# The Promotion of Human Rights in International Investment Law

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# The Promotion of Human Rights in International Investment Law

Research paper carried out under the supervision of Professor Elena Cima and Ms Ines Mesek in the framework of the seminar "International Investment Law"

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# Abbreviations & Acronyms

| | |
|---|---|
| AB | Appellate Body |
| BHR | Business Human Right(s) |
| BIT | Bilateral Investment Treaty(ies) |
| CRCC | China Railway Construction Corp |
| CSR | Corporate Social Responsibility |
| EU | European Union |
| IHRL | International Human Rights Law |
| IIA | International Investment Agreement(s) |
| IIL | International Investment Law |
| ILO | International Labour Organization |
| FDI | Foreign Direct Investment(s) |
| FET | Fair and Equitable Treatment |
| FIFA | International Federation of Association Football |
| GATT | General Agreement on Tariffs and Trade |
| HR | Human Right(s) |
| ISDS | Investor-State Dispute Settlement |
| OECD | Organization for Economic Cooperation and Development |
| OHCHR | Office of the High Commissioner for Human Rights |
| PRI | Principle for Responsible Investment |
| RBI | Responsible Business Initiative |
| SDG | Sustainable Development Goal(s) |
| TBT | Technical Barriers to Trade Agreement |
| TPP | Tobacco Plain Packaging |
| UN | United Nations |
| UNCITRAL | United Nations Commission on International Trade Law |
| UNCTAD | United Nations Conference on Trade and Development |
| UNGP | United Nations Guiding Principles on Business and Human Rights |
| WTO | World Trade Organization |

*The idea of human rights is as simple as it is powerful:*
*that people have a right to be treated with dignity[1].*

# I. Introduction

The International Federation of Association Football (FIFA) World Cup Qatar 2022 opening ceremony was held in Doha on 20 November 2022. However, if one part of the world was celebrating football, the other was grieving for Human Rights. More than 6'500 migrant workers reportedly died while building the stadiums[2]. They lived in undignified conditions, and their passport was confiscated upon their arrival in Qatar, therefore restricting their freedom of movement[3]. On 16 December, in Doha, Lusail Stadium hosted the victory of Argentina. The China Railway Construction Corp (CRCC) – a Chinese construction enterprise – is one of the co-builders of this prestigious stadium[4]. Even though an award has yet to be rendered, since the China-Qatar BIT[5] considers that *every kind of asset*[6] constitutes an investment, a construction project is covered by this definition. Therefore, without detailing too much, if a dispute were to arise between CRCC – the investor – and Qatar – the host State – International Investment Law (IIL) would apply.

As the World Cup approached, non-governmental organizations frequently raised the lack of human rights protection in Qatar[7]. In parallel, it was discovered that the CRCC also built an Uyghur internment camp in China[8]. Therefore, Human Rights (HR) violations during the construction of Lusial Stadium are seriously being questioned. However, as the State and investor are **co-perpetrators** of the alleged HR breaches, it is doubtful they will ever be brought in front of an HR Court or the Investor-State Dispute Settlement (ISDS). Therefore, those alleged HR violations are, at the expense of workers, unlikely to be remedied[9].

On the contrary, under the current IIL framework, HR promotion can be significantly improved when the host state is **willing** to pursue an investor who did not comply with HR. Regarding international investments, the ISDS system is almost always international arbitration. While a procedural reform is being conducted by the United Nations Commission on International Trade Law (UNCITRAL) Working Group III[10], I will concentrate on the substantive changes that can promote HR in IIL.

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[1] United Nations Global Compact, *Human Rights,* (13.12.2022), available at: https://www.unglobalcompact.org/what-is-gc/our-work/social/human-rights.

[2] S. Ingle*, Stadiums of shame: the numbers World Cup hosts Qatar don't want to be seen,* 14 November 2022, (19.11.2022), available at : https://www.theguardian.com/football/2022/nov/14/stadiums-of-shame-the-numbers-world-cup-hosts-qatar-dont-want-to-be-seen.

[3] P. Pattison, *Qatar's World Cup Slaves*, Geneva Summit for Human Rights and Democracy, 18 February 2020, available at : https://genevasummit.org/speech/qatars-world-cup-slaves/.

[4] T. Finn, *China Railway Constructions Corp wins Qatar World Cup stadium contract,* Reuters, 28 November 2016, (19.11.2022), available at: https://www.reuters.com/article/us-soccer-worldcup-qatar-idUSKBN13N1HV.

[5] Agreement Between the Government of the People's Republic of China and the Government of the State of Qatar concerning the Encouragement and Reciprocal Protection of Investments, April 1999, (China-Qatar BIT).

[6] Art. 1, China-Qatar BIT (1999): The term "investment" means *every kind of asset* […].

[7] Amnesty International, *Qatar: Six things you need to know about the hosts of the 2022 FIFA World Cup*, 16 November 2022, (19.11.2022), available at: https://www.amnesty.org/en/latest/news/2022/11/qatar-six-things-you-need-to-know-about-the-hosts-of-the-2022-fifa-world-cup/.

[8] Middle East Eye, *Qatar World Cup stadium company 'built Uyghur internment camp'*, 20 October 2022, (19.11.2022), available at: https://www.middleeasteye.net/news/qatar-world-cup-stadium-company-built-uyghur-internment-camp.

[9] U. Kriebaum, Human rights and international investment law *in* Y. Radi (ed.), *Research Handbook on Human Rights and Investment*, Edward Elgar, Cheltenham, 2018, p. 22.

[10] B. Choudhury, Investor Obligations for Human Rights*, ICSID Review*, Vol. 35, No. 1-2, 2020, p. 83.

**Arbitration** allows investors to challenge HR policies imposed by States[11], such as the increase of labour rights, the right to water, or the environment. Under International Human Rights Law (IHRL), States must guarantee HR, but if they do so, they might be challenged under IIL[12]. Consequently, two main effects must be emphasized. Firstly, investors ask for enormous damages when they file a claim in front of an investment tribunal[13]. They often win against the States, who became more concerned about their loss of power to regulate within their sovereignty[14]. Secondly, the fear of arbitration can also lead to a chilling effect[15]. Indeed, to avoid arbitration, States will be reluctant to promulgate new laws that could irritate investors. The host State population is usually the "victim" of the chilling policy.

These concerns are not new. However, we can see a shift in society as **HR are gaining in popularity and visibility** thanks to popular culture. For example, through social media, we saw the proliferation of posts concerning the treatment of Uyghurs, the protestation for the Black Lives Matter movement or the young people's advocacy for climate change. While the concern for each issue is usually ephemeral, we cannot overlook that a widespread community talked intensively about the subject. People became, at least for a short period of time, concerned and informed about these problems. These popular social movements allow society not to be ignorant anymore. Furthermore, it is well known that changes in society will enable changes in the law[16].

Concerning transnational investments, two main **criticisms** are highlighted by popular opinion. The first one is the reconsideration of giant multinationals and their impact on our lives. Nowadays, it is impossible to live while altogether avoiding Nestlé or Facebook. They are part of our lives. Some will even say that they gained so much power as to become more powerful than States[17]. Therefore, the idea that businesses – and not only States – must respect HR while operating was born[18]. The second one is the rise of new concerns and goals regarding investments. Investment is not *only* seen as a "money-making machine" anymore but also carries the Sustainable Development Goal (SDG)[19]. For instance, these new considerations include the profit for the worker and their social demands[20] or the absence of harm to the environment[21]. Therefore, a Foreign Direct Investment (FDI) ultimate goal must be the host country's development[22]. Moreover, sustainable development necessarily involves HR considerations.

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[11] L. E. Peterson & K. R. Gray, *International Human Rights in Bilateral Investment Treaties and in Investment Treaty Arbitration*, International Institute for Sustainable Development, 2003, p. 5, (11.01.2023), available at: https://www.iisd.org/publications/report/international-human-rights-bilateral-investment-treaties-and-investment-treaty.

[12] *Ibid.*, p. 22.

[13] E. Peterson, *Human Rights and Bilateral Investment Treaties – Mapping the role of human rights law within the investor-state arbitration*, Rights & Democracy, Montreal, 2009, p. 20.

[14] A. Reinisch, *Advanced Introduction to International Investment Law*, Elgar Advanced Introductions, Cheltenham, 2020, p. 2 ; E. Peterson*, op. cit.*, p. 20.

[15] L. E. Peterson & K. R. Gray*, op. cit.*, p. 22.

[16] M. Hirsch, Social movements, reframing investment relations, and enhancing the application of human rights norms in international investment law, *Leiden Journal of International Law,* Vol. 34, 2021, p. 133.

[17] C. Alet & L. Delassale, Quand les multinationales attaquent les États, ARTE France & Yami 2 (prod.), 2016, also available online at : https://www.youtube.com/watch?v=qDkYtveqUFw&t=219s.

[18] B. Choudhury, Investor Obligations for Human Rights*, op. cit.*, p. 84.

[19] United Nations General Assembly, *Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises*, A/76/238, 27 July 2021, p. 3 (cited: United Nations General Assembly, *Report of the Working Group*).

[20] D. Gaukrodger, *The future of investment treaties - Background note on potential avenues for future policies,* 6th Annual Conference on Investment Treaties, OECD, 2021, p. 5.

[21] Human Rights Council, *Right to development in international investment law – Overview of the ongoing study by Expert Mechanism of the Right to Development*, A/HRC/EMRTD/5/CRP.2, Conference room paper, Expert Mechanism on the Right to Development, Fifth session, 1 March 2022, N 7.

[22] B. Choudhury, Investor Obligations for Human Rights*, op. cit.*, p. 82.

As much as the system surrounding FDI has its share of flows, FDI are necessary. Thus, what is needed is to address the challenges mentioned above in order to reform the system and use it to the best of its abilities[23]. In short, IIL must reduce the asymmetric relation between State and investors and consider the HR of people affected by those investments[24]. Furthermore, since IHRL cannot be separated from IIL, investment arbitrators will necessarily be confronted with HR issues[25]. If we want to keep arbitration as the ISDS for IIL, arbitrators will need to assess HR claims correctly.

HR is a vast subject. Concerning IIL, investors also have their own HR. However, as I highlighted with the above mentioned examples and challenges, I choose to write this paper on the promotion of the people's HR, such as the right to health, labour rights, freedom of movement, and many others. Therefore, I will look at different means and methods that States can use to promote FDI and improve people's HR in parallel. My goal is not to reform the system but to amend it. This should allow us to better assess the impact FDI can have on HR and to address how to afford better protection. First, it is essential to understand how HR are incorporated into the current IIL system. Thus, I will assess the impact HR had on the development of Bilateral Investment Treaties (BIT) and which improvements are still needed. Furthermore, since a strong presence of investors marks IIL, I will also highlight some HR commitments made by corporations and how they created a soft law canvas. Secondly, I will briefly assess the role that investment tribunals can play in holding companies accountable for violations of HR. Thirdly, I will highlight some propositions to turn HR into hard law. While multiple solutions exist, such as a multilateral convention or improving the host state investment law, I will concentrate on 2 of them. The first one happens on the international level and searches to actively renegotiate BIT to include HR considerations and provisions. The second one happens on the national level and seeks to create a mandatory HR due diligence law. The exporting country would promulgate this law binding all its enterprises even when they operate abroad. Finally, I will conclude my paper by summarizing my findings in a provocative manner.

# II. Human rights within the existing legal framework

The first part of this paper is dedicated to assessing where HR currently stand in the IIL system. It will be presented based on 2 different approaches. Firstly, I will, following a growing timeline, evaluate the development of BIT going from an old to a new generation. Secondly, I will review the importance of soft law for responsible business conduct, which allows a better consideration for HR.

## A. Hard law – BIT

The primary source of IIL is the BIT concluded between 2 States. To understand how they became as widespread as today, we should look back to the beginning of FDI and the protection that was specially granted to them. This created the "old BIT" network, which is still the prominent source of IIL today. They are characterized mainly by the absence of HR provisions and tribunal jurisdiction to address those disputes. However, a "new generation of BIT" is recently starting to spread. They include new clauses that will allow tribunals to accept HR claims within their jurisdiction and address the merits of such claims. I will assess a few trends in the recent drafting of BIT and will pursue an analysis of one of the most progressive

[23] D. Gaukrodger*, op. cit.*, p. 6.
[24] M. Hirsch*, op. cit.,* p. 138.
[25] E. Peterson*, op. cit.*, pp. 10, 26.

BIT toward HR. This rapid overview should allow us to have an idea of the current advancement of HR promotion within the BIT fragmented system.

### a) Historical development

FDI was primarily designed as a tool to bring capital to developing countries in order to enhance their economic growth by creating employment and reducing poverty[26]. To attract investment, host countries needed to afford special **protection** to foreign investors. Indeed, during the 19th century, we saw many cases of abuse regarding alien rights, such as unlawful arrests, detention, or discrimination. In parallel, a particular need for the protection of their property was necessary. As a result, BIT were created in the late 1950s[27]. Since there is no common text of rules regulating IIL[28] and approximately 2200 BIT are currently in force[29], FDI regulation is quite fragmented.

However, since these BIT all had the goal of protecting their nationals' investment abroad, they still have many similarities. Indeed, most BIT were concluded between a wealthy country – home State – whose nationals invested in an emerging country – host State[30]. This led to bargaining asymmetries allowing wealthy countries to impose their will on developing countries and creating a consistent BIT network for themselves[31]. Therefore, the current system is asymmetrical: while investors only have rights, States only have obligations[32]. BIT will protect the standards of treatment regarding the investors, including *their* HR, but will omit the HR of the host state's population[33]. Concerning HR, according to a study conducted by United Nations Conference on Trade and Development (UNCTAD) in 2001, investor social responsibility can only be characterized as **absent** from BIT[34].

Since ISDS is based on arbitration, for the tribunal to be competent, it must have the **jurisdiction** to address the issue at hand. The absence of HR within the BIT provisions is an obstacle that must be overcome before addressing the merits of the case. If tribunals do not have jurisdiction over HR, it will be challenging to apply IHRL in their reasoning[35]. Moreover, tribunals usually are unwilling to address HR arguments[36]. Since almost no BIT allow States to start an arbitration claim[37], this situation is mainly encountered when States invoke an HR-based argument as a counterclaim justifying a treaty violation. Two situations can be outlined. Firstly, when an investor breaches HR, the host State can refuse the protection of the BIT to this investor. Secondly, when a State introduces a law to protect HR (for example, a new law

[26] L. Colen & M. Maertens & J. Swinnen, Foreign direct investment flows to developing countries: the role of international investments agreements *in* O. De Schutter & J. Swinnen & J. Wouters (eds.), *Foreign Direct Investment and Human Development*, Routledge, Abingdon, 2013, pp. 71-106.
[27] E. Peterson*, op. cit.*, pp.10-12.
[28] L. E. Peterson & K. R. Gray*, op. cit.*, p. 5.
[29] UNCTAD, *International Investment Agreements Navigator,* (11.12.2022), available at: https://investmentpolicy.unctad.org/international-investment-agreements.
[30] M. Malik, *South-South Bilateral Investment Treaties: The same old story?,* IV Annual Forum for Developing Country Investment Negotiators Background Papers New Delhi, October 27-29, 2010, International Institute for Sustainable Development, Winnipeg, 2011, p. 1.
[31] W. Alschner & D. Skougarevskiy, Mapping the Universe of International Investment Agreements, *Journal of International Economic Law*, Vol. 19, 2016, p. 562.
[32] E. Peterson*, op. cit.,* p. 14.
[33] B. Choudhury, Investor Obligations for Human Rights*, op. cit.*, p. 83.
[34] UNCTAD, *"Social Responsibility*", UNCTAD Series on Issues in International Investment Agreements, UNCTAD/ITE/IIT/22, 2001, p. 16.
[35] O. De Schutter & J. Swinnen & J. Wouters, Introduction: foreign direct investment and human development *in* O. De Schutter & J. Swinnen & J. Wouters (eds.), *Foreign Direct Investment and Human Development*, Routledge, Abingdon, 2013, p. 14.
[36] L. Colen & M. Maertens & J. Swinnen, *op. cit.*, p. 89.
[37] V. Kube & E. U. Petersmann, Human Rights Law in International Investment arbitration*, Asian Journal of WTO and International Health Law*, Vol. 11, No. 1, 2016, p.80.

protecting the rights of the native population), it can invoke HR as an exception for breaching the BIT.

The Germany-Pakistan BIT[38] was the first BIT ever concluded in 1959. According to its preamble, the only goal of this treaty was[39] "to create favourable conditions for investments by nationals and companies of either State in the territory of the other State"[40]. In other words, this treaty's only goal is to ease and protect investments. There is no mention of SDG, social or environmental aspects. According to article 11, any dispute "as to the interpretation of the application of the present treaty"[41] will be referred to arbitration if other means were unfruitful. Therefore, even if a tribunal was willing to consider HR in its reasoning, it would be difficult to interpret *this* treaty contrary to its purpose and wording[42]. To conceptualise the spread – or **lack – of HR** in BIT, by 2014, according to the Columbia Centre on Sustainable Development, only 0.5% of treaties included references to HR and mainly in their preamble[43].

### b) A new generation of BIT

Fortunately, a **new generation** of investment policies is blooming. According to UNCTAD[44]:

> "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.

In other words, these new BIT should try to maximize the positive effect of investments while minimizing their negative impacts on society[45]. Since this transformation is already occurring, I will try to summarize, non-exhaustively, the key provisions – related to HR – already included in this new generation of BIT. The changes mainly happen on 3 levels: 1) the preservation of the right of the State to regulate, 2) a non-lowering of standards clause, and 3) the orientation toward sustainable development.

#### 1) Right to regulate clause

By increasing the State's **right to regulate**, governments want to avoid having to compensate an investor because their domestic law is amended. In other words, States want to change the requirements for indirect expropriation by excluding such a claim when they change their domestic law[46]. Based on a UNCTAD 2019 study, "the preservation of States' regulatory space

[38] Treaty between the Federal Republic of Germany and Pakistan for the Promotion and Protection of Investments, 25 November 1959, (Germany-Pakistan BIT).
[39] The 1959 Germany-Pakistan BIT was replaced by a new Germany-Pakistan BIT in 2009.
[40] Preamble, Germany-Pakistan BIT (1959).
[41] Article 11, Germany-Pakistan BIT (1959).
[42] The word "human" is not mentioned. The word "development" is only mentioned once with regard to increasing productivity.
[43] IISD, *Webinar: Investment Treaties and Human Rights Law: Interactions and Recent Developments*, 20 November 2019, (20.10.2022), available at : https://www.iisd.org/events/webinar-investment-treaties-and-human-rights-law-interactions-and-recent-developments.
[44] UNCTAD, *Investment Policy Framework for Sustainable Development,* UNCTAD/DIAE/PCB/2015/5*,* 2015, p. 17.
[45] O. De Schutter & J. Swinnen & J. Wouters, *op. cit.*, p. 7.
[46] U. Kriebaum, *The State's Duty to Protect Human Rights – Investment and Human Rights*, pp. 10-14.

remains the most predominant area of reform"[47]. This tendency was already installed in the 2004 US Model BIT[48]:

> Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do *not* constitute indirect expropriations[49].

Usually, States want to preserve their right to regulate concerning **public interest**[50]. Since this notion is not well defined, BIT usually set forth a list of general exceptions that reflect what they consider public interest. General exceptions often include HR related to health or labour rights[51]. However, this practice is less well spread than we would hope. Indeed, out of the 11 BIT concluded in 2019, only 5 contained general exceptions[52].

As to better understand the importance of this kind of provision, let us look at a fictional example. The State of Barbapapaland introduces a new law prohibiting the use of asbestos in its construction. As per the scientific community, asbestos is not currently banned worldwide, but it is recognized to be carcinogenic[53]. Therefore, prohibiting this material would constitute a valid public health concern. If there is a provision similar to the one above mentioned in the BIT, Barbapapaland could enact this law without fearing an expropriation claim from a foreign investor using asbestos in the construction of a hospital. Thus, the main advantage of inserting a right to regulate clause in the BIT is to avoid a chilling effect on the development of the national law in the host State[54]. *A contrario*, this could lead to the promulgation of more national laws protecting HR.

### 2) Non-lowering of standards clause

This leads to another problem that some new BIT are trying to correct. Since States want to attract more and more FDI, they can be incentivized to lower their domestic standard to attract more FDI[55]. This can be avoided by explicitly recognizing the obligation **not to relax domestic law** protecting health or safety to attract FDI. Since only 4 of the 11 BIT concluded in 2019 contain such a provision, this practise still needs to be well spread[56].

Article 13 on Investment and Labour of the Rwanda-USA BIT[57] states:

> 1. The Parties recognize that it is inappropriate to encourage investment by weakening or reducing the protections afforded in *domestic labour laws*. […] If a Party considers that the other Party has offered such an encouragement, it may request *consultations* with the other Party […].

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[47] UNCTAD, *The Changing IIA Landscape: New Treaties and Recent Policy Developments*, UNCTAD/DIAE/PCB/INF/2020/4, IIA Issues Notes, No. 1, 2020, p. 6 (cited: UNCTAD, *The Changing IIA Landscape*).
[48] Treaty between the government of the United States of America and the government of [country] concerning the encouragement and reciprocal protection of investment, 2004, (US Model BIT).
[49] Annex B number 4 letter a, US Model BIT (2004).
[50] D. Collins, An Introduction to International Investment Law, Cambridge University Press, Cambridge, 2017, p. 251.
[51] *Ibid*., p. 261-266.
[52] UNCTAD, *The Changing IIA Landscape, op. cit.*, p.9.
[53] Solidar Suisse, *For a global ban on asbestos*, (25.11.2022), available at: https://solidar.ch/en/topics/decent-work/asbestos/.
[54] O. De Schutter & J. Swinnen & J. Wouters, *op. cit.*, p. 6.
[55] D. Collins, *op. cit.*, p. 250.
[56] UNCTAD, *The Changing IIA Landscape, op. cit.*, p.9.
[57] Treaty between the government of the United States of America and the government of the Republic of Rwanda concerning the encouragement and reciprocal protection of investment, 19 February 2008, (USA-Rwanda BIT).

> 2. For purposes of this Article, *"labour laws"* means each Party's statutes or regulations, or provisions thereof, that are directly related to the following internationally recognized labour rights:
> (a) the right of association;
> (b) the right to organize and bargain collectively;
> (c) a prohibition on the use of any form of forced or compulsory labour;
> (d) labour protections for children and young people, including a minimum age for the employment of children and the prohibition and elimination of the worst forms of child labour; and
> (e) acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health[58].

This provision is progressive on a few matters. Firstly, as stated above, it shall prevent lowering the domestic law standards on labour rights. Secondly, if those standards are not respected, a consultation shall also occur between the parties to find a remedy. Thirdly, there is a list of labour laws protected by this provision. The idea of a list is quite interesting since it clearly defines which right is included. When going in front of a tribunal, arbitrators will be bound by this BIT, and these concerns will enter within their jurisdiction. This already avoids many problems of interpretation and jurisdiction in the case of an ISDS. Fourthly, the content of the list is also worth mentioning. While child or forced labour protection might seem evident, such is not the case with the right of association or trade union.

