including a fundamental breach of transparency and obstacles to effective access to justice, in judicial and administrative proceedings;*  
*or*
- c. Manifest arbitrariness; or*
- d. Targeted discrimination on manifestly wrongful grounds, such as gender, race, or religious belief; or*

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<sup>268</sup> UNCTAD, International Investment Agreements Reform Accelerator, *op. cit.*, p. 20.

<sup>269</sup> CETA, *op. cit.*

<sup>270</sup> Agreement between the Government of Hungary and the Government of the United Arab Emirates for the Promotion and Reciprocal Protection of Investments, signed in 2021, and entered into force in April 2022 (Hungary-United Arab Emirates BIT (2021)).

*e. Harassment, coercion, abuse of power, or similar bad faith conduct*<sup>271</sup>.

Other examples are found in Article 6.1 (a) of the Morocco Model BIT (2019), Article 9.2 of the Netherland Model BIT (2019), Article 5.2 of the Slovakia Model BIT (2019)<sup>272</sup>, and Article 5 of the US Model BIT (2012)<sup>273</sup>.

This more precise and clear “threshold” to determine whether there has been a breach of the FET standard lowers the probability for the host State to face claims by investors. Moreover, it allows host States to change and adapt their public policies considering evolving objectives. In fact, it ensures that the adoption by a host State of sustainable, environmental, social, and labor policies are not directly in violation of the FET standard clause. On the side of the investors, they will have a clearer vision on whether or not the host State has violated the FET standard, helping them assess the chances of success of a potential claim. Furthermore, tribunals faced with an exhaustive list of obligations will not be left with the hard task of interpreting in the blank. They will have a direct guidance in their interpretative lines, leading to less broad and overarching interpretations<sup>274</sup>.

To continue, certain IIAs have explicitly stated that the legitimate expectations doctrine is no longer a part of the FET standard. This has been done in the Australia–United Kingdom FTA (2022)<sup>275</sup>, whose FET standard clause states that :

*“For greater certainty, the mere fact that a Party takes or fails to take an action that may be inconsistent with an investor’s expectations does not constitute a breach of this Article, even if there is loss or damage to the covered investment as a result”*<sup>276</sup>.

This is an important innovation as it provides a potential solution to the issue arising from the legitimate expectations of the investors. Effectively, with such an explicit statement, a foreign

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<sup>271</sup> Article 23, Hungary-United Arab Emirates BIT (2021).

<sup>272</sup> Agreement between the Slovak Republic and ..... For the Promotion and Reciprocal Protection of Investments, signed in 2019 (Slovakia Model BIT (2019)).

<sup>273</sup> Treaty Between the Government of the United States of America and the Government of [Country] Concerning The Encouragement and Reciprocal Protection of Investments (U.S. Model Bilateral Investment Treaty (2012)).

<sup>274</sup> UNCTAD, International Investment Agreements Reform Accelerator, *op. cit.*, p. 20.

<sup>275</sup> Australia-United Kingdom Free Trade Agreement, signed in 2021, and entered into force in 2023 (Australia – United Kingdom FTA (2021)).

<sup>276</sup> Article 13.7 (4), Australia–United Kingdom FTA (2021)

investor cannot initiate an arbitration against the host State for breach of the FET standard simply because it has adopted a measure or regulation that goes against its legitimate expectations. This means that a new CSR measure or regulation adopted by the host State that negatively affects the investment is not per se a violation of the FET standard. This indirectly incentivizes foreign investors to act responsibly, as they understand that new measures, even if in contradiction with their legitimate expectations, will not be a ground to file a claim against the host State. Thus, investors are motivated to adopt CSR principles to avoid conflicts and ensure the stability of their operations.

Finally, another option for the future, which has already been done by some IIAs, is to entirely remove the FET standard clause<sup>277</sup>. An explicit omission can be found in the Intra-MERCOSUR cooperation Facilitation Investment Protocol of 2017<sup>278</sup> in its Article 4.3 which states that :

*“For greater certainty, the standards of "fair and equitable treatment", of "full protection and security" and the pre-establishment phase are not covered by this Protocol”.*

Whilst not explicitly stating it, the Brazil Model BIT (2015)<sup>279</sup> also does not include a FET standard.