### 3) Sustainable development and human rights orientation

In 2015, the UN promulgated the SDG[59]. This goal was globally accepted by States and will penetrate the drafting of BIT[60]. Indeed, 9 out of the 11 BIT concluded in 2019 refer – to different extents – to the SDG[61]. Since HR are included in the United Nations (UN) SDG, they will either be mentioned alone or through the SDG[62]. While most new generation BIT refer to **HR in their *preamble***, it remains exceptional to have explicit HR *provisions*[63]. While the preamble is important for treaty interpretation[64], it does not bind an investor to respect HR.

Since the Morocco-Nigeria BIT[65] is one of the most progressive BIT currently in force, I will analyse its relevance in relation to HR. In a general overview, out of the 6 paragraphs of its preamble, 3 of them mention sustainable development, 1 defines the requirements of sustainable development, 1 mentions the *need* for developing countries to *exercise* their *right* to regulate, and 1 seeks "the *balance* of the rights *and obligations*" of the parties[66]. Therefore, it is safe to say that we are far from the 1959 Germany-Pakistan BIT, whose only goal was the protection of investments[67]. Therefore, if the same problem were to arise in front of the same tribunal, the outcome would be very different thanks to the progressive preamble of the Morocco-Nigeria BIT, which promotes responsible and sustainable investments.

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[58] Article 13, Rwanda-US BIT (2008).
[59] United Nations General Assembly, Resolution adopted by the General Assembly on 25 September 2015, A/RES/70/1, 21 October, 2015 (cited: United Nations General Assembly, *Resolution*).
[60] C. Baltag & Y. Dautaj, Promoting, Regulating and Enforcing Human Rights through International Investment Law and ISDS, *Fordham International Law Journal,* Vol. 45, No. 1, 2021, p. 9.
[61] UNCTAD, *The Changing IIA Landscape, op. cit.,* p.9.
[62] C. Baltag & Y. Dautaj, *op. cit.*, p. 33.
[63] U. Kriebaum, *The State's Duty to Protect Human Rights – Investment and Human Rights*, *op. cit.,* p. 8.
[64] M. M. Mbengue, *Preamble*, Oxford Public International Law, September 2006, (06.01.2023), available at : https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1456.
[65] Reciprocal Investment Promotion and Protection Agreement between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria, 3 December 2016, (Morocco-Nigeria BIT).
[66] Preamble, Morocco-Nigeria BIT (2016).
[67] *Supra,* II A a, Historical development, p. 5.

Furthermore, this was the first BIT to *explicitly* mention HR in its preamble[68]:

> Recognizing the important contribution investment can make to the sustainable development of the state parties, *including* the reduction of poverty, increase of productive capacity, economic growth, the transfer of technology, and *the furtherance of human rights* and human development[69].

I would like to note two features related to the wording: 1) HR, which is mentioned 6 times in the treaty, is broader than labour or health rights, and 2) this treaty explicitly includes HR in the SDG[70]. Since there is no clear definition of the components of the SDG, giving examples of what is included can make the outcome of arbitration more predictable. This is particularly important since the right of the state to regulate is accepted within the SDG[71]. In other words, this treaty allows the State to regulate to protect HR.

This BIT is also innovative as it gives investors rights and ***obligations***[72]. As above mentioned, investors usually only have rights, while States only have obligations. For instance, *investors* – themselves and not the Contracting Party – are forbidden to take part in or encourage corruption[73]. Moreover, investors must also respect HR in accordance with core labour and environmental standards, as well as the labour and HR obligations of the host State[74]. In other words, a HR provision contained in a national law could be directly opposed to the investor.

The next notable innovation is article 15 on Investment, labour, and HR protection[75]. Article 15 para. 2 has a similar wording and functions as article 13 para. 1 of the Rwanda-USA BIT[76]. The goal is to avoid lowering domestic **labour law** and racing to the bottom. Provisions of this character are often found in the new generation of BIT[77]. Article 15 para. 3[78], is similar but has a broader scope. Indeed, it also includes values such as **public health** and **safety**, but it only relates to principles and does not refer to a body of domestic or international law.

On the other hand, article 15 para. 5[79], is more of a soft law language since it provides for a high level of **regulations** but only within the **limits** "appropriate to [a party] economic and social situation"[80]. I believe those limits are appropriate. Given this treaty's general wording, we

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[68] N. Zugliani, Human Rights in International Investment Law: The 2016 Morocco-Nigeria Bilateral Investment Treaty, *International and Comparative Law Quarterly,* Vol. 68, No. 3, 2019, p. 763.
[69] Preamble, Morocco-Nigeria BIT (2016).
[70] K. Mahmutaj, *Will the Morocco-Nigeria Bilateral Investment Treaty Transform Sustainable Development into Hard Law*, Blog of the European Journal of International Law, 27th January 2022, (23.10.2022), available at : https://www.ejiltalk.org/will-the-morocco-nigeria-bilateral-investment-treaty-transform-sustainable-development-into-hard-law/.
[71] Article 23 para. 1, Morocco-Nigeria BIT (2016) : […] the host State has the right take regulatory or other measures to ensure that development to ensure that development in its territory is consistent with the goals and principles of sustainable development, and with other legitimate social and economic policy objectives.
[72] O. Ejims, "The 2016 Morocco-Nigeria Bilateral Investment Treaty: More Practical Reality in Providing a Balanced Investment Treaty ?", *ICDIS Review*, Vol. 34, No. 1, 2019, p. 74 (cited: O. Ejims, The 2016 Morocco-Nigeria Bilateral Investment Treaty).
[73] Article 17 para. 3, Morocco-Nigeria BIT (2016) : Investors and their Investments shall not be complicit of […] aiding and abetting, and conspiracy to commit or authorization of such acts [corruption].
[74] Article 18 para. 2 to 4, Morocco-Nigeria BIT (2016).
[75] Article 15, Morocco-Nigeria BIT (2016).
[76] *Supra,* II A b 2, Non-lowering of standards clause, pp. 6-7.
[77] N. Zugliani, *op. cit.*, p. 765.
[78] Article 15 paragraph 3, Morocco-Nigeria BIT (2016): The Parties recognize that it is inappropriate to encourage investment by relaxing domestic labour, public health or safety. They shall not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such measures as an encouragement for the establishment, acquisition, expansion, or retention in their territories, of an investment.
[79] Article 15 paragraph 5, Morocco-Nigeria BIT (2016): Each Party shall ensure that its law and regulations provide for high levels of labour au human rights protection *appropriate* to its economic and social situation, and shall strive to continue to improve these law and regulations.
[80] N. Zugliani, *op. cit.*, p. 764.

clearly see the parties' intent: a responsible investment to ensure the economic growth and development of the host country. However, we should not forget that not every State has the same capacity to ensure HR as developed countries do. While this is not the subject of this paper, I believe prudence is also needed in the wording of BIT. Let us not forget that investors can also sue the State regarding HR. Allow me to make a parenthesis to explain my thoughts. I could easily imagine 2 situations. Firstly, a Swiss investor suing an Arabic country because women are required to wear a burka or not allowed to work at their company[81]. In the same manner, when non-essential workers were required to work in Tanzania even while the COVID-19 pandemic was killing people all around the world[82]. While one issue would be based on the difference of what is considered HR because of the culture (social situation), the other could be because the country cannot provide food to its citizens if people are not working (economic situation). While such issues might seem unlikely to be given a reason by a tribunal, since the system is somewhat incoherent and unpredictable, we cannot know which rabbit might come out of their hat. Therefore, I believe it is essential to always consider the limits of a country even when promoting HR; otherwise, it might become counterproductive.

Furthermore, article 15 para. 6 provides that "all parties shall ensure that their laws, policies, and actions are consistent with the international human rights agreements to which they are a Party". According to Niccollò Zugliani, "article 15 may constitute a textual basis for the **jurisdiction of arbitral tribunals over human rights issues that arise out of the activities of the host State**"[83]. However, since this BIT does not allow States to initiate an ISDS, they can only submit a counterclaim once an investor starts the dispute[84].

To summarize, the current IIL network is mostly constituted of old BIT that favour investment and does not contain any reference to HR. Therefore, it makes it more difficult for tribunals to have HR jurisdiction and address alleged violations. However, there is an improvement in the current and future drafting of BIT. They usually reduce the asymmetric relationship between state and investor by creating obligations for investors, they also contain references to public health, safety, environment, or labour law, and they also make references to HR treaties or domestic law. While they could be even more progressive, the main problem is that they only constitute a minority of the 2200 BIT in force. Thus, we should also look at other existing sources of IIL that could help promote HR.

## B. Soft law – Corporate code of conduct

While soft law is not the first instrument we consider when we want to protect something as important as HR, it does not make it any less valuable. Thanks to their considerable acceptance and adjustability, soft law principles are able to fill gaps still inaccessible to hard law. Firstly, it is important to explore how such a phenomenon came to happen and how it can be used to create binding obligations. Secondly, given their influence, talking about soft law in business and HR without mentioning the famous United Nations Guiding Principles on

[81] In Switzerland, a law bans wearing the burka as it was seen as "against the dignity of women". This popular initiative was accepted by the people on 7 March 2021 and constitutes article 10a of the Swiss Constitution. For more information, see: K. Romy, *«L'initiative sur la burqa défend la dignité de la femme»,* Swissinfo, 25 janvier 2021, (11.01.2023), available at : https://www.swissinfo.ch/fre/economie/votations-du-7-mars-_-l-initiative-sur-la-burqa-d%C3%A9fend-la-dignit%C3%A9-de-la-femme-/46295846.

[82] Former Tanzanian president John Magufuli was heavily criticised internationally because of its gestion of the pandemic. Indeed, he decided to prioritize letting markets open, and people work in order to preserve the economy. By refusing to impose a lockdown, he advanced that "a lot of people just can't isolate themselves because they have to go out and earn money every day". For more information, see: I. Muleke, *Tanzania criticized for not cooperating in COVID-19 fight*, Made for minds, 5 January 2020, (11.01.2023), available at: https://www.dw.com/en/tanzania-under-fire-from-who-for-lackluster-response-to-covid-19-pandemic/a-53304699.

[83] N. Zugliani, *op. cit*, p. 765.

[84] O. Ejims, The 2016 Morocco-Nigeria Bilateral Investment Treaty, *op. cit.,* p. 77.

Business and Human Rights (UNGP) would be sacrilegious. Therefore, I will quickly summarize 1) how they became the starting point of institutionalized voluntarism, 2) their innovative content, and 3) observe of their influence a decade after their instauration.

a) Soft law characteristics and utility

Soft law is characterized by its **voluntary** nature[85] and **non-binding** norms that help define States' – or corporations' – behaviour[86]. Since there is no consensus on the definition of soft law[87], I will use the negative concept of soft law as opposed to hard law. Thereby, soft law can be understood as non-binding principles – as opposed to legal obligations – that cannot be enforced by a Court of law[88]. Furthermore, they are not part of the traditional sources of law included in article 38 of the International Court of Justice Statute[89]. Soft law principles can create standards of expectation or demonstrate shared value, but they lack the credibility, predictability, and responsibility[90] encoded by our general perception of the law.

HR obligations in business are mainly of soft law nature[91]. While the desire to turn them into hard law is present, the **challenge** mainly consists of the lack of support necessary to implement them as binding obligations. On the one hand, States refused to ratify previous international initiatives that had to be abandoned[92]. Moreover, in June 2014, the United Nations Human Rights Council adopted a resolution mandating a working group to elaborate an international legally binding instrument on Transnational Corporations and Other Business Enterprises with respect to human rights[93]. The 8th session of the working group took place in Geneva from 24 to 28 October 2022,[94] and worked on the Third revised draft[95]. However, a consensus has yet to be reached. On the other hand, there have been domestic initiatives that were also mostly unsuccessful and replaced by soft law measures[96].

Firstly, soft law is way more **accepted** by corporations. Therefore, corporations themselves often adopt corporate social responsibility (CSR) commitments, including HR content[97]. Based on research documented by Yadira Castillo, it was found that transnational corporations mostly adopt CSR commitments to safeguard their reputation[98]. Indeed, since public opinion is getting increasingly interested in HR violations, this puts pressure on corporations to maintain an honourable reputation[99], one that respects HR and the value of their customers. Since CSR

[85] B. Choudhury, Balancing Soft and Hard Law for Business and Human Rights, *ICLQ*, Vol. 67, 2018, p. 962.
[86] G. Adinolfi, Soft Law in International Investment Law and Arbitration*, The Italian review of international and comparative law*, No. 1, 2021, p. 89.
[87] *Ibid*., p. 89.
[88] European Center for Constitutional and Human Rights, *Hard law/soft law,* (28.11.2022), available at: https://www.ecchr.eu/en/glossary/hard-law-soft-law/.
[89] G. Adinolfi*, op. cit.*, p. 90.
[90] B. Choudhury, Balancing Soft and Hard Law for Business and Human Rights, *op. cit.*, pp. 970-971.
[91] *Ibid.*, p. 962.
[92] *Ibid*, pp. 979-980.
[93] United Nations General Assembly, *26/9 Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights*, A/HRC/RES/26/9, 14 July 2014.
[94] Business & Human Rights Resource Centre, *8th Session of the UN Intergovernmental Working Group on a proposed treaty on business and human rights,* 24 October 2022, (28.11.2022), available at: https://www.business-humanrights.org/en/latest-news/8th-session-of-the-un-intergovt-working-group-on-a-proposed-treaty-on-business-and-human-rights-24-28-oct-2022/
[95] Legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises, Third revised draft, 17 August 2021, (Third revised draft).
[96] Swiss Responsible Business Initiative proposed a due diligence obligation to respect HR obligations while conducting activities abroad. However, this initiative was not accepted by the people and was replaced by an obligation for corporations to establish a report on "non-financial questions" while conducting business. For more information, see: *infra*, IV B, Mandatory human rights due diligence, pp. 43 ff.
[97] Y. Castillo, The Appeal to Human Rights in Arbitration and International Investment Agreements, *Annuario Mexicano de Derecho Internacional*, Vol. XII, 2012, p. 55.
[98] *Ibid.,* pp. 56-58.
[99] M. Hirsch, *op. cit.*, p. 140.

initiatives are soft law principles, they cannot be opposed to corporations in a Court. Therefore, corporations only have advantages of adopting such principles. On one side, they are seen as the "good guy" because they seem respectable to the public. On the other side, they cannot be found guilty or have to compensate if they don't respect these principles. However, other outcomes have more impact on companies than the law. In the above mentioned research, a company stated: "while there are no legal sanctions for non-compliance with the built-in instrument, there are worse outcomes, such as the demise of the company. […] A branded company accused of violating human rights may disappear because the share price falls […] which results in the company no longer being viable. […] In the worst-case scenario, the company must leave the country"[100].

Secondly, soft law also is **adjustable** and flexible. There are no common principles of soft law. Instead, you find a proliferation of initiatives and set of principles to incorporate HR in business[101]. Companies and States can choose which item they want to insert in their BIT or their CSR, like composing a meal in a restaurant. They can personalize their menu, leave some rules out and even have leftovers if they do not like them after ordering. While leftovers are poorly seen, and you can be called out for it, it is rare that someone will force you to finish your plate. Some companies truly want to respect HR while conducting business activities. However, it does not mean that it is an easy task. In a podcast, Kerrie Warring, the CEO of International Corporate Governance Network[102], underlined that soft law principles, such as the Organization for Economic Cooperation and Development (OECD) guidelines, helped corporations to identify HR abuses and supported them in their initiatives. Furthermore, she emphasised the need for practical examples. These examples can be used to explain to asset owners how to change their practice or negotiate new contracts so as to respect HR in their business activities[103].

Thirdly, principles are not the ultimate goal. They are a **gateway** used to transform the principles into binding obligations. Indeed, the objective is to hold corporations and states accountable for their HR violations [104]. However, since imposing obligations is more complicated than voluntary measures, soft law is still better than nothing. I would like to outline two ways in which soft law is particularly efficient. Firstly, principles attest to bottom-up governance[105]. Some corporations will adopt CSR rules, and some will comply with them. The more corporations do so, the more others will be pressured to follow the same rule. This will allow – with time – to create a standard of conduct. The more corporations abide by those standards, the closer it will become general practice. It might be a bit hopeful for the moment, but constant State practice paired with the feeling of complying with a rule allows to create custom, which is a legally binding source of international law[106]. Furthermore, a State might choose to contract with responsible corporations instead of one with the reputation of breaching HR[107]. Secondly, soft law principles can also create expectations for States. If a corporation has a CSR policy, a State can have legitimate expectations that the company will

[100] Y. Castillo, *op. cit.*, p. 58.
[101] B. Choudhury, Balancing Soft and Hard Law for Business and Human Rights, *op. cit.*, p. 963.
[102] The organisation is now recognised as the world's leading governance organisation, representing investors who manage just over 70 trillion in US dollars and coming from over 45 different countries.
[103] T. Belsom & K. Warring, *Incorporating human rights and climate into investment mandates*, The PRI Podcast, 11 July 2022, (30.10.2022), available at: https://www.unpri.org/the-pri-podcast/incorporating-human-rights-and-climate-into-investment-mandates/10233.article.
[104] B. Choudhury, Balancing Soft and Hard Law for Business and Human Rights, *op. cit.*, pp. 970, 974.
[105] *Ibid.*, p. 972.
[106] G. Adinolfi, *op. cit.*, pp. 89-90.
[107] L. Amis, *A Guide for Business – How to Develop a Human Rights Policy*, UN Global Compact, 2nd ed., 2015, p. 5.

abide by them[108]. Therefore, based on the principle of *bona fide*, when a corporation fills a claim in front of an investment tribunal, the State could *try* to defend itself by saying that such behaviour was expected of the corporation[109]. Therefore, if the investor is of bad faith, it should not be granted the protection of the BIT[110].

b) United nations guiding principles on business and human rights

"In 2011, the UNHRC unanimously endorsed the UNGP, a set of guidelines for States and companies to prevent and address human rights abuses committed in business operations"[111]. Since the UNGP were built by John Ruggie and not by United Nations (UN) members, it was the 1st time that a UN body endorsed a text not negotiated by the parties[112]. This consensus was reached thanks to Ruggie consulting shareholders, much diplomacy to disperse discord, and the deliberate choice to create a soft law instrument[113]. The UNGP are built on 3 pillars: 1) the State duty to protect HR, 2) the fact that corporations must respect HR when operating, and 3) the victim's access to justice and reparation when its rights were breached[114]. When adopted, it was clear that the UNGP were only the **starting point** of addressing HR issues in business and were not meant to solve them. Indeed, they ended up being the foundation to shape nowadays frameworks and policies[115]. For example, many corporations based their CSR policy on the UNGP[116]. On a side note, I would like to note that the UNGP were not the beginning of voluntary social responsibility toward HR. Indeed, at the end of the 1990s, some corporations were already pondering on the best way to conduct their business while respecting HR[117]. However, as Peter Muchlinski explains, the UNGP marked the beginning of **institutionalized voluntarism**:

> The UNGPs seek to affect the decision-making system of the firm and establish certain expectations on states, to further corporate human rights observance. As such, 'institutionalized voluntarism' is a compromise between greater procedural commitments to control human rights risks in business operations, possibly reinforced by national legal obligations, but stopping short of full international legal liability for human rights abuses[118].

I will briefly lay out the content of some provisions of the UNGP. The first part of the UNGP concerns the **state's duty to protect HR.** To summarize, under IIL, States have obligations toward their investors. At the same time, they must fulfil their IHRL obligations[119]. Since these obligations are not mutually exclusive, states should take the necessary measures – such as

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[108] United Nations, *The Corporate Responsibility to Respect Human Rights – An Interpretative Guide*, HR/PUB/12/02, 2012, p. 27 (cited: Interpretative Guide).
[109] *Urbaser S.A. and Consorcio de Aguas Bilbao Biskaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic*, ICSID Case No. ARB/07/26, Award, 8 December 2016, para. 1195 (cited : Urbaser).
[110] *Phoenix Action Ltd v. Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, para. 106-108 (cited: *Phoenix Action Ltd v. Czech Republic).*
[111] United Nations Human Rights, *The UN Guiding Principles on Business and Human Rights – An Introduction*, 2011, p. 2.
[112] J. Ruggie & T. Nelson, *Human Rights and the OECD Guidelines for Multinational Enterprises: Normative Innovations and Implementation Challenges*, Corporate Social Responsibility Initiative Working Paper No. 66, Cambridge, Harvard University, 2015, p.5.
[113] S. Brabant & A. Crockett, In Memoriam John G. Ruggie (1944-2021), *ICC Dispute Resolution Bulletin*, No. 3, 2021, p. 9.
[114] United Nations, *Guiding Principles on Business and Human Rights,* HR/PUB/11/04, 2012, p. 1.
[115] B. Reinboth & S. Deva & J. Morrison, *Spotlight on human rights: Taking stock of what's next for business and human rights*, The PRI Podcast, 6 December 2021, (30.10.2022), available at: https://www.unpri.org/the-pri-podcast/spotlight-on-human-rights-taking-stock-of-whats-next-for-business-and-human-rights/9131.article.
[116] S. Brabant & A. Crockett, *op. cit.*, p. 9.
[117] P. Muchlinski, The Impact of the UN Guiding Principles on Business Attitudes to Observing Human Rights, *Business and Human Rights Journal,* Vol. 6, No. 2, 2021, p. 215.
[118] *Ibid.*, p. 219.
[119] Article 1, UNGP.

introducing new laws and regulations– to fulfil their IHRL obligations[120]. It is important to note, that there is not *one* solution to obtain such a result[121]. For instance, states could produce instruments helping corporations to assess their own HR violations[122]; they could also promote soft law mechanisms or even introduce new laws[123]. Moreover, corporations *domiciled* in the home State territory shall respect HR extraterritorially[124]. In other words, states should take measures to prevent corporations bearing their nationality from breaching HR while operating abroad. In my view, this could include a state's jurisdiction to rule on the HR violations committed abroad by a company domiciled on their territory[125]. Finally, as already mentioned, State should conserve the necessary regulatory space to exercise their right to regulate appropriately[126]. Since most new BIT contain a similar provision, I believe there has already been tremendous progress with this regard. The next step would be to renegotiate the "outdated" ones[127]. The last chapter of this paper is dedicated to the presentation of some ways states can use to fulfil the UNGP goals better[128].

The second part of the UNGP concerns the **corporate responsibility to respect HR**[129]. The UNGP commentary explains that "the responsibility to respect human rights is a global standard of expected conduct for all business enterprises wherever they operate" [130]. Furthermore, respecting HR is like 2 faces of the same coin. On one side, businesses have the negative obligation not to breach HR in their operations[131]. On the other side, they have the positive obligation to "prevent or mitigate adverse HR impacts […] directly linked to their operations"[132]. Article 12, as well as the interpretative guide to UNGP, also clarifies what is meant by *Business Human Right* (BHR). Indeed, the definition of HR can change from one State to another. Therefore, it was important to agree that the HR included in the principles were, at the minimum, the **internationally recognized** ones[133]. The Principle for Responsible Investment (PRI) established this comprehensive figure:

| | **International Bill of Human Rights** (comprising the Universal Declaration of Human Rights; the International Covenant on Economic, Social and Cultural Rights; the International Covenant on Civil and Political Rights and its two Optional Protocols) | **International Labour Organization's Declaration on Fundamental Principles and Rights at Work and the eight core conventions** |
|---|---|---|
| EXAMPLES | ▪ Right to non-discrimination<br>▪ Right to health<br>▪ Right to an adequate standard of living<br>▪ Right to freedom of expression<br>▪ Right to privacy<br>▪ Right to a living wage | ▪ Freedom from forced labour<br>▪ Freedom from child labour<br>▪ Freedom from discrimination at work<br>▪ reedom to form and join a union, and to bargain collectively |

*Source: B. Reinboth & N. Halkjaer Pederson, Why and How Investors Should Investors Act on Human Rights, Principle for Responsible Investment, 2020, p. 7.*

[120] Article 1, UNGP.
[121] Article 3, UNGP.
[122] For example, article 964a ff. of the Swiss Code des Obligations state than corporations shall produce an annual report on non-financial issues including HR concerns.
[123] For example, the UK Modern Slavery Act (2015) requires companies to publish a statement establishing which steps they have taken to ensure that slavery or human trafficking do not occur within their company or supply chain.
[124] Article 2, UNGP.
[125] For example, in Nevsun Resources Ltd. v. Araya, 2020 SCC 5, the Supreme Court of Canada dismissed a motion to strike a proceeding started against Nevsun Resources Ltd. for actions that took place in Eritrea, opening the door for litigation in Canada to hold corporations civilly liable for breaches of IHRL.
[126] Article 9, UNGP.
[127] *Infra,* IV A, Renegotiating bilateral investment treaties, pp. 27 ff.
[128] *Infra,* IV B, Mandatory human rights due diligence, pp. 43 ff.
[129] Article 11, UNGP.
[130] United Nations, *Guiding Principles on Business and Human Rights*, *op. cit.,* p. 13.
[131] Article 13 (a), UNGP.
[132] Article 13 (b), UNGP.
[133] *Interpretative Guide*, pp. 9-10 ; Article 12, UNGP.

An important innovation of those principles is their **scope of application**[134]. Usually, HR obligations only apply to States. However, the UNGP clearly state that they also apply to corporations[135]. In addition, in 2013, the Office of the High Commissioner for Human Rights confirmed that the UNGP applied to corporations *as well as* – to some extent at least – their **chain of supply**[136]. In other words, if the Barbapapaland (developed country) company Hoody sells sweatshirts, the UNGP will also apply to their sub-contractor Couture who sews and assembles the sweatshirts in Barbabelleland (developing country). In some cases, we could even go one step further and apply the principles to their sub-sub-contractor Cotton in Barbamamaland (the least developed country), which furnishes the fabric to Couture. Since Hoody usually is a rich and strong company, they have more means to apply and respect the UNGP than their sub-contractors. Therefore, if we want to promote HR, it is important that their commitments also apply to their sub-contractors, who usually work in riskier areas concerning potential breaches of HR.

If a corporation wants to respect HR, it needs to have: 1) a public policy commitment stating how it will respect HR[137], followed by 2) a due diligence process, and 3) a functioning remedy system.

### 1) Public policy commitment

Usually, corporations elaborate their own **code of conduct**. Those codes allow other businesses or clients to know what constitutes the values of this business and which comportment can be reasonably expected from them[138]. The code of conduct provisions should also allow the company to identify and assess the impacts their business operations can have on HR[139]. In order to concretize these notions, I will look at Inditex's HR policy. This will also illustrate the direct impact the UNGP have on the drafting of a corporate code of conduct. To contextualize, Inditex is a Spain based company that owns many fashion brands – such as Zara or Stradivarius – and operates in more than 50 countries by employing approximately 1.5 million employees[140]. On 12 December 2016, Inditex introduced its Policy on Human Rights[141] as to complete its already existing Code of Conduct for Manufacturers and Suppliers[142].

*Article 3.1: Commitment*[143]

To meet the Agenda for Sustainable Development set by the United Nations, Inditex has assumed as its own the Sustainable Development Goals (SDGs). Moreover, the Group acknowledges that respect for Human Rights**, in the framework of** the United Nations Guiding Principles on Business and Human Rights,

From the beginning, we note that Inditex is committed to promote and respect the SDG and have a particular emphasis on HR *based on* the UNGP. Many other companies also introduced their own HR policy. Most of them based them on the UNGP[145]. Therefore, we can say that they are not only widely accepted by States, but also by corporations. This is

[134] Article 17, UNGP.
[135] B. Reinboth & N. Halkjaer Pederson, *Why and How Investors Should Act on Human Rights*, Principle for Responsible Investment, 2020, p.8.
[136] UNHCR, *Advice regarding the UNGPs and the financial sector*, Request from the Chair of the OECD Working Party on Responsible Business Conduct, 27 November 2013.
[137] Article 15 (a), UNGP ; Article 16, UNGP ; Interpretative Guide, p. 27.
[138] Interpretative Guide, p. 27.
[139] Interpretative Guide, p. 32.
[140] Inditex, *Supply Chain Programmes : Workers at the Centre,* (02.12.2022), available at: https://static.inditex.com/annual_report_2016/en/our-priorities/sustainable-management-of-the-supply-chain/supply-chain-programmes-workers-at-the-centre.php.
[141] Inditex, Policy on Human Rights, 12 December 2016 (cited: Inditex Policy on Human Rights).
[142] Inditex Code of Conduct for Manufacturers and Suppliers.
[143] Article 3.1, Inditex Policy on Human Rights.
[145] UN Working Group on Business and Human Rights, *Taking stock of investor implementation of the UN Guiding Principles on Business and Human Rights*, A/HRC/47/39/Add.2, Geneva, 2021, p. I.

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|---|---|
| is a key element for sustainable development. | already a huge step compared to the non-existence of HR in business a few years ago. |
| In this context, Inditex undertakes to play an active role in the promotion of Human Rights, and to work proactively to **respect** them. | General commitment to **respect** HR. This directly relates to art. 11 UNGP that is the foundation for corporate responsibility. |
| This commitment entails **preventing** or, *if appropriate*, **reducing** the negative consequences of its *own* proceedings on Human Rights. | Moreover, the commitment to **prevention** is general meanwhile, the one to **reduce** the impact only occurs *if appropriate*. I would like to note that art. 13 (a) UNGP do not include the *if appropriate*. Therefore, the scope of Inditex policy seems to be a bit narrower than the UNGP. It also allows the company some margin of appreciation instead of having a systematic commitment. |
| Likewise, it shall do its *utmost* to prevent or reduce the negative consequences on Human Rights directly related to the proceedings of *third parties* with whom the Group is engaged in a business relationship. | Concerning the scope of the policy [146], this commitment also applies to their supply chain. This follows the innovative approach set forth by art. 13 (b) UNGP. With a large group such as Inditex, the main issue in relation to HR will be their application in the supply chain. Therefore, it is a relief that this was not excluded from their policy. On a side note, as per the Cambridge dictionary, utmost is "used to emphasize how important or serious something is". Therefore, this commitment *seems* rather strong[147]. |
| *Article 3.2: Inditex's operating principles in respect of Human Rights[144]*<br><br>Through this Policy, Inditex implements its commitment towards respecting and promoting Human Rights, *as set forth in* the United Nations Guiding Principles on Business and Human Rights, and fostering them in the communities where it operates | Once again, Inditex policy directly refers to the UNGP. However, in article 3.2, they also elaborate which sources their policy is inspired by as well as toward which HR standards they are committed[148]. While they include the general internationally recognized HR (ILO and Bill of Rights, see figure 1), they also based their policy on the UNGP, OECD Guidelines, UN Global Compact and the UN SDG. Finally, a list of the HR whom Inditex might mainly impact was dressed. It includes non-labour HR, such as the right to health, freedom, or opinion. And, mostly, labour HR such as the rejection of childen or forced labour. |

In my view, a corporation's Human Rights Policy is comparable to a table of content at the beginning of a research paper. While it would be complicated to follow a paper without this structure, it does not determine the quality of the content. In my opinion, in the BHR context, the due diligence process set forth by the corporation and the remedies once breaches were discovered constitute the quality of the content.

### 2) Due diligence

Lucy Amis defines HR due diligence as "the ongoing process taken to identify, prevent and mitigate and account for negative human rights impacts which the company may cause or

[144] Article 3.2, Inditex Policy on Human Rights.
[146] L. Amis, *op. cit.,* p. 19.
[147] Cambridge Dictionary, *utmost*, (02.12.2022), available at: https://dictionary.cambridge.org/dictionary/english/utmost.
[148] L. Amis, *op. cit.,* p. 18.

contribute to through its own activities, or which may be directly linked to the company's products, operations or services by a business relationship."[149]. Therefore, corporations shall set out a straightforward due diligence process[150]. If properly conducted, the due diligence assessment should ***prevent*** the potential impact the conduct of business activities can have on HR[151]. For a better result, each assessment policy should be tailor-made for the corporation. To be effective, the UNGP suggest that the corporation makes its due diligence following these steps: 1) an impact assessment[152], 2) an action taking process based on the result of their impact assessment[153], 3) a responsive instrument and tracking of the performance[154], and 4) the communication on the assessment of impacts[155].

I will continue with my Inditex example. However, rather than looking at a text, I will base my analysis on actions they made to comply with due diligence commitment. In their 2021 Annual Report on HR, they stated that the UNGP were the solution to all problems arising with BHR[156]. Therefore, we can follow the different steps preconised by the principles to observe what a real due diligence policy looks like. Concerning the impact assessment, there is not *one* correct way to do it. For instance, an evaluation can be done previously to the implementation of a new factory in an area with specific risks regarding the local population or before contracting with a new supplier[157]. In other words, the impact assessment obligation is a continuous one[158]. It means that new surveys should be done over time, and the policy is bound to change. Inditex conducted its latest impact assessment in 2018. It was done by Shif,t who is an expert in the field[159]. The assessment found **7 areas that were riskier** and should be prioritized. Each area further emphasized which HR was linked to the danger. For example, forced labour is hazardous for migrant workers and the treatment of raw materials[160]. The result of this assessment was the creation of the program "Worker at the Center 2019-2022", after whose conclusion they will update their due diligence policy[161]. Concretely, **46 projects** touching 1,366,420 workers were implemented. Some of these projects focus on assuring a living wage, protecting migrant workers, or gender inclusion[162]. These programs are the integration of HR through the functioning of the company[163]. Per the UNGP, the concrete actions undertaken depend on what is *appropriate*. The bigger the company, the longer the supply chain is, and the more complicated it is to integrate those policies[164]. While this initiative is relatively new, other programs – with the similar goal of integrating HR – occur at different levels of Inditex. For example, they raise awareness by **training** their suppliers and managers on HR,[165] or they install an Ethics and Sustainable Committees directly reporting to the Board of Directors[166]. Concerning their tracking commitment, they installed the **Grievances Mechanisms.** In a few words, they collaborate with international partners such as the International Labour Organization (ILO) or with the representatives of the groups that can be directly affected[167].

[149] L. Amis, *op. cit.*, p. 30.
[150] Article 15 (b), UNGP ; Article 17, UNGP.
[151] Interpretative Guide, p. 34.
[152] Article 18, UNGP.
[153] Article 19, UNGP.
[154] Article 20, UNGP.
[155] Article 21, UNGP.
[156] Inditex, Human Right, 2021, p. 6.
[157] L. Amis, *op. cit.*, p. 31.
[158] Interpretative Guide, p. 37.
[159] Inditex, Human Right, 2021, p. 17.
[160] Inditex, Annual Report, 2021, p. 194.
[161] Inditex, Annual Report, 2021, p. 223.
[162] Inditex, Annual Report, 2021, pp. 226-227.
[163] L. Amis, *op. cit.,* p. 31.
[164] *Ibid*., p. 31.
[165] Inditex, Human Right, 2021, p. 14.
[166] Inditex, Human Right, 2021, p. 11.
[167] Inditex, Human Right, 2021, p. 22.

Furthermore, a **Whistle Blowing Channel** exists where it is possible to make complaints that will be addressed by the Committee of Ethics[168]. Finally, given the length and details contained in the **reports** the group establishes each year, I do not think there is any issue concerning the communication. Finally, I would like to note that Inditex, on 2 September 2020 joined 25 other companies asking for a European Union (EU) *mandatory* HR & environmental due diligence[169].

On the contrary, an investigation conducted by Public Eyes in 2019[170] suggests a lack of transparency in the supply chain. The investigation follows the fabrication of a sweatshirt commercialized by Zara – a fashion brand belonging to Inditex. They mostly denounce the poor working conditions, such as the terrible night shifts or wages below the vital minimum. They submitted the report to Inditex before publishing it but received no response. Therefore, one can wonder if the due diligence policy is only a **paper report** or a real commitment.

### 3) Remedies

Finally, even if the company has the best policy and intention possible, it can still violate HR[171]. Therefore, they should also enforce a system for remedies[172]. The UNGP do not preconise the means for providing remedies; they only set forth the principle. For example, corporations could cooperate with local institutions or ask for help from the National Contact Point provided by the OCDE guidelines[173]. However, the obligation for remedies only applies when the **company *itself* recognizes** that it violated HR during the conduct of its activities[174]. *A contrario,* except if they are deemed responsible by a Court or tribunal, they cannot be held accountable if they refute the accusations[175]. Therefore, as long as they deny the HR allegations, they will not have to provide any remedies. By doing so, they still act according to their policies.

On 1 March 2020, the Australian Strategic Policy Institute published a report concluding that 82 companies operating in the region of Xinjiang were benefiting from forced labour[176]. To make it simple, this report followed the controversy of Uyghurs' displacement and internment camps by China in the Xinjiang region[177]. Inditex was part of those companies. In a 27 pages long statement, Inditex answered by saying that they do "not tolerate any form of modern slavery or human trafficking in its organization or in its supply chain"[178]. In the pages following their statement, they explain their due diligence policy as well as their HR commitments. I believe that the UNGP's remedy pillar is its **weakest** link. Businesses may be willing to prevent HR violations voluntarily, but they are far less willing to offer reparation once a violation was found. Most companies will likely change their due diligence policy to improve it for the future but admitting past HR violations is another story. If they do so publicly, they may face media criticism; they may be required to pay compensation; and it will be easier to open a criminal investigation against them. As a result, we can comprehend the business decision to bury the

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[168] Article 3.7, Inditex Policy on Human Rights.
[169] Business & Human Rights Resource Centre, *26 companies, business associations, and initiatives make joint call for EU mandatory human rights & environmental due diligence*, 2 September 2020, (03.12.2022), available at: https://www.business-humanrights.org/en/latest-news/eu-mandatory-due-diligence/.
[170] T. Kollbrunner, *Sur les traces d'un pull emblématique de Zara,* Public Eye – Le Magazine, N. 20, 2019, pp. 4-17.
[171] Interpretative Guide, p. 63.
[172] Article 22, UNGP.
[173] Interpretative Guide, p. 64.
[174] Interpretative Guide, p. 65.
[175] Interpretative Guide, pp. 66-67.
[176] V. Xiuzhong Xu, *Policy Brief: Uyghurs for sale – "Re-education, forced labour and surveillance beyond Xinjiang,* The Australian Strategic Policy Institute, No. 26, 1 March 2020*,* (11.01.2023) available at: https://www.aspi.org.au/report/uyghurs-sale.
[177] M. Yerramilli de Rege, *Zara and the Uyghur Crisis: Is there Forced Labour in Inditex's Supply Chains?*, 10 January 2022, (03.12.2022), available at : https://gflc.ca/zara-and-the-uyghur-crisis-is-there-forced-labour-in-inditexs-supply-chains/.
[178] Inditex Group, Modern Slavery, Human Trafficking and Transparency in Supply Chain, Statement 2020.

problem, especially since they will not face legal consequences for breaching their commitments.

June 2021 marked the 10th anniversary of the UNGP. For this occasion, the UN Working Group on Business and HR published a report on the development and enforcement of the UNGP. Three significant **positive impacts** were noted. First, the efforts of responsible investors as well as institutions were highlighted[179]. For example, the UE committed to introduce rules for *mandatory due diligence* toward HR[180]. Likewise, an increase of code of conduct[181] among investors as well as other soft law instruments was noted. Second, the UNGP influenced the creation of other soft law instruments, such as the OCDE Guidelines, who added a chapter on HR right after the issuance of the UNGP[182]. Another example is the PRI, an investor network that promotes sustainable business, which developed its own standards based on the OCDE Guidelines and the UNGP[183]. Third, at the beginning of 2022, more than 100 companies signed a request for a UE *effective* corporate *accountability* law[184].

However, **the lack of responsibility and accountability** for investors toward HR remains concerning[185]. This could be explained by the fact that CSR codes and measures are voluntary and non-enforceable. In other words, if corporations do not respect HR included their own code of conduct, the State cannot hold them accountable[186]. Therefore, symbolic compliance[187] with the UNGP by establishing a code of conduct and HR policy should be publicly called out. For example, while FIFA makes significant efforts toward HR commitments[188] and due diligence regulations[189], remedies, particularly compensation[190], remain more problematic. The mandatory due diligence framework may help narrow the gap, but I believe we should also look for methods to impose binding responsibilities in BIT or state legislation.

To summarize, soft law is important to protect HR. Some States and companies really want to protect HR but they do not possess the necessary means and methods in autarchy. Therefore, soft law initiatives can help them by providing examples, instruments and recommendations that will allow them to design their best tailor-made policy. However, others will use this system in order to promote their reputation by creating beautiful brochures filled with empty promises. Those cases are often discovered by private investigations, but the perpetrators usually refuse to answer the allegations. In order to better promote HR without killing the soft law network, I trust that some commitments – the widely accepted ones – should become binding on both

[179] UN Working Group on Business and Human Rights*, op. cit.*, 2021, p. I.
[180] Business & Human Rights Resource Centre, *Towards an EU mandatory due diligence & corporate accountability law*, 29 April 2020, (05.12.2022), available at: https://www.business-humanrights.org/en/latest-news/eu-commissioner-for-justice-commits-to-legislation-on-mandatory-due-diligence-for-companies/.
[181] UN Working Group on Business and Human Rights*, op. cit.*, 2021, p. I.
[182] B. Reinboth & N. Halkjaer Pederson, *op. cit.*, p. 10.
[183] *Ibid.*, pp. 2-6.
[184] Business & Human Rights Resource Centre, *More than 100 companies and investors call for effective EU corporate accountability legislation,* 8 February 2022, (05.12.2022), available at: https://www.business-humanrights.org/en/latest-news/eu-mandatory-due-diligence-2022/.
[185] UN Working Group on Business and Human Rights*, op. cit.*, p. I.
[186] Y. Castillo, *op. cit.,* p. 58.
[187] B. Choudhury, Balancing Soft and Hard Law for Business and Human Rights, *op. cit.*, p. 975.
[188] For example, HR were a factor considered during the bidding for the 2026 FIFA Wold Cup. Statement available at (05.12.2022) : https://www.fifa.com/social-impact/human-rights/news/human-rights-key-focus-for-fifa-world-cup-2026-tm.
[189] For example, extensive HR assessment made by Shift and John Ruggie in order to improve their HR policies. See report at (05.12.2022): https://shiftproject.org/resource/for-the-game-for-the-world-fifa-and-human-rights/.
[190] Amnesty International, *Qatar: Infantino must tackle human rights issues if world is to 'focus on the football',* 4 November 2022, (05.12.2022), available at : https://www.amnesty.org/en/latest/news/2022/11/qatar-infantino-must-tackle-human-rights-issues-if-world-is-to-focus-on-the-football/ ; R. Harris, *'Let's focus on the football!' - FIFA bosses tell World Cup teams not to lecture on morality,* 4 November 2022, (05.12.2022), available at: https://news.sky.com/story/lets-focus-on-the-football-fifa-bosses-tell-world-cup-teams-not-to-lecture-on-morality-12737705.

States and investors while others should remain voluntary and keep being promoted until they become a global expectation. However, mostly due to the very nature of soft law, this proposition is not without controversy.

## III. The role of investment tribunals

While investment tribunals have been part of the ISDS system since the birth of BIT, their role – if they are willing to accept it – might become considerable to hold investors accountable for HR breaches conducted under the scope of BIT. To illustrate this possibility, I will begin by exposing the transition arbitrators have seen occurring concerning HR. Then, I will continue by disclosing some challenges they must overcome if they want to take part in the promotion of HR. However, while an increase of participation from tribunals might be seen favourably by some, it certainly does not make the unanimity. Therefore, I will try to give justice to different points of views and depict how the participation of tribunals concerning HR obligations for investors still is a burning controversy.

Usually, investment tribunals are reluctant to examine HR arguments that they classify as different cases than those concerning IIL[191]. This is due to the fragmentation of public international law among various domains such as IIL or IHRL[192]. However, nowadays, HR are **penetrating** many investment disputes. For starters, investors began to dispute laws enacted by the host country to protect HR-related concerns[193]. Second, HR derived consideration appears in certain tribunals' reasoning. For example, a tribunal may reduce the amount of compensation owing to expropriation during the assessment of proportionality, which includes public values.[194]. Furthermore, while this phenomenon is far from the majority, more arbitrators are inclined to open the door for HR through the "clean hands" doctrine[195]. Therefore, this development leads to two observations. On the one hand, IIL and IHRL cannot be wholly separated[196]. On the other hand, they are not mutually exclusive and must, thus, be reconciled[197]. As a result, for both bodies of law to be respected[198], the **interpretation** of treaties is determining. As this is generally the tribunals' task, we should explore the role of investment tribunal in the promotion of HR.