This gives more freedom and flexibility to host States in their adoption of new measures, allowing them to legislate on the environment, labor rights and social welfare with less risks to face a claim by an investor. This is positive on the side of CSR – more hard law regulations imposing socially responsible conduct by investors can be adopted without fearing consequences. On the other hand, it is true that it decreases the protective aspect of a BIT. However, this Paper argues that this is important in the shift to rebalance IIAs which have always been overprotective.

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<sup>277</sup> UNCTAD, International Investment Agreements Reform Accelerator, *op. cit.*, p. 20.

<sup>278</sup> Protocol of Cooperation and Facilitation of Intra Mercosur Investments, signed in 2017, and entered into force in 2019 (Intra-MERCOSUR Investments Facilitation protocol (2017)).

<sup>279</sup> Cooperation and Facilitation Investment Agreement Between the Federative Republic of Brazil And X (Brazil Model BIT (2015)).

To conclude, based on the balanced approach, tribunals need to analyze and weigh all the factors involved according to the specific circumstances of the case in question. Indeed, they need to balance the protection of the foreign investors' expectations and their entitlement to the stability of the host State's environment with the right of the host State to legislate and change its existing legislation to adapt to the evolving circumstances<sup>280</sup>. This Paper argues that, this coupled with the innovative drafting solutions – adding substantive content with a clear list of specific obligations, “removing” the legitimate expectations of investors from the FET standard, and finally omitting FET clauses - encourage investors to uphold CSR obligations, demonstrating a shift from soft law to hard law.

### C. Indirect Expropriation

As shown in section IV (B) the interpretation of the notion of indirect expropriation has been criticized to constitute a threat to the State's right to regulate<sup>281</sup>. To overcome this issue, there has been the development of new drafting methods of expropriation clauses.

Firstly, IIAs should and an increasing number of them have, lay out criteria for States' measures that may or may not be deemed to be an indirect expropriation, allowing for more balance between investors' rights and States' interests<sup>282</sup>. The examples below clearly state which measures **do not** constitute an indirect expropriation.

The expropriation clause in the CETA (2017)<sup>283</sup> provides that no expropriation may take place unless it serves a public purpose and is applied in a non-discriminatory manner, while at the same time respecting due process of law and leading to the payment an appropriation compensation (classical expropriation clause found in most IIAs)<sup>284</sup>. The innovative part comes with the precisions found in Annex 8.2 that provides that :

*“For greater certainty, except in the rare circumstance when the impact of a measure or series of measures is so severe in light of its purpose that it appears manifestly*

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<sup>280</sup> VALENTI *in* SACERDOTI, *op. cit.*, p. 55.

<sup>281</sup> DE NANTEUIL, *op. cit.*, p. 10.

<sup>282</sup> UNCTAD, International Investment Agreements Reform Accelerator, *op. cit.*, p. 24.

<sup>283</sup> Text of the CETA – Chapter eight: Investment.

<sup>284</sup> Art. 8.12, CETA.

*excessive, non-discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriation”.*

Similarly, the Canada Model BIT (2021) provides at its Article 9 (3) that :

*“An indirect expropriation under paragraph 1 may occur when a measure or a series of measures of a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure. A non-discriminatory measure of a Party that is adopted and maintained in good faith to protect **legitimate public welfare objectives, such as health, safety and the environment, does not constitute indirect expropriation, even if it has an effect equivalent to direct expropriation...**”<sup>285</sup>.*

This can also be found in the COMESA Agreement (2007)<sup>286</sup>, SADC Model BIT (2012)<sup>287</sup>, ASEAN–Hong Kong, China SAR Investment Agreement (2017)<sup>288</sup>, Armenia–Singapore Agreement on Trade in Services and Investment (2019)<sup>289</sup>, and in the Burkina Faso–Turkey BIT (2019)<sup>290</sup>.