In a preliminary remark, I would like to highlight the elephant in the room. States have the obligation to protect HR. HR treaties and provisions are only binding on them[199]. In parallel, **corporations cannot directly violate HR** treaties since they were not made with the purpose of applying to them. Since the State is responsible for ensuring the respect of HR, *they* should take the necessary measures so that corporations do not breach them[200]. That is the theory. In reality, corporations do violate HR,[201] but the State is not always capable or willing to address these violations[202]. In addition, the substantial problem regarding IIL is that there is no

[191] R. Polanco Lazo & R. Mella, Investment arbitration and human rights cases in Latin America *in* Y. Radi (ed.), *Research Handbook on Human Rights and Investment*, Edward Elgar, Cheltenham, 2018, p. 89.
[192] *Ibid.*, p. 89.
[193] R. Y. Gao, The Role of Public International Law in Integrating Human Rights Considerations in Investment Treaty Arbitration, *Asian Journal of WTO and International Health Law*, Vol. 16, No. 2, 2021, p. 280.
[194] D. Collins, *op. cit.*, p. 280.
[195] O. De Schutter, The host state: improving the monitoring of international investments agreements at the national level *in* O. De Schutter & J. Swinnen & J. Wouters (eds.), *Foreign Direct Investment and Human Development*, Routledge, Abingdon, 2013, p. 177 (cited: O. De Schutter, The host state).
[196] B. Choudhury, Investor Obligations for Human Rights*, op. cit.,* p. 86.
[197] R. Polanco Lazo & R. Mella, *op. cit.*, pp. 91-92.
[198] B. Choudhury, Investor Obligations for Human Rights*, op. cit.*, p. 87.
[199] U. Kriebaum, *The State's Duty to Protect Human Rights – Investment and Human Rights*, *op. cit.,* p. 1.
[200] B. Choudhury, Investor Obligations for Human Rights*, op. cit.*, p. 85.
[201] R. Y. Gao, *op. cit.*, p. 281.
[202] U. Kriebaum, *The State's Duty to Protect Human Rights – Investment and Human Rights*, *op. cit.,* p. 2.

binding *international* instrument for investments[203]. Therefore, no binding responsibility for corporations to respect HR is internationally recognized[204]. However, as discussed in this chapter, this does not prevent tribunals from considering them.

As already elaborated, most BIT do not contain any HR provisions[205] making it difficult for parties to file a claim for their breach[206]. Following the wording of most BIT, investment disputes can only be examined by a tribunal if they are directly linked to the investment at the exclusion of other conflicts between the parties, such as HR[207]. However, human rights **counterclaims** might be the new mean to make investors accountable for their HR violations on the territory of the host State[208]. This will be examined by following the reasoning of the Urbaser award[209]. This award is particularly important in the field of HR and IIL as it was the first investment tribunal "to accept its jurisdiction to hear a host State's counterclaims on alleged violations of international standards of human rights by a foreign investor"[210].

This dispute is based on the Spain-Argentina BIT[211]. While the wording of some provisions of this BIT will be further analysed in the award, I would like to note some generalities concerning the normative framework of the case. Firstly, this BIT was concluded in 1991, therefore, way before States even considered the SDG. As a result, the only purpose of the preamble is the protection of investments[212]. Secondly, the typical clauses for investment protection are present, namely: Fair and Equitable Treatment (FET)[213], Most Favoured Nation[214], and National Treatment without reference to like circumstances[215]. Thirdly, expropriation – which also includes indirect expropriation – is only possible for public utility and on the condition that compensation is paid[216]. On the contrary, what is non-existent are progressive clauses. For instance, there is no provision preserving the right of the State to regulate, no general policy exception, no corporate social responsibility, no interdiction of lowering the standards… Finally, in the whole treaty, there is not a single reference to either public health, environment, or HR. To sum up, while the tribunal still manages to find a cave out to justify the application of some HR bodies, **this treaty is nothing close to progressive**. However, the award rendered upon this treaty is. Therefore, we can ask ourselves – if we agree with the reasoning of the tribunal – whether others could not also accept HR claims and obligations based on old BIT.

Since I will use the Urbaser case to exemplify to which extent HR norms can be relevant in investment disputes, it is important to summarize the factual background of the dispute quickly.

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[203] R. Y. Gao, *op. cit.*, p. 281.
[204] P. Cortés Gonzáles, *Human Rights Counterclaims*, Jus Mundi, 9 June 2022, N 7, (07.12.2022), available at: https://jusmundi.com/en/document/publication/en-human-rights-counterclaims.
[205] *Supra*, II A a, Historical development, p. 4.
[206] E. Ruggeri Abonnat, *Counterclaims*, Jus Mundi, 26 August 2022, N 3, (07.12.2022), available at: https://jusmundi.com/en/document/publication/en-counterclaims.
[207] E. De Brabandere, *Human Rights Counterclaims in Investment Treaty Arbitration*, 25 October 2018, (07.12.2022), available at : https://oxia.ouplaw.com/page/723.
[208] P. Cortés Gonzáles, *op. cit.*, N 1.
[209] *Urbaser S.A. and Consorcio de Aguas Bilbao Biskaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic*, ICSID Case No. ARB/07/26, Award, 8 December 2016 (cited : Urbaser).
[210] A. Kozyakova, *Foreign investor misconduct in international investment law*, Springer, Cham, 2021, p. 161.
[211] Acuerdo para la promocion y la proteccion reciproca de inversiones entre el Reino de España y la Republica Argentina, 3 October 1991, (Spain-Argentina BIT).
[212] Preamble, Spain-Argentina BIT (1991) : Wishing to intensify economic cooperation for the economic benefit of both countries, By seeking to create favourable conditions for investments made by investors of each party in the territory of the other, and Recognising that the promotion and protection of investment under this Agreement encourages initiatives in this field, translated form Spanish.
[213] Article IV para. 1, Spain-Argentina BIT (1991).
[214] Article IV para. 2, Spain-Argentina BIT (1991) ; Article VII, Spain-Argentina BIT (1991).
[215] Article IV para. 5, Spain-Argentina BIT (1991).
[216] Article V, Spain-Argentina BIT (1991).

In 2000, a Spanish investor won a 30 years water concession contract[217]. The contract was won upon the promise of investing a certain sum into local water service as well as wastewater management. Furthermore, the parties agreed on a fixed tariff for providing the population with water[218]. Around 2001-2002, Argentina suffered from a severe economic crisis[219]. So as to help the people, Argentina decided to devalue their peso as well as lower the tariff – previously agreed with the Spanish company – for water[220]. Moreover, the Spanish investor did not invest the promised amount[221]. All these issues led to the unilateral termination of the concession contract by Argentina in 2006, which gave it to a local company[222]. The Spanish investor filed a claim in ICSID for breach of contract concerning the FET clause, non-impairment, and expropriation[223]. Argentina filed a counterclaim saying that the investor violated their obligation of investment under the BIT and the internationally recognized **HR to water under IHRL**[224].

### 1) Jurisdiction over a human right-based counterclaim

The first issue a tribunal must resolve – before assessing the merits of HR – is whether it has **jurisdiction** over the claim or not. As for all ISDS disputes, for a tribunal to have jurisdiction over a matter, the consent to submit this issue to arbitration must be given. The investor's expression of consent can usually be found in the BIT. Therefore, the **broadest** an arbitration clause is the more issues – including HR related ones – a tribunal can accept under its jurisdiction[225]. To put it differently, even if a tribunal is willing to consider HR in its reasoning, the BIT must be written broadly enough or directly include the possibility of submitting an arbitration claim for a public interest dispute[226].

Canada-Uruguay BIT[227]
Any dispute between one Contracting Party and an investor of the other Contracting Party*, relating to a claim by the investor that a measure taken or not taken by the former Contracting Party* is in breach this Agreement *and that the investor has incurred loss or damage* by reason of, or arising out of, that breach […]

[228]Spain-Argentina BIT
Disputes arising between a Party and an investor of the other Party *in connection with investments* within the meaning of this Agreement […]

In my view, the first BIT would only give the tribunal jurisdiction to rule over a dispute that meets the condition of damage for the investor only and fault from the State only. Therefore, the investor's breaches of HR would not be covered by the tribunal jurisdiction. On the contrary, the second BIT would allow any dispute as long as it is connected to the investment. Therefore, if the HR claim – or counterclaim – is related to the investment, the tribunal would have jurisdiction. This distinction was developed in the Urbaser award – based on the Spain-Argentina BIT – when the tribunal declared that any party to the dispute could submit a request

[217] Urbaser, para. 34.
[218] A. Kozyakova*, op. cit.*, p. 161.
[219] Urbaser, para. 34.
[220] J. Hepburn, *Analysis: arbitrators in Urbaser v. Argentina water dispute deviate from prior Impregilo award on necessity and damages*, Investment arbitration reporter, 12 January 2017, (06.12.2022), available at : https://www.iareporter.com/articles/analysis-arbitrators-in-urbaser-v-argentina-water-dispute-deviate-from-prior-impregilo-award-on-necessity-and-damages/.
[221] A. Kozyakova*, op. cit.*, p. 161.
[222] Urbaser, para. 34 ; A. Kozyakova*, op. cit.*, p. 161.
[223] Urbaser, para. 35 ; N. Briercliffe, *Holding investors to account for human rights violations through counterclaims in investment treaty arbitration,* Allen & Overy LPP, 31 January 2017, (07.12.2022), available at: https://www.jdsupra.com/legalnews/holding-investors-to-account-for-human-59713/.
[224] Urbaser, para. 36 ; A. Kozyakova*, op. cit.*, p. 162.
[225] U. Kriebaum, Human rights and international investment law, *op. cit.* , p. 14 ; P. Cortés Gonzáles, *op. cit.*, N 6 ; U. Kriebaum, *The State's Duty to Protect Human Rights – Investment and Human Rights*, *op. cit.,* p. 4.
[226] R. Y. Gao, *op. cit.*, p. 313.
[227] Article XXII (1), Canada-Uruguay BIT (1997).
[228] Article X (1), Spain-Argentina BIT (1991), translated from Spanish.

if it was related to the investment[229]. Even though the asymmetrical relationship between the parties was outlined – obligation for the State and rights for the investor – the tribunal considered that this arbitration clause was broad enough to accept **claims from the State**[230]. It also noted that, contradictory to other treaties, since this provision **did not limit the scope of the dispute** arising between the parties, HR could also be considered as long as the breach was related to the investment[231].

Furthermore, for a counterclaim to be accepted, it must be connected to the claim. The tribunal declared that the ***factual* link** between the claim and counterclaim was "manifest" as they "are based on the same investment"[232]. Legal scholars pointed out that, in opposition to the Saluka v. Czech Republic[233] case, the Urbaser tribunal did not even consider whether a legal link was given[234].

Thanks to the broad wording of the BIT and the interpretation of the tribunal, it was the first time an investment tribunal accepted a counterclaim based on the violation of a human right[235], namely the right to water.

### 2) International human rights law as the applicable law

Since the Spain-Argentina BIT does not vest any obligations on the investor – not even an SGD goal in the preamble – and does not provide the observance of Argentina's domestic law[236], the investor objected that it did not have any obligation[237]. The tribunal agrees that the relation is asymmetrical and that the primary focus of the BIT is the protection of investments. However, it does not mean that the protection of investment excludes any rights from the host State[238]. Therefore, to know whether the investor may have some obligations even if it is not expressly stated in the BIT, we must resolve the preliminary question of knowing whether the BIT should be read *only* according to IIL or be interpreted with regard **to other sources such as international public law or IHRL**[239]. Therefore, the tribunal reasoned *a contrario*. However, since the BIT did not exclude[240] the possibility of invoking other sources, the tribunal accepted them[241]. To put it in another way, it allowed the State to invoke rights setting obligations on the investors based on more extensive sources than the BIT.

BIT are non-exhaustive in their provisions. Thus, they need to be interpreted and given structure. Some BIT expressly state which bodies of law, such as domestic or public international law, are to be applied. Others are silent[242]. Moreover, article 31.3 (c) of the Vienna

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[229] Urbaser, para. 1143.
[230] *Ibid.,* para. 1143.
[231] *Ibid.*, para. 1147.
[232] *Ibid.*, para. 1151.
[233] *Saluka Investment B. V. v. The Czech Republic*, UNCITRAL, Decision on Jurisdiction over the Czech Republic's Counterclaim, 7 May 2004, para. 76.
[234] A. Kozyakova*, op. cit.*, p. 162 ; E. Guntrip, *Urbaser v Argentina: The Origins of a Host State Human Rights Counterclaim in ICSID Arbitration?,* EJIL:Talk!, 10 February 2017, (07.12.2022), available at: https://www.ejiltalk.org/urbaser-v-argentina-the-origins-of-a-host-state-human-rights-counterclaim-in-icsid-arbitration/.
[235] A. Kozyakova*, op. cit*., p. 162.
[236] J. Hepburn, *In a first, BIT tribunal finds that it has jurisdiction to hear a host state's counterclaim related to investor's alleged violation of international human rights obligations,* Investment arbitration reporter, 12 January 2017, (07.12.2022), available at: https://www.iareporter.com/articles/in-a-first-bit-tribunal-finds-that-it-has-jurisdiction-to-hear-a-host-states-counterclaim-related-to-investors-alleged-violation-of-international-human-rights-obligations/ (cited: J. Hepburn, *BIT tribunal finds that it has jurisdiction*).
[237] Urbaser, para. 1182.
[238] *Ibid.*, para. 1183.
[239] *Ibid.*, para. 1186.
[240] Article X (1), Spain-Argentina BIT (1991), *a contrario*.
[241] Urbaser, para. 1187.
[242] L. E. Peterson & K. R. Gray*, op. cit.*, p. 10.

Convention on the Law of Treaties provides that "any relevant rules of international law applicable in the relations between the parties" shall be taken into account when interpreting a treaty[243]. Part of the doctrine and case law follow the idea that BIT should always be interpreted with regard to international public law,[244] even when the BIT is silent[245]. They base their argument on the systemic interpretation preconised by the Vienna Convention[246] and on the role of tribunals in reducing fragmentation of the law when interpreting treaties' provisions[247]. Furthermore, they advance that arbitrators must enforce both IIL and IHRL and cannot leave one out[248]. This view is shared by, for instance, the Phoenix tribunal, which stated that BIT "cannot be read and interpreted in isolation from public international law, and its general principles. To take an extreme example, nobody would suggest that ICSID protection should be granted to investments made in violation of the most fundamental rules of protection of human rights, like investments made in pursuance of torture or genocide or in support of slavery or trafficking of human organs"[249]. This is particularly important as public international law includes IHRL[250].

Concerning the Urbaser case, article X (5) of the BIT provides that, when connected with the BIT[251], "general principles of international law" as well as "other treaties in force between the parties" may apply[252]. Therefore, this BIT must be interpreted in relation to legal sources outside of pure IIL[253] and must not be seen "as a closed system strictly preserving investors' rights"[254]. Later, the tribunal stated that the BIT must be interpreted harmoniously with international law, which includes IHRL[255] and noted the importance of *jus cogens* rules[256]. In this case, since the counterclaim is based on the right to water, the tribunal will examine the application of IHRL as substantial law to resolve the dispute.

While the idea that businesses should respect HR is a globally accepted expectation[257], this does neither define which rules can be considered as *general principles of public international law* nor which are *relevant*[258]. Ursula Kriebaum suggests those include: "in particular to the human rights treaties in force between the home and the host State of the investor. Otherwise, it must be established that a particular human right norm is customary international law"[259]. Going a step further, Patrick Abel argues that when public international law is open, the same mechanism should allow "directly applicable international human right obligations" to apply[260].

[243] Article 31.3 (c), Vienna Convention on the Law of Treaties.
[244] P. Cortés Gonzáles, *op. cit.*, N 4 ; E. Peterson*, op. cit.*, p. 22.
[245] R. Y. Gao, *op. cit.*, pp. 283-284.
[246] Article 31.3 (c), Vienna Convention on the Law of Treaties.
[247] C. Baltag & Y. Dautaj, *op. cit.*, pp. 24-25.
[248] *Ibid.*, p. 27.
[249] *Phoenix Action Ltd v. Czech Republic*, *op. cit.*, para. 78.
[250] L. E. Peterson & K. R. Gray*, op. cit.*, p. 10.
[251] Urbaser, para. 1188.
[252] Article X (5), Spain-Argentina BIT (1991).
[253] N. Briercliffe*, op. cit*.
[254] Urbaser, para. 1191.
[255] *Ibid.*, para. 1200.
[256] *Ibid.*, para. 1202.
[257] B. Choudhury, Investor Obligations for Human Rights*, op. cit.*, p. 84.
[258] E. Peterson*, op. cit.*, p. 22.
[259] U. Kriebaum, *The State's Duty to Protect Human Rights – Investment and Human Rights*, *op. cit.,* p. 5.
[260] P. Abel, Counterclaims Based on International Human Rights Obligations of Investors in International Investment Arbitration – Fallacies and Potentials of the 2016 ICSID Urbaser v. Argentina Award, *Brill Open Law*, No. 1, 2018, pp. 76-77.

### 3) Human rights obligations

Given that the Urbaser tribunal was the first one to accept its jurisdiction over a HR counterclaim, it was also the first one to examine the merits of an alleged violation of a HR, namely the right to water. I will first summarize the reasoning of the tribunal. Secondly, I will expose some legal scholars' reactions to this new development of the law. Thirdly, I will highlight the remaining problem that – even the most progressive - investment tribunal could not resolve. Finally, I will introduce possible solutions to hold investors accountable for their HR violations.

Preliminarily, the tribunal explains that while investors could not hold HR obligations in the past, this **changed**[261]. Therefore, it states that HR are not solely enforced by the State but also by private companies[262]. I think this switch in view is mostly due to the power that multinationals hold nowadays. Some authors argue that multinationals do not need protection anymore since they have become more powerful than some States[263]. As a first step, the tribunal refers to soft law principles[264]. It states that the company's HR commitment (code of conduct) and the UNGP help create a **standard of conduct** that can be *expected* from a country when a corporation operates on its territory. However, it recognizes that soft law is not sufficient to enforce obligations but that it will help *contextualize* them[265]. Therefore, "in light of this more recent development, it can no longer be admitted that companies operating internationally are immune from becoming subject of international law"[266]. As a second step, the tribunal turns toward HR treaties to search for specific obligations that shall also apply to corporations. After examining the Universal Declaration for Human Rights[267], the International Covenant on Economic, Social and Cultural Rights[268], and the International Labour Office Tripartite Declaration of Principles concerning Multilateral Enterprises and Social Policy[269], it concluded :"that 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"[270]. Therefore, the tribunal found a **direct obligation** of all parties, including investors and private institutions, **not to violate HR**[271]. In other words, for the first time, a tribunal stated that corporations had the negative obligation to abstain from violating HR.

However, if this conclusion helps the development of the law, it does not solve the State's counterclaim; namely that the investor violated the right of the population to water as it failed to make the promised investment. To answer this claim, the tribunal must determine whether the investor has a positive obligation to provide the right to water to the population[272]. It noted that the BIT did not include an obligation to provide water, only to make the investment[273]. Therefore, the obligation to provide water is only incumbent on the State[274]. If the State wanted

[261] Urbaser, para. 1194.
[262] *Ibid.*, para. 1193.
[263] R. Polanco Lazo & R. Mella, *op. cit.*, p. 85.
[264] *Supra,* II B, Soft law – Corporate code of conduct, pp. 9 ff.
[265] Urbaser, para. 1195.
[266] *Ibid*., para. 1195 ; D. Kabir & I. Glushchenko, *Human Rights in Investment Claims*, Jus Mundi, 11 June 2021, N 7, (19.01.2023), available at: https://jusmundi.com/en/document/publication/en-human-rights-in-investment-claims.
[267] *Ibid.*, para. 1196.
[268] *Ibid.*, para. 1197.
[269] *Ibid.*, para. 1198 ; E. Guntrip*, op. cit.*
[270] *Ibid.*, para. 1199.
[271] *Ibid.*, para. 1210 ; P. Abel, *op. cit.*, p. 62.
[272] *Ibid.*, para. 1206 ; Y. Castillo Meneses, Los Estados como demandantes en el arbitraje de inversión basado en tratados ? Comentario al laudo Urbaser vs. Argentina, *Anuario Mexicano de Derecho International*, Vol. XX, 2020, p. 454.
[273] *Ibid.*, para. 1207.
[274] *Ibid.*, para. 1208 ; J. Hepburn, *BIT tribunal finds that it has jurisdiction, op. cit.*

such an obligation on the investor, it should be provided either in the BIT or the Concession contract[275]. Furthermore, contrary to the no-harm principle, the obligation to provide water is **not a general principle of international law**[276]. Therefore, the counterclaim remained unsuccessful for Argentina but is a notable step for the promotion of HR in IIL.

Since this award was really innovative, many legal scholars shared their opinion on this new development of the law. On one side, they **agree** with the tribunal's conclusion that corporations are prohibited from breaching HR. For instance, this opinion seems to be shared by Banali Choudhury. While she notes that the level of consideration will differ from one tribunal to another depending on whether they accept the jurisdiction and how they consider the merits, she states that "reading in investor obligations for human rights into international investment law can begin immediately"[277]. In parallel, Anna Kozyakova believes this award is avant-gardist as it strikes the quest for a balance between investors' rights and obligations and looks forward to this award's contribution to the improvement of IIL[278]. Finally, the Urbaser award had a direct influence on subsequent cases. For example, in the Aven v. Costa Rica case, the tribunal stated that it "shares the views of *Urbaser* Tribunal that it can no longer be admitted that investors operating internationally are immune from becoming subjects of international law. It is particularly convincing when it comes to rights and obligations that are the concern of all States, as it happens in the protection of the environment"[279]. Therefore, this tribunal determined that the investor was obligated not to harm the environment.

On the other side, **criticisms** arose regarding the merits of the case. While accepting the tribunal's jurisdiction over the counterclaim and using international public law were relatively uncontroversial, such is not the case concerning the application of human rights treaties and soft law. First, the obligation to abstain from violating HR only applies to States, not investors. While human *rights* are directly applicable, this is not the case – except for *jus cogens* rules – regarding human rights *obligations*[280]. If we wanted to have directly applicable obligations to investors, we would need either a universally binding instrument or BIT provisions, but this is not currently the case[281]. In my view, what is implied behind this argument is that the tribunal's role is not to fill the blanks that the States decided not to include in the drafting of their treaties or when an international instrument is inexistent, considering the lack of support from States. Second, some authors argue that the tribunal misinterpreted the "abuse of rights-clause" contained in the international treaties on which they found the prohibition of violation[282]. To put it simply[283], the provision can only be applied as a safeguard measure as to avoid the abusive use of rights contained within the treaty. However, the usage of this clause cannot be applied outside of the HR treaty – therefore, it should not be applied to impose new obligations deriving from a BIT[284]. Third, Patrick Abel argues that "the Tribunal resorts to non-binding sources of human rights norms (so called soft law) to prove a legally binding international human rights obligation of investors […]. The Tribunal disregards that States in creating these norms have

[275] Urbaser, para. 1209.
[276] *Ibid*., para. 1207; Y. Castillo Meneses, *op. cit.,* p. 454.
[277] B. Choudhury, Investor Obligations for Human Rights*, op. cit.*, p. 101.
[278] A. Kozyakova*, op. cit.*, p. 163.
[279] *David R. Aven, Samuel D. Aven, Carolyn J. Park, Eric A. Park, Jeffrey S. Shioleno, Giacomo A. Buscemi, David A. Janney and Roger Raguso v. The Republic of Costa Rica*, ICSID Case No. UNCT/15/3, Final Award, 18 September 2018, para. 738.
[280] E. Guntrip*, op. cit.*
[281] P. Abel, *op. cit.*, p. 78.
[282] *Ibid.*, p. 82.
[283] For complete reasoning based on the analysis of the different HR provisions used by the tribunal, you may refer to this article: E. Guntrip, *Urbaser v Argentina: The Origins of a Host State Human Rights Counterclaim in ICSID Arbitration?,* EJIL:Talk!, 10 February 2017, (07.12.2022), available at: https://www.ejiltalk.org/urbaser-v-argentina-the-origins-of-a-host-state-human-rights-counterclaim-in-icsid-arbitration/.
[284] E. Guntrip*, op. cit.* ; P. Abel, *op. cit.*, p. 82.

expressly intended not to produce legally binding norms"[285]. Finally, while these concerns are perfectly valid and founded, I would like to point out two remarks. Some BIT were concluded more than 60 years ago when HR were not a concern in business. While States might have left them out intentionally, it is also possible they were not even considered as a possible issue. Continuing with a hypothesis, it is doubtful that they were adopted to limit the regulatory function of the State[286]. However, since tribunals often broadly interpret treaty provisions in favour of the investor, it resulted that the State's right to regulate is often impeded by their intervention[287]. Secondly, as already elaborated[288], soft law is a gateway toward binding obligations. The tribunal did not create new positive obligations for investors; it only stated that they could be held accountable when they breach HR. Given the current context, I do not believe many people would oppose this conclusion. In my view, while the tribunal's conclusion might be criticized based on purely logical legal arguments, I think it is morally acceptable and gives a better sense of justice than the complete absence of HR negative obligations on investors.