Secondly, some IIAs have listed criteria for the finding of an indirect expropriation<sup>291</sup>. This can be seen in Article 8.2 (b) of the Morocco-Nigeria BIT (2016) which provides that:

*“The determination of whether a measure or sense of measures of a Party constitute indirect expropriation requites a case-to-case, fact based inquiry into various factors*

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<sup>285</sup> Art. 9 (3), Canada Model BIT (2021).

<sup>286</sup> Art. 20.8, COMESA Agreement “*Consistent with the right of states to regulate and the customary international law principles on police powers, bona fide regulatory measures taken by a Member State that are designed and applied to protect or enhance legitimate public welfare objectives, such as public health, safety and the environment, shall not constitute an indirect expropriation under this Article*”.

<sup>287</sup> Art. 6.7, SADC Model BIT (2012).

<sup>288</sup> Annex 2, para.4, Agreement on Investment among the Governments of the Hong Kong Special Administrative Region of the People’s Republic of China and the Member States of the Association of Southeast Asian Nations, signed in 2017, and entered in June 2019 (ASEAN–Hong Kong, China SAR Investment Agreement (2017)).

<sup>289</sup> Annex 3-A, para. 3(b), Agreement on Trade in Services and Investments Between the Republic of Armenia and the Republic of Singapore, signed in 2019 (Armenia–Singapore Agreement on Trade in Services and Investment (2019)).

<sup>290</sup> Art. 6.2, Agreement between the Government of Burkina Faso and the Government of Turkey on Promotion and Protection Reciprocal Investments, signed in 2019 (Burkina Faso–Turkey BIT (2019)).

<sup>291</sup> ZHU, “Do Clarified Indirect Expropriation Clauses in International Investment Treaties Preserve Environmental Regulatory Space?”, *op. cit.*, p. 404ss.

*including, but not limited to the scope of the measures or series of measures and their interference with the reasonable and distinguishable concerning the investment’.*

This has also been done in the China–Republic of Korea FTA (2015)<sup>292</sup>, and in Article 8(3) of the ASEAN–India Investment Agreement (2014)<sup>293</sup> that provides that :

*The determination of whether a measure or series of related measures by a Party, in a specific fact situation, constitutes an expropriation of the type referred to in subparagraph 2(b) of this Article requires a case-by-case, fact-based inquiry that considers, among other factors: (a) the economic impact of the government measure, although the fact that a measure or series of related measures by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that such an expropriation has occurred; (b) whether the government measure breaches the government’s prior binding written commitment to the investor whether by contract, license or other legal document; and (c) the character of the government measure, including its objectives and whether the measure is disproportionate to the public purpose.*

A more recent example can be found in the United Arab Emirates–Uruguay BIT (2018), Annex on Expropriation, para. 4(a).

Thirdly, various IIAs have decided to explicitly exclude indirect expropriation<sup>294</sup>. This can be seen in Article 6.6 of the Intra-MERCOSUR Cooperation and Facilitation Investment Protocol (2017) and in Article 6.3 of the Brazil-India BIT (2020).

These clauses protect the host States’ right to regulate, reducing the *regulatory chilling effect* created by traditional expropriation clauses. In fact, allowing host States to regulate for its legitimate interests without the measure at stake being qualified as indirect expropriation limits investors’ rights to claim compensation for the reduction in value of their investment. For

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<sup>292</sup> Annex 12- B, para.3 (a), Free Trade Agreement Between the Government of the People’s Republic of China and the Government of the Republic of Korea, signed in 2015, and entered into force in December 2015 (China – Korea FTA (2015)).

<sup>293</sup> Agreement on Investment Under the Framework Agreement on Comprehensive Economic Cooperation, ASEAN-India, signed in 2014 (ASEAN–India Investment Agreement (2014)).

<sup>294</sup> UNCTAD, International Investment Agreements Reform Accelerator, *op. cit.*, p. 25.

instance, if an investor loses profit due to a new environmental measure adopted by the State, he will not be able file an arbitration proceeding against the host State, and hence, will not be protected. This enhances the host State's policy space, as it is clear that they are free to legislate for their public interests without fearing to be condemned to pay a big sum of money to investors. In turn, this indirectly pushes investors to operate responsibly as 1) they are aware that responsible business conduct aligned with environmental, social, and public health standards is essential to protect their investments from risks such as indirect expropriation, and, 2) investors who already engage in responsible business conduct will less likely be affected by new measures as, if their investments are already aligned with the objectives of such regulations, the utility and value of their investments may remain unaffected (leading investors to adopt a socially responsible conduct since the start of their investment).

As a result, this new way of drafting provides more certainty to both the host State and foreign investors<sup>295</sup>, and hence, leads to more CSR accountability. For the investors, they now know that failing to adhere to CSR standards can lead to new regulations that will make their investment less valuable or undermine its utility, and that they will not be protected by IIL if that is the case. For the States, they have more liberty to actually regulate on CSR, making the establishment of hard law CSR obligations more possible and effective. Thus, CSR can act as a preventive tool for investors to protect themselves from being negatively affected by public interest regulations.

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<sup>295</sup> UNCTAD, World Investment Report 2024, *op. cit.*, p. 24 ; ZHU, "Do Clarified Indirect Expropriation Clauses in International Investment Treaties Preserve Environmental Regulatory Space?", *op. cit.*, p. 378.

## VII. CONCLUSION

To conclude, this Paper has demonstrated that traditional (*first generation*) IIAs are characterized by an asymmetry between investors' rights and States' obligations. This has resulted in a *chilling effect* on States to regulate for their public welfare, including CSR obligations, leading to harmful conducts of investors being left unaddressed. As a reaction, a CSR movement was born. This movement has taken four different paths. First, an increasing number of *second generation* IIAs have started to impose indirect or direct CSR obligations on investors. Second, tribunals have adopted less extensive, and more predictable interpretations of standards of protection and treatment, allowing the State to regulate for its legitimate interests. Third, indirect methods were developed as a means to incentivize investors to act socially responsibly. This involves conditioning investors' access to a treaty's protections based on their behavior, reducing their compensation in accordance with their conduct, and the possibility for the host State to file a counterclaim. Finally, and most interestingly, this Paper has illustrated innovative drafting solutions for standards of protection and treatment in IIAs, which have recently been developed in *third generation* IIAs. These include adding clarifications and precisions on the meaning of "*like circumstances*" in non-discrimination standards, adding substantive content to the FET standard, limiting the legitimate expectations doctrine, and finally, laying down criteria to determine whether or not there has been an indirect expropriation.

This Paper argues that this last approach is the most promising for the future as it does not change the fundamental nature of IIL but indirectly strives to achieve the same goal. In fact, it has been shown that these drafting innovations lead to more balance within IIAs, ensuring investors are held accountable and/or do not benefit from protection if their conduct breaches CSR standards, and as a consequence negatively impacts the host State's territory.

However, challenges remain regarding the interpretation and especially the enforcement of CSR clauses. Indeed, most IIAs still do not allow States to initiate an arbitration against investors for breaches of their CSR obligations. Consequently, and because of the novelty of this movement, there are no arbitration cases on the subject yet. Moreover, one must keep in mind, that recently adopted IIAs, and new ones to come, have and may still chose to follow the *first generation* approach, and hence disregard CSR completely.

In sum, this Paper argues that CSR is slowly shifting from soft law to hard law. It is not yet the case, CSR obligations remaining mostly voluntary and lacking enforcement mechanisms. However, soft law instruments are increasingly influencing the drafting of *new generation* IIAs, and tribunals are increasingly taking into account CSR obligations when assessing the conduct of the investor, determining whether the latter deserves to be compensated or not. Thus, this Paper is optimistic that in the future, IIAs will be more balanced, and hold investors more accountable for their misconduct. Investors will not be able to negatively impact the host State's territory with no consequences as 1) they will have to act socially responsibly to benefit from the protections offered by IIL, and 2) they will be held accountable, eventually, by facing harsh legal consequences for failing to adhere to CSR standards.