To sum up, tribunals need to deal with HR. However, their reaction really differs. The easy path would be to reject a HR claim stating they do not have jurisdiction over it. Since most BIT belong to the old generation, it should not be too difficult to justify this way of thought. On the other hand, the difficult path is to accept, if the BIT is broad enough, HR counterclaims. Choosing this path means accepting to interpret the BIT within the international public law order. Furthermore, it gets even more sensitive when the tribunal has to define what is included within the principles of public international law. From this point on, many controversies arise. As of today, the Urbaser tribunal found out that, while investors do not have any positive obligation to enhance HR, the negative obligation not to violate HR can be considered a principle of public international law. However, this conclusion is far from obtaining consensus. Since some legal scholars voiced criticisms toward the merits of the claim, I guess investors were not any happier with the tribunal's reasoning. Notwithstanding, while this proposition does not seem popular, holding investors responsible for violating HR cannot be totally evinced from a tribunal spectrum. Therefore, to make this reasoning definitive as well as shut down controversies, it is necessary to make normative efforts and change the substantive provisions included in IIL instruments.

> *Some 16 million people worldwide remain victims of modern slavery. They help produce the food we eat, the clothes we wear and the products we use. This alone paints a dire picture of human rights abuses – before we even consider other abuses, such as child labour, exploitative and unsafe work conditions, and poverty pay[289].*

# IV. Turning human rights into hard law

The third part of this paper is dedicated to enhancing the conclusion of the Urbaser tribunal, namely, how to hold companies accountable for their HR breaches in a foreign country within the IIL framework. To be effective, the negative obligation not to violate HR should be clearly incorporated in a BIT or a strong national law. While many propositions to reform the system

[285] P. Abel, *op. cit.*, p. 79.
[286] UNCTAD, *International Investment Agreements – Reform Accelerator*, UNCTAD/DIAE/PCB/INF/2020/8, 2020, p. 3 (cited : UNCTAD, *Reform Accelerator*).
[287] *Ibid.*, p. 3.
[288] *Supra,* II B a, Soft law characteristics and utility, pp. 11-12.
[289] Share action, *Point of No Returns Part II – Human Rights*, 15 May 2020, (05.12.2022), available at: https://shareaction.org/reports/point-of-no-returns-part-ii-human-rights.

exist, I will first concentrate on how BIT can be renegotiated to better promote and protect HR. Second, based on the Swiss Responsible Business Initiative (RBI), I will appraise different criteria that exporting states should include in their national law to impose mandatory HR due diligence for their companies operating abroad.

## A. Renegotiating bilateral investment treaties

If FDI was always positively viewed when the first BIT were drafted, this assumption has changed. Indeed, it is now recognized that FDI can either, depending on diverse factors, have a positive impact on the host country or a negative one. In parallel, *sustainable* FDI are considered to always have a positive impact on the host country[290]. Therefore, when promoting FDI between countries, it is necessary to make the difference between these two categories and only encourage an investment that will have an overall positive impact in the long term. On the contrary, if an investment would have a short-term positive effect but with a negative balance in the long term, States should resist the temptation of accepting such an investment[291]. As such, IIL's main goal should be to leave the *stricto sensu* investment protection system behind and replace it with **sustainable investment** promotion.

Currently, the international community is working on a reform concerning the investment arbitration system[292]. Among others, they are assessing how to have a more coherent system that would also consider HR as well as arbitrators' competence to address such issues[293]. The other way of reform is to change the **substantive provisions** of the BIT[294]. They should be aligned with today's values, such as a country development which is necessarily associated with the promotion of HR[295]. Therefore, renegotiating old BIT as to include social considerations should be a state's priority[296]. While this programme is necessary, we should also be conscious that it is ambitious. As a prelude, I would like to note that we live in a plurilateral world marked by differences. From a HR point of view, we would love to have all rights highly respected and even positively promoted everywhere. However, aiming for this kind of reform at this point in time is too soon. If we want a proposition to be considered – eventually accepted and adopted – we need to build it with regard to the countries' divergences. Therefore, an inclusive proposition aimed to be widely called on should remain accessible by states regardless of their level of development, cultural differences, religion or divergent interests. In consequence, we should first focus on globally accepted goals. Secondly, since their importance is closer to a consensus, this should allow opening negotiations between States. Thirdly, I will focus on which provisions could be altered or added to BIT to better protect the most pressing issues concerning BHR.

### a) Aligning treaties with contemporary values

Treaties are the representation of the era and society in which they evolve. As a result, when the old generation of BIT were concluded, they enhanced the protection of investments[297]. Today, we have some hindsight on their development and the consequences of their application. We saw that tribunals are unpredictable in their application and that BIT are used as to sue states governing in favour of legitimate public policies[298]. Therefore, the first

[290] United Nations General Assembly, *Report of the Working Group, op. cit.*, p. 3.
[291] O. De Schutter, The host state, *op. cit.*, p. 158.
[292] C. Baltag & Y. Dautaj, *op. cit.*, p. 30.
[293] L. E. Peterson & K. R. Gray, *op. cit.*, pp. 36-37.
[294] *Ibid.*, p. 36.
[295] B. Choudhury, Investor Obligations for Human Rights, *op. cit.*, p. 82.
[296] C. Baltag & Y. Dautaj, *op. cit.*, p. 32.
[297] UNCTAD, *UNCTAD's Reform Package for the International Investment Regime*, 2018, p. 15 (cited: UNCTAD, *Reform Package*).
[298] *Ibid.,* p. 16.

consideration for reform is to have **balanced** BIT accounting for investor protection as well as obligations when they invest abroad. The unbalanced relationship mostly results from the States' priorities when negotiating a BIT[299]. Since FDI was only seen as positive, importing countries were not too concerned about the BIT powers, and exporting countries only wanted the protection of their nationals abroad. With this change of dynamics, new expectations are awaited from FDI. The main concern is the investor's role in the participation of HR violations during the conduct of their operations. While monetary profit used to be prioritized, HR protection is gaining in popularity and recognition[300]. This tendency is also happening with more general scope. For example, a *new* human right to a clean, healthy, and sustainable environment[301] was adopted by the UNGA on 28 July 2022 by 161 in favour, 0 against, and 8 abstentions[302].

The second consideration is the **SDG** adopted by the UN in 2015[303]. Those goals impregnated our conception of what the world should be. Indeed, they influenced the objectives of the international community, as well as national policy making and people's prospects for the future. Therefore, this impacted the expectations toward more sustainable investments[304]. However, since most BIT – hence, the normative framework of most transnational investments – were drafted before this goal was adopted, they do not consider it. As a result, there is a gap between the expectations toward investments and the way they are regulated. Just like we keep amending and developing laws in order to adjust them with this goal, there is a real need to renegotiate BIT for them to reflect the society in which they evolve. In parallel, I would like to emphasize how intrinsically linked HR, and the SDG are. In 1987 the World Commission on Environment and Development defined sustainable development as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs"[305]. As of today, the notion is defined as to include economic development, social development, and environmental protection[306]. Each goal is related to a HR,[307] and the UN Office of the High Commissioner for HR explicitly linked and summarized which HR supports which SDG[308]. More specifically, "the social development dimension necessarily includes human rights, since it is impossible to have social development and in turn sustainable development if human rights are undermined"[309].

Keeping that in mind, the UN Working group on the issue of HR and transnational corporations and other business enterprises "recommends that States ensure that all *existing* and *future* investment agreements are **compatible with their international human rights obligations**. States should also invoke international investment agreements to encourage responsible

[299] A. Kozyakova*, op. cit.*, p. 193.
[300] *Ibid*., p. 194.
[301] United Nations General Assembly, *Promotion and protection of human rights: human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms,* A/76/L.75,26 July 2022.
[302] IISD, *UNGA Recognizes Human Right to Clean, Healthy, and Sustainable Environment*, 3 August 2022, (23.12.2022), available at: https://sdg.iisd.org/news/unga-recognizes-human-right-to-clean-healthy-and-sustainable-environment/#:~:text=The%20UN%20General%20Assembly%20(UNGA,and%20sustainable%20environment%20for%20all.
[303] United Nations General Assembly, *Resolution, op. cit.*
[304]UNCTAD, *Reform Package*, *op. cit*., p. 15.
[305] Report of the World Commission on Environment and Development, *Our Common Future*, A/42/427, 1987, chapter 2 para. 1.
[306] Human Rights Council*, op. cit.*, N 7.
[307] Office of the United Nations High Commissioner for Human Rights, *Empowerment, Inclusion, Equality: Accelerating sustainable development with human rights,* brochure prepared for the High Level Political Forum on Sustainable Development, 2019, p. 2.
[308] OHCHR, *Summary Table on the Linkages between the SDGs and Relevant International Human Rights Instruments*, (24.12.2022), available at: https://www.ohchr.org/en/sdgs/publications-and-resources.
[309] Human Rights Council*, op. cit.*, N 7.

business conduct on the part of investors and hold them accountable for abusing internationally recognized human rights"[310]. It is important, once again, to note that States *must* protect HR. This obligation must also be fulfilled, by both States parties, during the negotiation process of a BIT[311]. While investments are usually made from a global north to a global south country, it does not mean that the global north State holds fewer obligations to respect, protect and fulfil its HR obligations when negotiating a BIT than the global south country. A BIT is a *bilateral* treaty that applies *equally* to both *parties*. Moreover, investors do not negotiate a treaty, their respective States do. Just to clarify, a State has HR obligations but a possibility to protect national investors within the scope of their obligations. Since most investment claims are based on old BIT that are not aligned with today's value and do not contain any HR obligations, States should renegotiate their old BIT[312] if they want to fulfil their obligations under IHRL.

b) Ensuring that all BIT are compatible with states' human rights obligations

The idea is simple: concluding new BIT containing HR obligations. Since they would be carefully drafted and contain obligations as well as consequences for HR breaches, this would lead to more significant accountability in case of HR violations occurring within the transnational investment framework[313]. The reality is more complicated. In order to conclude a bilateral treaty, both parties need, beforehand, to agree to start the negotiations which mostly depends on the parties' political will to change the existing rules[314] . However, as is particularly true concerning BIT, the bargaining powers between rich and emerging countries are highly unequal[315]. Typically, the developed country will impose its will upon the developing country[316].

While I will briefly outline the incentives and challenges of a treaty renegotiation later, I would like to begin by succinctly presenting an alternative to the amendment of a treaty, namely its **termination**. According to article 54 of the Vienna Convention on the Law of Treaties:

> The termination of a treaty or the withdrawal of a party may take place:
> (a) in conformity with the provisions of the treaty; or
> (b) at any time by consent of all the parties after consultation with the other contracting States[317].

Firstly, any State can terminate a BIT **unilaterally** as long as they respect the BIT's provisions[318]. In practice, there are two different situations based on the wording of the BIT. Either the treaty contains a tacit renewal termination clause, in which case a state must terminate the BIT during the window of time before the BIT is automatically renewed[319]. Since a BIT is usually concluded for a period between 10 to 15 years, if a country misses the window to terminate the treaty, it will need to wait for another 10-15 years before having the possible to unilaterally terminate it[320]. Or the treaty contains a fixed-term termination clause in which case, after the expiration date

[310] United Nations General Assembly, *Report of the Working Group, op. cit.*, p. 2.
[311] *Ibid*., p. 18.
[312] *Ibid.,* p. 7.
[313] D. Gaukrodger*, op. cit.*, p. 9 ; K. How & E. Choo, *Negotiation, Compliance and Termination of Investment Treaties: The State's Perspective*, Global Arbitration review, 14 January 2022, (18.12.2022), available at: https://globalarbitrationreview.com/guide/the-guide-investment-treaty-protection-and-enforcement/first-edition/article/negotiation-compliance-and-termination-of-investment-treaties-the-states-perspective.
[314] A. Kozyakova*, op. cit.*, p. 232.
[315] W. Alschner & D. Skougarevskiy, *op. cit.*, p. 562 ; A. Kozyakova*, op. cit.*, p. 62.
[316] W. Alschner & D. Skougarevskiy, *op. cit.*, pp. 573-574.
[317] Article 54, Vienna Convention on the Law of Treaties.
[318] Article 54 let. a, Vienna Convention on the Law of Treaties.
[319] N. Bernasconi-Osterwalder & S. Brewin & M. Dietrich Brauch & S. Nikièma, Terminating a Bilateral Investment Treaty, *IISD Best Practice Serie*, No. 3, 2020, p. 2.
[320] F. M. Lavopa & L. E. Barreiros & M. V. Brun, How to Kill a BIT and not Die Trying: Legal and Political Challenges of Denouncing or Renegotiating Bilateral Investment Treaties, *Journal of International Economic Law*, No. 16, 2013, p. 879.

arises, it is possible to terminate the BIT at any time upon the notification to the other party. Once the waiting period, usually between 6 months to 1 year, after the reception of the notification, the BIT will be terminated[321]. Nowadays, since more BIT are terminated than concluded, a trend to terminate outdated BIT is emerging[322]. For example, India terminated 44 BIT between 2013 and 2019[323]. However, while there is no empirical study relating to the issue, it is legitimate to wonder whether the unilateral termination of BIT will not have a negative butterfly effect concluding with less FDI incentive since there is less protection for potential investors[324]. Moreover, BIT often possess a survival clause, generally lasting between 15 to 20 years, during which the BIT provisions will continue to apply – for already implemented investments – after its termination[325]. In other words, while this is an effective solution to denounce outdated BIT, terminating a BIT unilaterally will not have consequences directly on the term, but only once the survival clause has expired.

Secondly, a BIT can also be **mutually terminated** without any perspective of renewal. The mutual termination can be done at all times but requires parties' consent[326]. Such was the case when the EU decided to terminate all intra-European BIT[327]. This method is also used when a State wants to replace the BIT by a free trade agreement, a regional agreement or simply go out of the international investment protection system[328]. The advantage of terminating a BIT with consent is that, since they already agree upon the termination of the treaty, the parties can also decide to waive or diminish the survival clause.

Thirdly, a BIT can also be unilaterally terminated with a **proposition of renegotiation.** This is the plan of India who wants to draft new BIT[329] according to the new India Model BIT adopted in 2015[330]. This strategy leads to 2 remarks. Firstly, India had been on the receiving part of investments claims and lost many of them[331] which created an incentive to terminate the "poorly drafted" BIT[332]. Secondly, India became more powerful, and its economy is developing. Therefore, they created a new Model BIT and want to base their bilateral relations on this treaty which is more representative of their current interests[333]. Since Model BIT allow states to know what their priorities are[334], as well as create a map for negotiations[335], it is only natural that a country that has established a new Model BIT will want international investments to follow these priorities. However, while Model BIT represent what a country considers important, the

[321] N. Bernasconi-Osterwalder & S. Brewin & M. Dietrich Brauch & S. Nikièma, Terminating, *op. cit.*, p. 3.
[322] United Nations General Assembly, *Report of the Working Group, op. cit.*, p. 8 ; N. Bernasconi-Osterwalder & S. Brewin & M. Dietrich Brauch & S. Nikièma, *op. cit.*, p. 1.
[323] S. Hartmann & R. Spruk, The impact of unilateral BIT terminations on FDI: Quasi-experimental evidence from India, *The Revue of International Organizations,* 2022, (11.01.2023), available at : https://link.springer.com/article/10.1007/s11558-022-09471-3.
[324] F. M. Lavopa & L. E. Barreiros & M. V. Brun, *op. cit.,* p. 879.
[325] *Ibid.,* pp. 879-880.
[326] Article 54 let. b, Vienna Convention on the Law of Treaties.
[327] Agreement for the termination of Bilateral Investment Treaties between the Member States or the European Union, 5 May 2020.
[328] N. Bernasconi-Osterwalder & S. Brewin & M. Dietrich Brauch & S. Nikièma, *op. cit.*, p. 11.
[329] A. Ross, *India's termination of BITs to begin*, Global Arbitration Review, 22 March 2017, (24.12.2022), available at: https://globalarbitrationreview.com/article/indias-termination-of-bits-begin.
[330] Model Text for the Indian Bilateral Investment Treaty, 28 December 2015.
[331] N. Peacock & N. Joseph, *Mixed messages to investors as India quietly terminates bilateral investment treaties with 58 countries*, Herbert Smith Freehills, 16 March 2017, (24.12.2022), available at: https://hsfnotes.com/arbitration/2017/03/16/mixed-messages-to-investors-as-india-quietly-terminates-bilateral-investment-treaties-with-58-countries/.
[332] K. How & E. Choo*, op. cit.*
[333] A. Ross, *op. cit.*
[334] K. A. N. Duggal & N. J. Diamond, *Model Investment Agreements and Human Rights: What Can We Learn from Recent Efforts?*, Colombia Journal of Transnational Law, 19 August 2021, (18.12.2022), available at: https://www.jtl.columbia.edu/bulletin-blog/model-investment-agreements-and-human-rights-what-can-we-learn-from-recent-efforts.
[335] K. How & E. Choo*, op. cit.*

concluded BIT will show which concessions were needed to reach an agreement[336]. Therefore, India is laying the basis for a new investment protection system but knowing whether it will be successful or not will depend on the results of the negotiations.

Fourthly, parties can either **renegotiate** a new BIT after the previous one was terminated, or they can decide to **amend** the old BIT to reflect today's priorities. This proposition probably is the best since, given the way BIT are usually written, it would waive the survival clause and the renegotiated BIT would immediately have effects on previous and upcoming investments[337]. In any case, parties can also agree to diminish the period of the survival clause or its scope when they negotiate[338]. However, the main issue of this proposition is to have the explicit consent of both parties[339]. In addition, they not only need to consent to the principle of amendment or renegotiation but also to the content of the new provisions. While we might believe that mostly global south states would want to renegotiate[340] – because they often lose cases with costly consequences – I want to note that global north states can also be progressist in their preoccupations. For example, Canada was one of the first country to include policy exceptions in its BIT[341]. Meanwhile, Italy currently possesses the most progressive BIT Model[342]. While the incentive to negotiate is the first factor to draft a new BIT between two states successfully, the second factor might be the shared values and common interests between the said states. In my view, globally accepted values and common objectives such as the SDG or a minimum HR protection are a good basis to start negotiations. For instance, since Italy has a model BIT containing a whole chapter on sustainable development, it is likely that – if approached by the other party to an old BIT – they might accept to amend some of their old BIT so as to include similar provisions. This process might be lengthy and only amend some provisions with some willing countries – therefore leaving other problems for later – but it would allow to, at least, get rid of some old BIT without any references to HR. These old BIT are still used and bite States who cannot regulate for the sake of protecting their population. Therefore, doing something is still better than doing nothing even if the outcome is not as perfect as HR organizations would wish for.

### c) Human rights focused propositions to amend BIT provisions

Keeping in mind the worldwide accepted objective of minimum HR protection as well as more balanced BIT that would allow states to protect the rights of their citizens without fearing the threat of arbitration, I would like to make some propositions for amending BIT to better reflect those objectives. However, I will remain careful with my propositions to reach a possible consensus for both negotiating states. While the purpose of this paper is the promotion of HR, we cannot forget that BIT are based on negotiation and **consensus** from all parties involved. If the propositions are not mature enough to be accepted, it would probably be a loss of time and resources to recommend them. This implies the need to prioritize some HR over others. To make it simple, the protection of children is more accepted than the right to love whom we want or the position of women in society. Whether this distinction is fair or not is another debate than the one to know if we will have better results of negotiating on the first or the second matter. Concerning BHR, I believe, we should focus the priorities on rights such as – but not limited to – modern slavery, child labour, workers' health, or irreparable harm to the

[336] W. Alschner & D. Skougarevskiy, *op. cit.*, p. 565.
[337] F. M. Lavopa & L. E. Barreiros & M. V. Brun, *op. cit.*, pp. 881, 883-884.
[338] N. Bernasconi-Osterwalder & S. Brewin & M. Dietrich Brauch & S. Nikièma, *op. cit.,* pp. 13-14.
[339] F. M. Lavopa & L. E. Barreiros & M. V. Brun, *op. cit.,* p. 885.
[340] *Ibid.*, p. 885.
[341] A. Newcombe, *General Exceptions in International Investment Agreements*, Draft Discussion Paper, Prepared for BIICL Eighth Annual WTO Conference, London, 13th and 14th May 2008, p. 3.
[342] *Infra,* IV A c, Human rights focused provisions to amend BIT provisions, pp. 31 ff.

environment. Therefore, I will elaborate on the content of BIT amendments for tuning HR into hard law by keeping these remarks in mind.

First of all, UNCTAD did enormous work about reforming BIT. In 2015, they summarized 5 aspects where change was much needed for International Investment Agreements (IIA)[343]. While they do not directly mention HR, they are directed toward their promotion. For example, UNCTAD strongly advises drafting balanced BIT to preserve the state's right to regulate or make responsible investments[344]. Moreover, they propose "a best-fit combination" of measures that can be taken by States and incorporated into IIA to make them more consistent with their obligations as well as to create a coherent IIL system[345]. In 2018, they established a package to reform IIA. They preconize 3 phases for the reform, namely, a new generation of IIA following the SDG, modernizing the old ones, and creating a coherent IIL framework[346]. Concerning the second phase, they proposed 10 options to modernize treaties, such as replacing outdated treaties, amending some provisions, or working on their interpretation[347]. Finally, in 2020, since most ISDS are based on old BIT, UNCTAD drafted the Reform Accelerator to accelerate states substantive change in their treaties' provisions[348]. While "the Reform Accelerator is focused on eight aspects of the agreements that are most in need of reform: definition of investment, definition of investor, national treatment, most-favoured-nation treatment, fair and equitable treatment, full protection and security, indirect expropriation and public policy exceptions"[349], I will focus on the modernization of BIT provisions that are the closest to HR rather than a general reform of IIA. Lastly, it is well known that there is not a single way to modernize BIT, but a multitude of ways, all aiming at the same goal[350]. Thus, I do not hold the pretension of exhaustively talking about all the different means and methods, rather to concretize my thoughts by giving a few examples of HR focused possible BIT provisions. Moreover, I will compare my ideas with the latest model BIT available, namely the 2022 Italian Model BIT[351].

### 1) Inclusion of human rights in the preamble

While the preamble is non-binding, mentioning HR in it is important for their consideration when a tribunal interprets the treaty's provisions[352]. Since HR are part of domestic and international law, as well as sustainable development, these references would already be a start[353]. However, it would be even better to explicitly write *human rights*, or that the parties must not derogate from their HR obligations by establishing this treaty, or to mention specific rights that the treaty also seeks to preserve next to the protection and promotion of investments[354]. Since the preamble is non-binding and SDG is well accepted globally, as well as relatively present in the new BIT[355], I do not think this proposition is unbearable for states to negotiate and amend their old BIT.

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[343] UNCTAD, *Investment Policy Framework for Sustainable Development*, *op. cit.*, p. 8.
[344] *Ibid*., pp. 19, 77.
[345] *Ibid.*, p. 87.
[346] UNCTAD, *Reform Package, op. cit.*
[347] *Ibid*., pp. 77-92.
[348] *Ibid*., p. 2.
[349] United Nations General Assembly, *Report of the Working Group, op. cit.*, p. 10.
[350] Human Rights Council*, op. cit.,* N 13.
[351] Model BIT Italy – August 2022.
[352] P. Dumberry, Suggestions for Incorporating Human Rights Obligations into BITs *in* K. Singh & B. Ilge (eds.), *Rethinking Bilateral Investment Treaties: Critical Issues and Policy Choices*, Both ENDS & Madhyam & Centre for Research on Multinational Corporations, Amsterdam & New Delhi, 2016, pp. 214-215.
[353] B. Choudhury, Human Rights Provisions in International Investment Treaties and Investor-State Contracts, *UCL Working Paper Series*, 2020, p.11, (11.01.2023), available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3643407 (cited: B. Choudhury, Human Rights Provisions).
[354] UNCTAD, *Reform Package, op. cit.*, p. 42.
[355] For development and analysis of the Morocco-Nigeria BIT, see: *supra*, II A b 3, Sustainable development and human rights orientation, pp. 7 ff.

Following this approach, the Italian Model BIT preamble includes many HR considerations. To summarize some key points, they seek 1) to strengthen investments "in accordance with the objective of sustainable development", 2) particularly with regard to "high levels of environmental and labour protection", 3) they also reiterate their commitment to the Charter of the United Nations and the Universal Declaration of Human Rights, 4) they encourage investors to respect soft law principles that promote CSR such as the OECD Guideline, 5) they specially promote against sex-based discrimination, and 6) they clearly state that the parties preserve their right to regulate[356]. This preamble establishes general objectives as well as particular considerations for environment and labour rights or the preservation of the state regulatory space. To make them binding, and not only for interpretation purposes, these concerns are also reflected in the different provisions.

### 2) Investment definition & Clean hands doctrine

Not all investments are protected by the BIT, only those included within its scope of application are. However, there is no consensus on the definition of a protected investment. Therefore, it will significantly vary depending on the wording of the BIT. A first step for an investment to be protected is that it brings a "contribution to the *economic* development of the host State"[357]. While this condition remains controversial[358], it is nonetheless a prerequisite to access ICSID jurisdiction[359]. A second step, as was already done in the Morocco-Nigeria BIT, is to define it as an investment "which contribute [to] *sustainable* development of [the host State]"[360]. Such a definition would indirectly consider HR as a condition to access the treaty provision. While the second approach is definitely more protective of HR, it can also be more complicated to negotiate. However, given the hindsight we now have on FDI that do not always harbour a positive long-term outcome, the first proposition – contribution to economic development - should be a priority for BIT amendment if States do not wish to have more damages than advantages from FDI. While the FDI would not embody the social and environmental aspects of the SDG, it would at least contribute to the economic aspect of this goal.

Another way to exclude the BIT protection toward harmful investment is through the clean hand doctrine. The first expression of this doctrine is to condition the definition of an investment to an investment made "in accordance with the law"[361]. According to the Phoenix tribunal, "States cannot be deemed to offer access to the ICSID dispute settlement mechanism to investments made in violation of their laws"[362]. Since HR are usually part of the domestic law, this would *allow* tribunals to decline their jurisdiction over the dispute because the investor's hands are dirty[363]. The other expression of this doctrine would simply be to condition the access to the tribunal upon the respect of HR[364] or, less restrictively, that the investors conducted a thorough due diligence process. Some would even argue that this doctrine is a principle of international

[356] Preamble, Italy Model BIT (2022).
[357] *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 23 July 2001, para. 52.
[358] O. K. Fauchald, International investment law in support of the right to development ?, *Leiden Journal of International Law,* Vol. 34, 2021, p. 183.
[359] Article 25 of the ICSID Convention does not mention the Salina criteria but it is systematically checked by an ICSID tribunal to know whether they have the jurisdiction or not. However, it does not mean that a dispute unacceptable by ICSID because of the Salini criteria, will also be rejected by another ad hoc tribunal. For more information, see: P. Tzeng & A. Ugale, *Salini test*, Jus Mundy, 28 November 2022, (10.01.2023), available at: https://jusmundi.com/en/document/publication/en-salini-test.
[360] Article 1, Morocco-Nigeria BIT (2016).
[361] P. Dumberry, *op. cit.*, p. 224.
[362] *Phoenix Action Ltd v. Czech Republic*, *op. cit.*, para. 101.
[363] P. Dumberry & G. Dumas-Aubin, The Doctrine of 'Clean Hands' and the Inadmissibility of Claims by Investors Breaching International Human Rights Law, *Transnational Dispute Management Special Issue: Aligning Human Rights and Investment Protection*, Vol. 10, No. 1, 2013, p. 7-8.
[364] P. Dumberry, *op. cit.*, p. 225.

law[365]. Indeed, "the Special Rapporteur observed that the clean hands doctrine was an important principle of international law that had to be taken into account whenever there was evidence that an applicant State had not acted in good faith and had come to court with unclean hands"[366]. Even if we do not agree that the clean hand doctrine is a principle of international law, we cannot deny that it holds certain support. Narrowing the scope of the BIT to the respect of the domestic law – which usually includes HR – or the conduct of due diligence can be another track to better protect HR since investors would not be able to start an investment claim if their hands are dirty. Furthermore, compared to the strict respect of HR, it might be easier to convince the other party of the well-grounded disposition since it would not impact the protection of diligent investors.

The Italy Model BIT states that only investments "made in accordance with the applicable law before or after the entry into force of this agreement"[367] will be covered[368]. In my view, this is an expression of the clean hand doctrine. While its content will need to be defined by a tribunal, the intent is clear: investors must respect the law if they want to be offered the BIT protection. However, there is no mention that the investment must contribute to the "economic development of the host State". Therefore, whether the investment must contribute to the economic development of the host State will depend on whether the tribunal will apply the Salini test to conclude the existence of an investment.

### 3) Right to regulate & Public policy exceptions

Increasing the State's right to regulate is one of the priorities when reforming a BIT. While this concern is not new, its implementation is still lacking[369]. To be effective, the right to regulate needs 2 components. First, simply stating that a state can self-regulate. This could either be done in the preamble or a separate provision. However, for it to be effective, a BIT needs to specify the scope of this right. Therefore, second, the BIT also needs to provide for public policy exceptions which allow the State to self-regulate even if it limits the investors' protection[370]. To clarify, what is at stake is not whether the state can change the law or not – it can – but whether it will have to compensate the investor for the loss of opportunity[371]. Even if a BIT does not have public policy exceptions, it does not mean the State will necessarily be recognized as breaching its obligations. However, it will depend on the outcome of the arbitration and the unpredictable interpretation of the BIT[372]. For example, Australia introduced a new regulation to print tobacco packets as plain or dark brown to protect the health of its people by dissuading them from smoking[373]. This act was attacked by Philipp Morris, alleging a breach of the Hong Kong-Australia BIT[374]. The tribunal gave reason to Australia[375]. If some states can afford to go to arbitration, wait for the award, and maybe pay damages, others cannot even pay their lawyers' fees without external help. Moreover, a company's revenue is sometimes higher than the State's gross domestic product. Those were some of the concerns

[365] P. Dumberry & G. Dumas-Aubin, *op. cit.*, p. 3.
[366] United Nations, *Report of the International Law Commission*, A/60/10 Fifty-seventh session, 2005, para. 236.
[367] Article 2, para. 2, Italy Model BIT (2022).
[368] Article 3 (a), Italy Model BIT (2022).
[369] SUPRA p. 6.
[370] Human Rights Council*, op. cit.*, N 32 ; United Nations General Assembly, *Report of the Working Group, op. cit.*, p. 14 ; B. Choudhury, *Human Rights Provisions, op. cit.*, p. 12.
[371] C. Titi, *The Right to Regulate in International Investment Law (Revisited),* Courses of the Summer School on Public International Law, Vol. 18, 14 March 2022, (05.11.2022), p. 11. available at: https://iclrc.ru/en/publications/38.
[372] UNCTAD, *Reform Accelerator*, *op. cit.*, p. 38.
[373] Articles 18-19 of the Tobacco Plain Packaging Act 2011, Australia, C2021C00466.
[374] Agreement between the Government of Hong Kong and the Government of Australia for the Promotion and Protection of Investments, 15 September 1993.
[375] *Philip Morris Asia Limited v. The Commonwealth of Australia*, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility, 17 December 2015.

when Philipp Morris sued Uruguay or threatened to sue Togo when they decided to protect their population by tightening tobacco regulations or changing their cigarettes' packaging[376].

In parallel, Australia was also attacked by States for the same regulation but based on the World Trade Organization (WTO) Agreement[377]. The Appellate Body (AB) said that the measure was WTO consistent with Australia's commitments, based on article 2.2 of the Technical Barriers to Trade Agreement (TBT) following this reasoning:

> The Appellate Body upheld the Panel's finding that the tobacco plain packaging (TPP) measures were apt to make a meaningful contribution to Australia's objective of improving public health by reducing the use of, and exposure to, tobacco products and the complainants had not demonstrated that they were more trade-restrictive than necessary to fulfil a legitimate objective, within the meaning of Art. 2.2, taking into account the nature and gravity of the risks that would arise from the non-fulfilment of Australia's objective, and the fact that none of the alternatives proposed by the complainants were less trade restrictive than the TPP measures[378].

BIT that already include public policy exceptions[379] often provide a list of exceptions based on article XX General Agreement on Tariffs and Trade (GATT)[380]. Moreover, UNCTAD Reform Accelerator, while improving the GATT list, is also inspired by it[381]. Trade and investment laws are like 2 sides of the same coin[382]. They both share the same function of solving economic disputes between the parties[383]. While rules are different, it is not uncommon to have references to WTO jurisprudence in investment awards. Moreover, WTO judges sometimes become arbitrators, and some requirements or standards of protection are similar in both laws[384]. Some even say that WTO law and IIL cannot be separated and should be considered together, like communicating vessels, to have better coordination within the public international law system[385]. Therefore, I will make a digression regarding WTO law.

The purpose of including these exceptions is to avoid the tribunal conferring too many rights to investors. Therefore, it is important that those exceptions are not too narrowly interpreted as it would have the opposite effect of preventing the State from regulating[386]. To prevent this from happening, I think it is better to draft BIT based on **article 2.2 TBT** than on article XX

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[376] Last Week Tonight, *Tobacco: Last Week Tonight with John Oliver (HBO),* 16 February 2015, (22.11.2022), available at : https://www.youtube.com/watch?v=6UsHHOCH4q8.

[377] *Australia — Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WT/DS435, Reports of the Appellate Body, 9 June 2020.

[378] WTO, *WTO Dispute Settlement: One-Page Case Summaries 1995–2020*, 2021, p. 188.

[379] For example, article 10 of the Canada Model BIT 2004 was a precursor for including general exceptions and is strongly inspired by article XX GATT and its chapeau.

[380] UNCTAD, *Reform Accelerator*, *op. cit.*, p. 38 ; General Agreement on Tariffs and Trade, 1867 U.N.T.S. 190, 33 I.L.M. 1153, 1994 (cited : GATT).

[381] *Ibid.*, pp. 26-27.

For example, "necessary to protect human, animal or plant life or health" is the exact same wording in UNCTAD reform as in article XX (b) GATT. Others are slightly improved in UNCTAD's proposition. For instance, GATT XX (g) provides a measure "relating to the conservation of exhaustible natural resources," and UNCTAD completes it by specifying that they can either be living or non-living. This distinction could be helpful if a State decided to protect water. Other provisions, such as the product of prison labour that is present in the GATT, were abandoned by UNCTAD.

[382] O. De Schutter, The host state, *op. cit.*, p. 165.

[383] *Ibid.*, p. 167.

[384] Trade Law Guide, *WTO Law in Investment Treaty Arbitration*, (21.12.2021) available at: https://www.tradelawguide.com/Cms?Id=222 ; L. Wandahl Mouyal, *International Investment Law and the Right to Regulate – A Human Rights Perspective*, Routledge, London, 2016, pp. 13-14.

[385] O. De Schutter, The host state, *op. cit.*, pp. 184-185.

[386] A. Newcombe, *op. cit*., p. 3.

GATT. Indeed, article 2.2 TBT states that "legitimate objectives are, ***inter alia***[387]: national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment"[388]. First, by using *inter alia*, it clearly expresses that the list of public policy exceptions is non-exhaustive. In other words, and contradictory to the closed list of the GATT, with this kind of provision, even if the objective is not explicitly listed, a tribunal will have to determine whether the measure is legitimate or not[389]. Second, by expressly defining a list of public policy exceptions, written in a non-ambiguous manner, the BIT directly establishes that *these* goals are legitimate, and the tribunal cannot discuss this choice[390]. The advantage of combining these 2 types of protection is that the state will have more flexibility. Even if the tribunal has a narrow conception of exceptions, the state policy can still be saved if the objective is considered legitimate.

Since the primary objective of a BIT is to protect investments, we cannot give a blank check to states – even if the objective is legitimate – and should therefore put in place a weighing and balancing process to know whether the restriction to investment protection is justified or not. The AB calls it the ***necessity*** test, and 3 elements must be balanced to know whether the measure is consistent with the state's obligations or not. First, a tribunal should determine the relative importance of the value (health) the government wants to protect[391]. Second, if the new regulation (plain packaging for cigarettes) contributes to the protection of the value (health)[392]. According to the AB, "such a contribution exists when there is a genuine relationship of ends and means between the objective pursued and the measure at issue"[393]. Practically, does the fact that the cigarette packaging is plain and brown will incite people to smoke less? Going one step further than making them plain and brown, does the fact that the packaging shows lung cancer or people wearing a machine to help to breathe will dissuade some people from smoking? If yes, then the measure contributes to protecting health. If not, the State should compensate the investor for breaching the BIT since it was unnecessary. Third, the trade restrictiveness of the measure must be assessed[394]. This criterion should be adapted to the investment framework. Therefore, the tribunal should, in my view, evaluate the impact of the regulation on the enjoyment of the full potential of the investment. To know whether the measure (plain packaging) is necessary to protect the value (health), the tribunal should balance these 3 elements and determine which side weighs more.

Furthermore, when protecting the value (health), the state should assess whether a different measure (than plain packaging) could have the *same* outcome (less smoking) of protection but be *less* damageable for investments[395]. If such is the case, the state must choose this **alternative** or compensate the investor.

Moreover, Robert Brew suggests adding a chapeau to this provision such as "provided that such measures are not ultimately intended as a restriction on international investment"[396]. This

[387] Macmillan dictionary, *inter alia* : used for saying that there are other things apart from those that are mentioned. The usual way of saying this is 'among other things', (28.12.2022), available at: https://www.macmillandictionary.com/dictionary/british/inter-alia.
[388] Article 2.2, Agreement on Technical Barriers to Trade, 1868 U.N.T.S. 120, 1994 (cited: TBT).
[389] R. Brew, Exception Clauses in International Investments Agreements as a Tool for Appropriate Balancing the Right to Regulate with Investment Protection, *Canterbury Law Review,* Vol. 25, 2019, p. 218.
[390] *Ibid.*, p. 219.
[391] *United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285, AB-2005-1 - Report of the Appellate Body, 7 April 2005, para. 306 (cited: *United States – Gambling*).
[392] *Ibid.*, para. 306.
[393] *Brazil — Measures Affecting Imports of Retreaded Tyres*, WT/DS332, AB-2007-4 - Report of the Appellate Body, 3 December 2007, para. 145 (cited: *Brazil – Retreaded Tyres*).
[394] *United States — Gambling, op. cit.*, para. 306.
[395] *Brazil — Retreaded Tyres*, *op. cit.,* 156.
[396] R. Brew, *op. cit.*, p. 240.

would be an ultimate test to ensure that the regulation is not here to restrict FDI or discriminate but to protect the population[397].

While this proposition is drawn from WTO law and AB jurisprudence, I believe it could be adjusted to IIL. The advantage of a broad scope of protection for this provision is that the state is not limited in the welfare objectives it believes important. Moreover, since the list would be non-exhaustive, it could still be adapted with new objectives without needing to renegotiate the treaty. However, given that the measure should be necessary, without a better alternative, and not an indirect measure to prevent FDI, it also gives the tribunal the power to check that the state is not abusing the investors. Notwithstanding, to have a more predictable interpretation of public policy exceptions, the BIT should be drafted according to the state' in preserving their regulatory space and would probably require an interpretation note annexed to the provision.

Similarly to the preamble, article 6 para. 1 of the Italy Model BIT provides that:

> The Parties reaffirm the right to regulate within their territories to achieve legitimate policy objectives, *such as* the protection of public health, social services, public education, safety, the environment including climate change, public morals, social or consumer protection, privacy and data protection, or the promotion and protection of cultural diversity[398].

This BIT follows the 2 components of the right to regulate by saying that the state has a right to regulate and giving it context by naming a list of important public objectives. Interestingly, by using *such as* this provision does not limit the list of public goals as long as they are *legitimate*. This kind of drafting follows the example of article 2.2 TBT. Furthermore, this right is also explicitly developed with regard to environmental[399] and labour regulations[400] that authorize parties to choose their *desired* level of protection *as long as* it is "consistent with each Party's commitments to internationally recognized [labour] standards and agreements [on environmental protection][401]. In my view, given the wording difference between those provisions, the state retains a broader margin for labour and environmental rights since it can choose its *desired* level of protection. In parallel, article 6 para. 2 states that:

> For greater certainty, the provisions of this Agreement shall not be interpreted as a commitment from a Party that it will not change the legal and regulatory framework, including in a manner that may negatively affect the operation of covered investments or the investor's expectations of profits[402].

In other words, investors must be conscious that domestic law might change if the state regulates even outside of public welfare objectives. In a nutshell, the investor is offered protection such as fair and equitable treatment[403], or prohibition of discrimination[404] only within the state's right to regulate public welfare, but should also be conscious that other regulations can have a negative impact on their investments.

Finally, article 15 offers general exceptions allowing a state to enforce "measures necessary to protect human, animal or plant life or health"[405] including environmental measures[406]. On one side, the scope of this article is broader than the right to regulate since it applies to non-defined *necessary measures*. On the other side, the scope of this provision is limited since the

[397] *Ibid.*, p. 235.
[398] Article 6 para. 1, Italy Model BIT (2022).
[399] Article 20 para. 1, Italy Model BIT (2022).
[400] Article 22 para. 1, Italy Model BIT (2022).
[401] Article 20 para. 1, Italy Model BIT (2022) ; Article 22 para. 1, Italy Model BIT (2022).
[402] Article 6 para. 2, Italy Model BIT (2022).
[403] Article 4, Italy Model BIT (2022).
[404] Article 5, Italy Model BIT (2022).
[405] Article 15 para. 1 let. (b), Italy Model BIT (2022).
[406] Article 15 para. 3, Italy Model BIT (2022).

general exceptions can only be applied to Non-Discriminatory Treatment[407] and Transfers[408]. However, its major interest might be the comparison with article 6. In my view, article 15 is constructed on GATT XX. Firstly, it provides a closed[409] list of objectives – such as health – that are broad in their wording. Secondly, it is clearly expressed that the measures must be *necessary,* which might refer to the necessity test under the WTO agreement. Furthermore, those measures must "not be applied in a manner that would constitute arbitrary or unjustifiable discrimination between investments"[410]. This could be a sort of chapeau as an ultimate test to know whether the measure should be accepted. These restrictions toward regulatory measures are not even present in article 6. While those differences will not be practically relevant because this text is only a Model one, I wanted to highlight these discrepancies because they could be used by a court to give a different meaning to the same state action depending on the provision under which it is analysed.

#### 4) Defining indirect expropriation

Most of the time, expropriation is tolerated as long as it is for a public purpose and upon monetary compensation. Expropriation is subdivided into direct expropriation, which occurs when a State nationalizes or seizes the investment and indirect expropriation, which occurs when a State modifies national laws and regulations which, in consequence, has a similar effect on the investment as a direct expropriation[411]. Indirect expropriation constitutes more than 70% of investment claims and is often in favour of the investor. What is concerning is that some of those claims were against legitimate public regulations aiming to protect the environment or the population's health[412]. Since there is no consensus on what constitutes an indirect expropriation, tribunals were the ones to define the notion, and their practise is neither coherent nor predictable[413]. They distinguished between what constitutes indirect expropriation and what is a legitimate regulation. This distinction is crucial since the first one requires monetary compensation while the second one does not[414]. In its Reform Accelerator, UNCTAD proposes 3 ways to avoid a regulatory chill and clarify what constitutes an indirect expropriation: listing criteria for a finding of indirect expropriation (approach 1), defining measures – including public welfare objectives – that do not constitute indirect expropriation (approach 2), and including exceptions (approach 3)[415]. While these initiatives would indirectly help to conserve the regulatory policy framework for HR, it would be even better – following the second approach – to directly carve out legitimate HR objectives from the scope of the expropriation clause[416]. Since this is already done by tribunals when they differentiate between indirect expropriation and legitimate regulation, including such a provision into a BIT would not necessarily change the outcome. However, it would make it more predictable as well as assure protection for legitimate HR considerations, therefore reassuring states they can continue to legislate without fearing costly investment claims for expropriation.

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[407] Article 5, Italy Model BIT (2022).
[408] Article 10, Italy Model BIT (2022).
[409] In comparison with article 6, which contains "such as", article 15 does not leave the possibility of expanding its scope to not expressly mentioned objectives.
[410] Article 15 para. 1, Italy Model BIT (2022).
[411] C. Yannaca-Small, "Indirect Expropriation" and the "Right to Regulate" in International Investment Law, *OECD Working Papers on International Investment*, OECD Publishing, Vol. 4, 2004, pp. 3-5.
[412] UNCTAD, *Reform Accelerator*, *op. cit.*, p. 24.
[413] C. Yannaca-Small, *op. cit.,* pp. 9-20.
[414] U. Kriebaum, *The State's Duty to Protect Human Rights – Investment and Human Rights*, *op. cit.,* p. 11.
[415] UNCTAD, *Reform Accelerator*, *op. cit.*, pp. 24-25.
[416] B. Choudhury, Human Rights Provisions, *op. cit.*, pp. 12-13.

Article 9 of the Italy Model BIT refers to Annex II for interpreting the notion of expropriation[417]. Annex II para. 3 states – using the same list of *legitimate* policy objectives[418] defined in article 6 para. 1 to preserve the right to regulate – that legitimate policy goals "do not constitute indirect expropriations" [419]. Not to give the state a free card, these measures must not be *manifestly* excessive or discriminatory. In other words, if a state introduces a new regulation concerning the prohibition of extraction of asbestos to protect public health (legitimate objective) that applies to all corporations disregarding their size, nationality, or sector (non-discriminatory) and that is not disproportionate (non-excessive), the investor could not fill a claim for expropriation even if its business is the extraction of asbestos in the host country.

**5) Corporate social responsibility & Due diligence**

Many initiatives for CSR and corporations' due diligence mechanisms exist. Some are promoted by international organizations, while others are commitments directly erected by corporations themselves[420]. In parallel, new BIT also refer to CSR commitments in their provisions[421]. Thus, the first option would be to "encourage investors to comply with widely accepted standards" such as the UNGP[422]. Since this process is already implemented by many investors and States unanimously endorsed them in 2011[423], it does not seem particularly difficult to amend such a provision in BIT[424]. However, these commitments remain voluntary and non-binding[425]. Therefore, as for other initiatives, they can be seen as institutionalized voluntarism[426].

Article 19 of the Italy Model BIT is fully dedicated to CSR and responsible business conduct and follows this approach. In the first paragraph, the importance of investors' due diligence is recognized, and they agree to "promote the uptake by enterprises and investors of corporate social responsibility or responsible business practices with a view to contributing to sustainable development and responsible investment" [427]. Moreover, paragraph 2 refers to soft law principles and instruments such as the UNGP or the OECD Guidelines[428].

As set out by Megan Wells Sheffer, a second proposition would be to require a "*mandatory* pre-establishment and social impact assessment"[429]. This would be based on the due diligence commitment of enterprises to assess which effects their investment will have on the local population and environment *before* their implementation. While this proposition goes further that the fully voluntary one, given that some investors are already proposing mandatory due diligence rules as well as accountability[430], I believe it would also receive some support. Moreover, since this obligation would apply only *before* the implementation and would only be voluntary afterwards, the obligations would only be punctual. However, it might be important for HR since their potential impacts would have been drafted, and companies would know –

[417] Article 9 para. 1, Italy Model BIT (2022).
[418] Annex II para. 3, Italy Model BIT (2022) : "[…] measures by a Party that are designed and applied to protect legitimate policy objectives, such as the protection of public health, social services, public education, safety, environment including climate change, public morals, social or consumer protection, privacy and data protection, or the promotion and protection of cultural diversity do not constitute indirect expropriations.".
[419] Annex II para. 3, Italy Model BIT (2022).
[420] For more details, see: *supra*, II B b, United nations guiding principles on business and human rights, pp. 12 ff.
[421] United Nations General Assembly, *Report of the Working Group, op. cit.*, 27 July 2021, p. 13.
[422] UNCTAD, *Reform Package, op. cit.,* p. 66.
[423] *Supra*, II B b, United nations guiding principles on business and human rights, p. 12.
[424] M. Wells Sheffer, Bilateral Investment Treaties: A Friend or Foe to Human Rights, *Denver Journal of International Law and Policy,* Vol. 39, No. 3, 2011, pp. 512-513.
[425] *Supra,* II B a, Soft law characteristics and utility, p. 10.
[426] *Supra*, II B b, United nations guiding principles on business and human rights, p. 12.
[427] Article 19 para. 1, Italy Model BIT (2022).
[428] Article 19 para. 2, Italy Model BIT (2022).
[429] M. Wells Sheffer, *op. cit.*, pp. 514-561.
[430] *Supra*, II B b 3, Remedies, p. 18.

and not be able to pretend that they are oblivious – that they need to pay specific attention to some sensitive areas or policies.

A third proposition would simply be to make the commitments binding. Either by including a set of standards in the BIT, with consequences in case of non-respect or by denying benefits or protection of the BIT if companies do not respect their own promulgated commitments. For example, if a company has an amazing HR policy and annual reports saying that they do not have forced labour in their supply chain, they could be denied the protection of the BIT if this was found to be accurate and they refused to remedy it. While this idea would be great for HR, I am also aware that this proposition is not mature enough to really be implemented. However, it is still worth having some perspective when negotiating. It also shows that the first two propositions are way more reasonable than the last one.

### 6) Human rights

The Working Group on the issue of human rights and transnational corporations and other business enterprises summarized what is at stake in the BHR issue as:

> At the normative level, it is arguable that international human rights law applies to investors at least by implication, for it would be an anomaly to hold that non-State actors could do what States could not. Moreover, the human rights responsibilities of investors under international investment agreements should be on par with their rights. Therefore, if the agreements confer legally enforceable rights on investors, they should also impose legally enforceable human rights obligations – not merely soft responsibilities lacking any teeth – on investors[431].

The first issue is that, for the few BIT that include HR considerations, they usually only "encourage" or promote "best effort" to respect HR and do not have legally binding content[432]. Therefore, the first challenge is to make legally binding obligations going further than the soft law language preconized in the UNGP or voluntary CSR measures. The second issue, one of the criticisms of the Urbaser tribunal, is that HR obligations are only binding for States, not investors[433]. By incorporating **binding** HR obligations for ***investors*** in BIT, both issues would be solved at once. The direct applicability of HR obligations would not be an issue since it would constitute a breach of the BIT provisions which would immediately trigger the implementation of HR as a breach of the treaty. IHRL could be applied to interpret the BIT provisions. Since BIT are created by the states for the states, it is possible, as long as the parties are willing, to incorporate any HR obligations[434].

On one side, the most important provision is a negative obligation for companies not to violate HR and uphold them in the workplace[435]. The BIT could either refer to HR treaties, abide by the UNGP minimum list, or simply specify which rights go under this negative obligation[436], but they would need to be *binding* on *investors*. On the other side, the BIT could also enforce specific objectives indirectly promoting HR that companies should comply with. For example, each company should actively participate in the protection of the right to a healthy environment by using a minimum of 30% of renewable energies in their activities. Another one could be to promote the independence of the local population by reinvesting 0.5% of their benefit into small businesses owned by minorities. While those examples are shocking, not aligned with the

[431] United Nations General Assembly, *Report of the Working Group, op. cit.*, p. 20.
[432] P. Dumberry, *op. cit.*, p. 215 ; B. Choudhury, Human Rights Provisions, *op. cit.*, p. 13.
[433] *Supra,* III, The role of investment tribunals, pp. 19-20.
[434] P. Dumberry, *op. cit.*, p. 212.
[435] Human Rights Council*, op. cit.*, N 33.
[436] P. Dumberry,, *op. cit.*, pp. 217-218.

current investment's flow and not viable, they do, nonetheless, remain utopian possibilities for sustainable BIT and investments actively promoting HR.

For this mechanism to be effective, the BIT must also provide for the enforcement of the obligations; otherwise, it would be useless[437]. In other words, if an investor does not respect its obligations, it should bear the consequences[438]. Since the goal is to create enough incentive for the investor to uphold its obligations, different kinds of remedies exist. For example, a BIT could provide monetary compensation, community service, or adverse publicity to counterbalance the effects of the violation[439].

Concerning the Italy Model BIT, while the preamble refers to the Universal Declaration of Human Rights[440] and other provisions indirectly promoting some HR – either with soft or hard law language – I could not find a negative obligation on *investors* explicitly prohibiting them from harming HR. However, based on article 35, "a Party may deny the benefits of this Agreement to […] a covered investment if the denying Party […] maintains measures related […] to the protection of human rights which would be violated or circumvented if the benefices of this Agreement were accorded to that […] covered investment"[441]. This provision is directly addressed to investors who *could* lose the protection of this treaty if they act contradictory to the preservation of HR.

On a side note, what might be interesting is the obligation concerning labour rights that "each *Party* shall respect, promote and effectively implement throughout its territory the internationally recognised core labour standards as defined in the fundamental ILO Conventions"[442]. For example, this could help actively promote the emerging state to implement those principles better, therefore offering better protection for the workers. Moreover, given that investors must abide by the host state law, they would indirectly be touched by the host state elevating its labour standards. Furthermore, given the importance this treaty places on safeguarding the state's right to regulate, the host state would not fair an investment claim if it decided to do so.

### 7) Non-lowering of standards

A non-lowering of standards clause prohibits states from relaxing their domestic law to attract more FDI. This type of clause appears in some new BIT but is still not well implemented[443]. It could be interesting to have such a clause with a list of HR that must particularly be safeguarded. For instance, the Italy Model BIT specifically provides a non-lowering of standards clause with regard to environmental laws[444] and labour legislation[445]. This provision does not require any positive obligations; it simply prevents a race to the bottom. States and investors should refrain from encouraging or lower the protection already offered by the domestic laws to promote their investment. Based on the hypothesis that some states are reluctant to add domestic obligations because they might lose some investors, this provision could be an easy solution to make this fear disappear. Moreover, it should not be too difficult to amend as it is a negative obligation that does not require actively doing something and only

[437] *Ibid.*, p. 223.
[438] B. Choudhury, Human Rights Provisions, *op. cit.*, p. 14.
[439] M. Wells Sheffer, *op. cit.*, p. 520.
[440] Preamble, Italy Model BIT (2022).
[441] Article 35 (b), Italy Model BIT (2022).
[442] Article 22 para. 4, Italy Model BIT (2022).
[443] For further development and analysis of the Rwanda-USA BIT corresponding provisions, see: *supra*, II A b 2, Non-lowering of standards clause, pp. 6-7.
[444] Article 20 para. 2 and 3, Italy Model BIT (2022).
[445] Article 22 para. 2 and 3, Italy Model BIT (2022).

occurs before the implementation of the investment, therefore not reducing the protection offered to the investment.

### 8) Jurisdiction & Broadening arbitration clause

When dealing with an investment claim, to have fairer and more balanced awards, investment tribunals must also be able to consider non-economic values related to the investment. Therefore, BIT must contain a broad enough arbitration clause allowing them to deal with BHR as well[446]. In other words, if investors are given a sword through arbitration, it is necessary that States possess a shield to protect themselves. The first proposition is to have an effective counterclaim mechanism[447] allowing states to justify themselves by proposing HR based counterclaims. As above mentioned, tribunals – through arbitration – can already allow such counterclaims if the arbitration clause is broad enough[448]. However, it is necessary to rewrite narrow clauses[449] to allow HR counterclaims. Broadening the clause will force the tribunal to accept its jurisdiction. Meanwhile, substantive HR provisions will give states the merit of the counterclaim based on a breach of the BIT. This would allow for a straighter reasoning than that the disputed diversions of the Urbaser tribunal[450], which would lead to a better consideration of HR as well as a higher predictability and less controversy[451].

Consequently, if the arbitration clause is broad enough *and* investors have *obligations* under the BIT, nothing would prevent the State from starting the ISDS based on a breach of a substantive provision by the investor[452]. For example, this could allow a State to start a dispute with an investor if he was using forced labour in its factories. While this hypothesis is far from the current reality, and the reasoning a tribunal would hold with this kind of claim is still unknown, it nonetheless remains one of the many possibilities available for BIT's negotiators.

Article 24 of the Italy Model BIT states that *any* dispute[453] may be submitted to a tribunal but only by an investor[454] and as long as the "object of the claim is related to the breach of section 2"[455]. To clarify, section 2 is devoted to the promotion, protection and treatment of the investments while section 3 promotes the SDG. Therefore, only an investor may state a dispute based on a breach of their investment protection by the state. However, while nothing explicitly allows a State to bring a counterclaim, nothing also prevents it. The BIT is also not unequivocal whether the merit of the counterclaim could be based on the SDG contained in section 3 or if only rights in section 2 such as the right to regulate could be invoked by the State to defend itself.

### 9) Applicable law

While the BIT is the law governing the concerned investment, it can never be read in autarky from other legal systems and rules. The arising difficulty is to determine which body of rules should be applied when interpreting the BIT limited provisions. If we want to avoid any uncertainties and have a more predictable outcome, it is necessary for the parties to choose

[446] *Supra,* III 1, Jurisdiction, pp. 21-22.
[447] Human Rights Council*, op. cit.*, p. 14.
[448] For the reasoning of the Urbaser tribunal, see: *supra,* III 1, Jurisdiction, pp. 21-22.
[449] For contrast with the Canada-Uruguay BIT, see: *supra,* III 1, Jurisdiction, p. 22.
[450] *Supra*, III 3, Human rights obligations, p. 24.
[451] *Supra*, III 3, Human rights obligations, pp. 25-26.
[452] P. Dumberry, *op. cit.*, p. 212.
[453] Article 24 para. 1, Italy Model BIT (2022).
[454] Article 24 para. 1, Italy Model BIT (2022).
[455] Article 24 para. 1, Italy Model BIT (2022).

which law will be applicable within the BIT[456]. Diverse approaches are proposed to ensure that IHRL is applicable to the dispute.

The most straightforward way is to state that IHRL is part of the applicable law[457] or, as a rule of interpretation, that some HR should prevail in case of inconsistency with the BIT[458]. Another way would be to say that international law is applicable. The Italy Model BIT follows this approach as it provides that international law and principles are applicable but excludes domestic law[459]. According to Vivian Kube and Ernst-Ulrich Petersmann, "such a reference should be understood as incorporating international treaties, customary international law and general principles or law"[460]. Alternatively, one could also refer to domestic law, which usually also includes some HR[461]. However, except for the first proposition, the content of HR will depend on which HR treaties were ratified by the state parties as well as which ones are included in their national laws[462].

To summarize, States have an obligation to protect HR under IHRL. If they wish to fulfil their obligation, they will need to get rid of the outdated BIT and create a new system in harmony with the current values of society. To enhance the protection of HR these BIT should be inked within the SDG and balance the investors' rights and obligations. Since these objectives are widely recognized, they can be used as the common ground to start renegotiating old BIT. While the renegotiation or amendment should be preferred since it would allow States to get rid of the survival clause as well as keep an encouraging framework for investments, it is a challenging task since it would require the unanimous consent of the parties involved. Therefore, States can also terminate old BIT after their expiration or before their renewal. Keeping the reform option in mind, I proposed some alterations of certain BIT provisions that would be the most effective to better protect the State's obligation to preserve HR. This list is not exhaustive and only includes ideas. Furthermore, not all provisions need to be altered to *better* protect HR. In other words, having something – even tiny – is *better* than having nothing. Finally, using the 2022 Italian Model BIT, I wanted to show that exporting countries also have progressive HR considerations. Therefore, a partner country that would also like to promote respectful investments should try to contact Italy to amend certain provisions. While some will argue that this is costly, time-consuming and with an unpredictable outcome, I wonder if this is not also the case with arbitration. Finally, given the general lack of HR protection in the old BIT, would it not be better to take one step at a time rather than do nothing at all?

## B. Mandatory human rights due diligence

Reforming BIT is one possibility to promote HR in IIL. However, it is not the *sole* opportunity. Indeed, other instruments, such as international policies or domestic legislation, can also achieve a similar result[463]. Since home states are usually more developed, it also signifies they are more stable and stronger to implement regulations than the host state, which sometimes lacks the means or power to enforce a law[464]. Moreover, according to Olivier de Schutter, Johan Swinnen and Jan Wouters, "States have a *duty* under international law to protect human rights even *outside* their national territory, to the extent that they can influence situations that may lead to human rights violations. That applies, in particular, to the home States of

[456] *Supra*, III 2, Applicable law, pp. 22-23.
[457] V. Kube & E. U. Petersmann, *op. cit.*, pp. 95-96.
[458] P. Dumberry, *op. cit.*, p. 216.
[459] Article 26 para. 1, Italy Model BIT (2022).
[460] V. Kube & E. U. Petersmann, *op. cit.,* p. 96.
[461] Human Rights Council*, op. cit.*, N 34.
[462] V. Kube & E. U. Petersmann, *op. cit.*, p. 96.
[463] D. Gaukrodger*, op. cit.*, p. 10.
[464] A. Berkes, Extraterritorial responsibility of the home States for MNC's violations of human rights, *in* Y. Radi (ed.), *Research Handbook on Human Rights and Investment*, Edward Elgar, Cheltenham, 2018, p. 307.

transnational corporations, which deploy activities in other States than their State of origin"[465]. Continuing their thought, they add that the 'do no harm' principle "extends beyond a duty to abstain from causing harm: it implies a **positive duty to control private actors operating abroad** to ensure that human rights […] are not violated by such actors"[466]. The home state could fulfil its duties by promulgating a law for mandatory HR due diligence by companies[467]. Since there is not a single approach to attain this goal, states can draw their policy by choosing what is more adapted or efficient for themselves[468]. Some – more or less – ambitious initiatives already impose positive duties (establishing a report, transparency…) on corporations[469]. Since a mandatory HR due diligence law would be introduced nationally, I will focus on the Swiss situation in order to draw different principles that could be applied to any state wishing to create a similar regulation. As a first step, I will present the Swiss RBI, whose goal was to introduce mandatory due diligence for Swiss corporations. As a second step, since this initiative was rejected, I will display the consequences of the rejection that resulted in a counterproject.

### a) Responsible business initiative

In 2011, the petition "Right without borders" was submitted to the Parliament demanding that companies based in Switzerland also respect human and environmental rights abroad[470]. Following the government's inaction, on the 1st of November 2016, the popular Federal initiative "Responsible business - to protect people and the environment" was agreed to be put to a vote with 120'418 signatures[471]. For information, in Switzerland, people can submit a popular initiative to modify the Constitution if they collect a minimum of 100'000 citizens' signatures within 18 months[472]. Subsequently, people will have to vote whether they accept or reject the proposition[473]. However, the majority of both the cantons and people is necessary for the initiative to be accepted[474]. On the 29th of November 2020, the RBI was accepted by the population but rejected by the cantons[475]. While this law will never be implemented, I trust the proposed mechanism was innovative and extremely well-constructed and could be the basis for other regulations aiming at effective mandatory HR due diligence for corporations. Therefore, I will outline 4 components of this initiative that could be transposed to other legal regimes seeking to protect HR within transnational investments. Firstly, the personal scope of application of the law. Secondly, the material scope of application corresponds to internationally recognized HR. Thirdly, the obligation of due diligence is bestowed upon those corporations. Fourthly, the liability system is scheduled by the law.

In a nutshell, the main aim of this initiative is to go beyond voluntary due diligence measures taken by companies by replacing them with mandatory due diligence that can lead to legal and

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[465] O. De Schutter & J. Swinnen & J. Wouters, *op. cit.,* p. 15.
[466] *Ibid*., p. 17.
[467] Article 3 (a), UNGP.
[468] United Nations Human Rights*, UN Human Rights "Issues Paper" on legislative proposals for mandatory human rights due diligence by companies*, June 2020, p. 1 (cited: United Nations Human Rights*, UN Human Rights "Issues Paper).*
[469] *Ibid*., pp. 3-5.
[470] Amnesty international, *Remise de la pétition «Droit sans frontières» - 135'285 personnes demandent des règles contraignantes pour les firmes suisses*, 13 juin 2022, (04.01.2023), available at : https://www.amnesty.ch/fr/themes/economie-et-droits-humains/initiative-multinationales-responsables/initiative-multinationales-responsables/remise-de-la-petition-droit-sans-frontieres#.
[471] Confédération Suisse*, Initiative populaire fédérale «Entreprises responsables – pour protéger l'être humain et l'environnement». Aboutissement*, FF 2016 7885, 1 novembre 2016.
[472] Article 139 para. 1, Constitution fédérale de la Confédération suisse du 18 avril 1999 (cited : Swiss Constitution).
[473] Article 140 para. 1 let. a, Swiss Constitution.
[474] Article 142 para. 2, Swiss Constitution.
[475] Chancellerie Fédérale, *Votation No 636 - Tableau récapitulatif*, 29 novembre 2020, (04.01.2023), available at : https://www.bk.admin.ch/ch/f/pore/va/20201129/det636.html.

financial consequences for non-compliance. The need for action stems from the fact that the government refuses to act and that Swiss companies widely operate abroad and commit human rights violations that remain unpunished[476].

### 1) Personal scope of application & Extent of the obligation

For example, the RBI states that "the law shall regulate the obligations of companies that have their registered office, central administration or principal place of business in Switzerland"[477]. In other words, all corporations that are taking decisions in Switzerland, regardless of the form of the society[478], are concerned even if they are juridically situated in another state[479]. Therefore, paper companies operating from Switzerland shall also fall within the scope of personal application. For my demonstration, these corporations' "home" will be Switzerland. Furthermore, and here is the novelty, the RBI requires that Swiss corporations also respect HR abroad[480]. This definition is aligned with the UNGP, which provides that either the domicile or the jurisdiction of the State is sufficient to have expectations that these corporations respect HR[481] included in their **extraterritorial activities**[482].

Multinational corporations are defined as having operations in at least another country than their home country[483]. For example, Minería headquarter is located in Switzerland, but it has an affiliate called Minerita in Venezuela. While these entities are distinct, the affiliate remains controlled by the Swiss parent company, benefiting from the protection offered to foreign nationals. However, as noted by Gilles Lhuillier, "the multinational corporation (Minería) by definition escapes the application of national laws" [484] and only the affiliate (Minerita) can be liable under (Venezuelan) domestic law. However, the affiliate is often controlled by the parent company that has the power to make important decisions. Therefore, there is a gap between the entity liable under domestic law (Minerita) and the one who decided to disregard HR (Minería). To bridge this gap, the subject of due diligence obligation should be the **parent company** that bears the responsibility to apply the commitment to the **entire group**[485]. Therefore, the obligation is based on whether the parent company belongs to the home country (Swiss) but would also unfold its effects on foreign territories (Venezuela) since the company (Minería) controls the affiliate (Minerita). Therefore, this norm is characterized as a domestic measure with extraterritorial implications[486].

This raises an additional consideration concerning the scope of the application of the due diligence – and liability – of the parent company along the **supply chain.** At one end of the spectrum, investors favour a complete distinction between the parent and the subsidiary company and due diligence solely based on voluntary commitments[487]. At the other end of the spectrum, some suggest that the scope of the mandatory due diligence should be broader than

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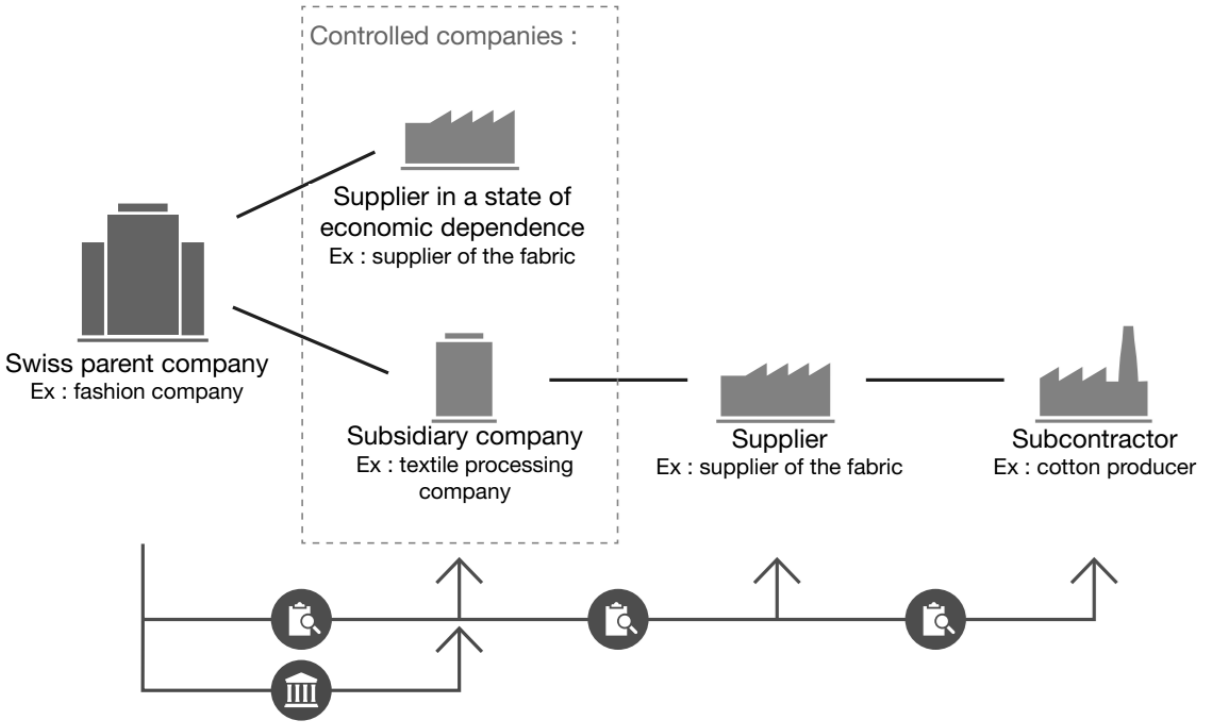
[476] Initiative multinationales responsables, *Brochure d'information*, pp. 3-8.
[477] Article 101a para. 1, proposed amendment to the Swiss constitution, translated from French. Full proposal available at: https://www.bk.admin.ch/ch/f/pore/vi/vis462t.html (cited: RBI).
[478] Initiative pour des multinationales responsables, *Questions et réponses sur l'initiative pour des multinationales responsables*, p. 4 (cited : Initiative pour des multinationales responsables, *Questions et réponses*).
[479] Initiative multinationales responsables, *Brochure d'information*, p. 10.
[480] Article 101a para. 2 let. a, RBI.
[481] Article 2, UNGP ; *Supra*, II B b, United nations guiding principles on business and human rights, pp. 12-13.
[482] United Nations, *Guiding Principles on Business and Human Rights*, *op. cit.*, p. 4.
[483] G. Lhuilier, MNC's obligations in their 'sphere of influence', *in* Y. Radi (ed.), *Research Handbook on Human Rights and Investment*, Edward Elgar, Cheltenham, 2018, p. 247.
[484] *Ibid*., p. 247.
[485] United Nations Human Rights*, UN Human Rights "Issues Paper"*, *op. cit.,* p. 10.
[486] United Nations General Assembly, *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises*, A /HRC/14/27, John Ruggie, 9 April 2010, N 48.
[487] P. Herbel, Les attentes des entreprises, *in* E. Decaux (ed.)*, La responsabilité des entreprises multinationales en matière de droits de l'homme*, Bruylant, Bruxelles, 2010, pp. 152, 154.

"closest commercial relationships" and include partners further down the supply chain[488]. An efficient proposition would be to have the due diligence obligations in the parent companies' contracts with their affiliates or subcontractors. By the butterfly effect, since each business (subcontractor) must respect this obligation based on its contractual relationship with its client (affiliate, parent company), it should also include a similar norm with its subcontractors[489]. The extent of the due diligence obligation would be linked to the *factual* importance of the business relationship[490]. Finally, in the middle of the spectrum, one could say that the parent company is only liable for the societies it *controls*. This control test could be based on stock ownership[491], management rights, or effective ability to control the society.




*Source: Conseil Fédéral, Votation Populaire – 29 novembre 2020, Chancellerie Fédérale, 26 août 2020, p. 11, translated from French*

This scheme was established by the Federal Council to explain the difference of scope between a company's obligations and its liability. Indeed, the RBI provides that companies "must *ensure* that these rights and standards are also respected by the companies they *control*; effective relationships determine whether one company controls another; factual control can also be exercised through economic power"[492]. The level of control is recognized if either a legal relationship gives rise to a group of companies or through economic power that creates

[488] United Nations Human Rights, *EU Mandatory Rights Due Diligence Directive: Recommendations to the European Commission*, 2 July 2021, p. 2 (cited: United Nations Human Rights, *EU Mandatory Rights Due Diligence Directive).*
[489] O. De Schutter*, Extraterritorial Jurisdiction as a tool for improving the Human Rights Accountability of Transnational Corporations*, 2006, pp. 44-45, (11.01.2023), available at : https://www.business-humanrights.org/en/latest-news/pdf-extraterritorial-jurisdiction-as-a-tool-for-improving-the-human-rights-accountability-of-transnational-corporations/.
[490] *Ibid*., p. 45.
[491] *Ibid*., p. 44.
[492] Article 101a para. 2 let. a, RBI, translated from French.

a relationship of dependence[493]. For example, factual control is given if the corporation is the sole client of the supplier. Legal control is given if the company detains the majority of managing rights[494]. Furthermore, the due diligence obligation applies to the whole supply chain[495] . However, as opposed to controlled societies[496], the parent company must only *apply* it but will not be *liable* if it is not conducted appropriately[497].

### 2) Material scope of application

The next debate is related to which rights are concerned by the regulation. While it is clear that the respect of all HR is desirable, including those associated with race, disability, and sexual orientation, it is also recognized that some of these rights are less related to business than others, such as modern slavery. Therefore, while building a regulation, if we wish to avoid having a broad law that is non-implementable, it is essential to consider the needs of corporations. Thus, the prioritization of some rights over others is generally accepted[498]. In addition, as the UNGP has established a list of minimum HR to be respected, this **list** could be the same for the mandatory due diligence obligation[499]. This list reflects the internationally recognized HR[500]. Following this approach, the RBI provides that companies must respect intentionally recognized HR[501] as indicated in the UNGP[502].

### 3) Mandatory due diligence

CSR initiatives exist, but they are voluntary and non-binding[503]. Thus, the next step is to make them mandatory[504]. While this idea is not a novelty[505], its implementation takes longer. The goal would remain the same as with voluntary due diligence, namely, to prevent harm to people arising from the activities of enterprises[506]. In other words, corporations would only have the negative obligation not to harm HR[507], thus, avoiding the corporations' concern of having to fulfil programmatic norms that would remain within the State's responsibility[508]. However, the way to achieve this objective would change by using the rule of law to implement the incentive to comply with the due diligence obligations[509]. The **content of this binding obligation** would follow the UNGP principles[510] of assessing, integrating, tracking and communicating HR impacts coming from the company's operations[511]. By basing due diligence obligation on the

[493] D. Canapa & E. Schmid & E. Cima, « Entreprises responsables » : trois malentendus, *Jusletter*, 23 Novembre 2020, p. 13, (11.01.2023), available at : https://jusletter.weblaw.ch/fr/juslissues/2020/1046/--entreprises-respon_b579f558dd.html__ONCE&login=false (cited : D. Canapa & E. Schmid & E. Cima, trois malentendus).
[494] Initiative pour des multinationales responsables, *Questions et réponses, op. cit.*, p. 5.
[495] *Supra*, II B b, United nations guiding principles on business and human rights, pp. 13-14.
[496] Article 101a para. 2 let. c, RBI.
[497] Article 101a para. 2 let. b, RBI ; Initiative multinationales responsables, *Brochure d'information*, p. 9.
[498] United Nations Human Rights*, UN Human Rights "Issues Paper", op. cit.,* pp. 16-17.
[499] *Supra*, II B b, United nations guiding principles on business and human rights, p. 13.
[500] *Ibid.,* p. 13.
[501] Article 101a para. 2 let. a, RBI.
[502] Initiative pour des multinationales responsables, *Questions et réponses, op. cit.*, p. 5.
[503] *Supra,* II B a, Soft law characteristics and utility, p 10.
[504] M. Doucin, Les initiatives françaises pour une convention internationale sur la responsabilité sociale des entreprises *in* E. Decaux (ed.)*, La responsabilité des entreprises multinationales en matière de droits de l'homme*, Bruylant, Bruxelles, 2010, p. 132.
[505] *Ibid.,* p. 138.
[506] United Nations Human Rights, *EU Mandatory Rights Due Diligence Directive, op. cit.*, p. 5.
[507] D. Canapa & E. Schmid & E. Cima Elena, trois malentendus, *op. cit.*, pp. 10-11.
[508] P. Herbel, *op.cit.*, pp. 151-152.
[509] United Nations Human Rights*, UN Human Rights "Issues Paper", op. cit.*, p. 3.
[510] *Ibid.,* p. 2.
[511] *Supra,* II B b 2, Due diligence, pp. 15-16.

existing and accepted UNGP, the law would not create new obligations for corporations[512]. Following this approach, the RBI incorporates due diligence as set out in the UNGP[513]:

> Companies are required to conduct due diligence (UNGP 17), including assessing actual and potential impacts (UNGP 18) on internationally recognized human rights (UNGP 12) and the environment, to take appropriate measures to prevent violations (UNGP 19-20) of internationally recognized human rights and environmental standards, and to remedy existing violations (UNGP 22) and report on actions taken (UNGP 21)[514].

One could say that the RBI transposed the UNGP due diligence into hard law[515], but with a limited scope of application[516] and a liability component[517]. Finally, due diligence is an obligation of means, not results. Therefore, as long as the corporation can prove that they conducted their diligence obligation assiduously and earnestly provided remedies they will not be liable under the RBI even with a recognized breach of HR[518].

#### 4) Liability mechanism

Since this regulation is mandatory, there must be **consequences** in case of a breach of the due diligence obligation. To be effective, the regulation must first determine who detains a pretension against a violation of the obligations. Since people cannot submit a claim under a BIT[519] and it is difficult to do it upon the host state's domestic law[520], this would be the occasion to let victims submit an action against a multinational corporation. Second, the form of the corporation liability and enforcement (civil, criminal, administrative) must also be provided[521]. Third, the conditions of liability need to be established. It must determine whether it is necessary that the victim supported damage or if the misconduct of the diligence is already sufficient to hold the corporation liable[522]. Fourth, can the company use the earnest conduct of its due diligence obligation as liberating evidence or a means to reduce the sanctions[523]. Finally, which sanctions will be bestowed on the corporation if it is recognized guilty (fines, financial compensation, imprisonment of the director, declaration of non-compliance)[524].

According to the RBI, the victim can start an action against the corporation before a Swiss civil court[525]. The victim must prove that they suffered damage from the company[526]. The company will be liable for itself and its controlled entities except if it can prove that it fulfilled its due

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[512] D. Canapa & E. Schmid & E. Cima, «Entreprises responsables » : une obligation de diligence, *Le Temps*, 10 Novembre 2020, p. 9.
[513] *Supra,* II B b 2, Due diligence, pp. 15-16.
[514] Article 101a para. 2 let. b, RBI, translated from French, brackets added.
[515] Initiative multinationales responsables, *Brochure d'information*, pp. 6-8, 11 ; D. Canapa & E. Schmid & E. Cima Elena, trois malentendus, *op. cit.*, pp. 8-9.
[516] *Supra*, IV B a 1, Personal scope of application & Extent of the obligation, pp. 45 ff.
[517] *Infra*, IV B a 4, Liability mechanism, p. 48.
[518] Article 101a para. 2 let. c, RBI ; Initiative multinationales responsables, *Brochure d'information*, pp. 6-8, 11 ; D. Canapa & E. Schmid & E. Cima Elena, trois malentendus, *op. cit.*, pp. 9-10.
[519] V. Kube & E. U. Petersmann, *op. cit.*, p. 87.
[520] L. E. Peterson & K. R. Gray, *op. cit.*, p. 17.
[521] United Nations Human Rights, *EU Mandatory Rights Due Diligence Directive, op. cit.*, p. 5 ; United Nations Human Rights*, UN Human Rights "Issues Paper", op. cit.*, p. 18.
[522] United Nations General Assembly, *Improving accountability and access to remedy for victims of business-related human rights abuse: The relevance of human rights due diligence to determinations of corporate liability - Report of the United Nations High Commissioner for Human Rights*, A/HRC/38/20/Add.2, 1 June 2018, N 12 (cited: United Nations General Assembly, *Improving accountability)* ; United Nations Human Rights, *EU Mandatory Rights Due Diligence Directive, op. cit.*, p. 5.
[523] United Nations General Assembly, *Improving accountability, op. cit.*, N 25-29, 32-33.
[524] United Nations Human Rights*, UN Human Rights "Issues Paper", op. cit.,* pp. 19-20.
[525] Initiative multinationales responsables, *Brochure d'information*, p. 11.
[526] D. Canapa & E. Schmid & E. Cima, trois malentendus, *op. cit.*, p. 12.

diligence obligations[527]. If the corporation is found guilty, it will have to compensate for the damage.

As above mentioned, the RBI will never be a law. However, the different components of the initiative will be assessed by any state wishing to implement a similar regulation. Furthermore, from my point of view, while this initiative was really promising, it cannot be considered extreme. Indeed, it could have been possible to have a wider scope of HR than the internationally recognized one or liability for the entire supply chain. Therefore, I believe this initiative would have allowed Switzerland to be an example for other countries by clearly expressing their refusal to stand with HR abuse while still being reasonable toward the burden placed on corporations.

### b) The consequences of rejection

Following the rejection of the initiative, a **counterproposal** was adopted. While a transparency obligation was introduced alongside the due diligence obligation, I will only succinctly elaborate on the latter. Firstly, for the limited sectors related to minerals extractions coming from conflict zones and child labour, only in the country of production determined upon the "made in" label, and if the corporation is not exempted from the obligation, corporations have a due diligence obligation[528]. Concretely, the law requires the company to establish a management system. First, the company must include a policy in its contracts with its subcontractors. Secondly, it must trace its supply chain and assess the risks that may occur in its activities. Finally, it should establish a management plan to reduce the identified risks[529]. These findings must be reported in an annual report. If a corporation does not establish it, it can be fined up to 100'000 Swiss francs[530]. However, there is no obligation related to the report's content and corporations will not be fined even if they conducted poor diligence or refused to remedy when a HR violation is discovered[531]. From the government's perspective, this law is coordinated with the international standards in force[532]. However, I believe this situation will raise the same problems as voluntary CSR[533]. Therefore, if Switzerland does not want to show a poor example of its corporations' lack of responsibility for HR breaches abroad, it will need to introduce better legislation or add legal consequences for the misconduct of its businesses. This view seems to be widely shared as a recent petition calling for the introduction of a strong Swiss law for the accountability of multinationals has gathered 217'509 signatures in 100 days[534].

Finally, given the current lack of responsibility for multinationals in Switzerland when the new European Directive on Corporate Sustainability Due Diligence is adopted, Switzerland will definitely not be "coordinated on the international level" as the Federal Council wishes[535]. The EU is currently working on adopting a **directive for mandatory HR and environmental due**

[527] Initiative pour des multinationales responsables, *Questions et réponses, op. cit.*, p. 4 ; Initiative multinationales responsables, *Brochure d'information*, p. 11.
[528] D. Canapa & E. Schmid & E. Cima, «Entreprises responsables»: limitations et perspectives, *Revue de droit suisse*, No. 141, Vol. 5., 2021, pp. 562-563 (cited : D. Canapa & E. Schmid & E. Cima, limitations et perspectives).
[529] N. Bueno, *Diligence des entreprises, travail des enfants et minerais*, Zurich Open Repository and Archive, 2021, p. 6, (11.01.2023), available at : https://www.zora.uzh.ch/id/eprint/217676/.
[530] Conseil Fédéral, *Votation Populaire – 29 novembre 2020*, Chancellerie Fédérale, 26 août 2020, p. 12, (11.01.2023), available at : https://www.admin.ch/gov/fr/accueil/documentation/votations/20201129.html (cited: Conseil Fédéral, *Votation Populaire).*
[531] D. Canapa & E. Schmid & E. Cima, limitations et perspectives, *op. cit.*, pp. 573-574.
[532] Conseil Fédéral, *Votation Populaire, op. cit.*, p. 16.
[533] *Supra,* II B b 3, Remedies, pp. 17-18.
[534] Coalition pour des multinationales responsables, *En seulement 100 jours, 217 509 signatures ont été récoltées pour la responsabilité des multinationales,* 1 décembre 2022, (05.01.2023), available at : https://responsabilite-multinationales.ch/actualite/en-seulement-100-jours-217-509-signatures-ont-ete-recoltees-pour-la-responsabilite-des-multinationales/.
[535] Coalition pour des multinationales responsables, Tenez votre promesse, Madame la Conseillère fédérale Keller-Sutter, 24 août 2022, (05.01.2023), available at : https://www.youtube.com/watch?v=trfBX0VG6tI.

**diligence** for its large companies. On 30 November 2022, they published the general approach this policy will follow[536]. In parallel, since the EU work has been going on for some time and it is expected for the directive to be soon implemented, the swiss government also published a report on the divergences between the EU proposition and its own regulations[537]. Without pretending to be exhaustive, I will present a brief overview of the intersections of the developments of these 2 documents. Firstly, the EU provides an express and general duty of care for HR and the environment, while the swiss law is limited to the restrictive circle of children and has a restrictive scope[538]. Secondly, while the swiss law only applies to the swiss entity[539], its European counterpart would apply to the parent company, their subsidiaries, and the "chain of activities"[540]. Thirdly, while the EU directive provides for the civil liability of companies and full compensation of damages if the corporation does not comply with its due diligence obligations[541], swiss corporations do not have any liability even if they do not respect their due diligence and breach HR[542]. Finally, since the EU directive shall apply to large European companies and non-EU companies active in the EU[543], the adoption of the directive will necessarily have consequences for swiss companies operating in the EU[544]. Therefore, the Swiss Federal Council, while it does not have an obligation to comply with or copy the EU regulation, will need to follow the development of this directive and act accordingly[545]. Following the publication of the general approach by the Council of the UE, the Federal Council published its "marche à suivre"[546] which many criticized as being a "delaying action" by opting for "delaying tactics"[547].

To summarize, home States can establish a mandatory HR due diligence obligation for corporations domiciled in their territory, even for their extraterritorial activities. Such a law would end the impunity of multinational companies that violate HR abroad. When creating their law, states will consider whether they want a general obligation on all corporations (RBI), limited to specific sectors (counterproposal) or depending on the size of the society (UE directive). Furthermore, if the scope of the due diligence obligation and the liability of the parent company only applies to the parent company (counterproposal), controlled subsidiaries (RBI) or, to some extent, the supply chain (UE Directive). Moreover, the law should refer to a list of HR included in the due diligence obligation. It could either be based on internationally recognized HR or have a wider scope. Additionally, the content of the due diligence must also be set out. The law could take over the substance of the UNGP *mutatis mutandis*, or it could create a different content. The essential criterion is that this regulation is binding on

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[536] Council of the European Union, Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 - General Approach, 6533/22, 30 November 2022 (cited : Council of the European Union, Proposal for a Directive).

[537] Département fédéral de justice et police DFJP, *Mandat du DFJP du 23 février 2022 Analyse des propositions de directives de l'UE sur le devoir de vigilance des entreprises en matière de durabilité et sur la publication d'informations en matière de durabilité par les entreprises et examen de la nécessité d'adapter le droit suisse - Rapport sur les propositions de l'UE en matière de durabilité et sur le droit en vigueur en Suisse*, 25 novembre 2022, (11.01.2023), available at : https://www.ejpd.admin.ch/ejpd/fr/home/actualite/mm.msg-id-92009.html (cited : Département fédéral de justice et police DFJP, *Mandat du DFJP).*

[538] *Ibid.,* p. 10.

[539] Département fédéral de justice et police DFJP, *Mandat du DFJP*, *op. cit.,* p. 19.

[540] Council of the European Union, Proposal for a Directive, *op. cit.,* N 17-18.

[541] *Ibid*., N 27-28.

[542] Département fédéral de justice et police DFJP, *Mandat du DFJP*, *op. cit.,* p. 18.

[543] Council of the European Union, Proposal for a Directive, *op. cit.,* N 12-13.

[544] Département fédéral de justice et police DFJP, *Mandat du DFJP*, *op. cit.,* p. 21.

[545] *Ibid*., pp. 21-22.

[546] Département fédéral de justice et police, *Gestion durable des entreprises : le Conseil fédéral détermine la marche à suivre*, 2 décembre 2022, (05.01.2023), available at : https://www.bj.admin.ch/bj/fr/home/aktuell/mm.msg-id-92009.html.

[547] Amnesty International, Le Conseil Fédéral reconnaît le retard de la Suisse, mais tarde à agir, 6 décembre 2022, (05.01.2023), available at : https://www.amnesty.ch/fr/pays/europe-asie-centrale/suisse/docs/2022/conseil-federal-reconnait-retard-suisse-mais-tarde-agir.

corporations. Therefore, the law shall introduce an effective liability mechanism providing that corporations will be condemned if they breach their HR due diligence obligations. However, as the case of Switzerland demonstrated, some governments are not motivated to act. Indeed, it went from an effective mandatory proposal to a law with a very narrow scope and the absence of liability for HR violations. In parallel, the UE is actively working on introducing a directive for mandatory HR and environmental due diligence. Given the economic importance of the UE, I trust the instauration of this regulation will improve the accountability for HR violations by European corporations while conducting activities in foreign countries. Since the introduction of mandatory HR due diligence law seems to be based on political will, I wonder how other exporting countries such as the US, Japan, Singapore, or South Korea will react. Will they follow the example of the UE, or will they remain accomplices of their corporations' HR ?

# V. Conclusion

To summarize, firstly, HR are non-existent in the old generation of BIT. However, even in the newly concluded ones, after the acceptance of the UNGP and the SDG by the international community, while more than 90% refer to the SDG in their preamble, it remains almost non-existent in the provisions. Furthermore, less than 50% of them contain a right to regulate clause and less than 40% one for the non-lowering of standards. Therefore, even this new generation of BIT is not promising for the promotion of HR. While the Nigeria-Morocco BIT and the Italy Model BIT might be good examples of the way to follow, they remain inconsequential amidst the number of treaties. Secondly, the different soft law initiatives might be generally accepted, but only as long as they remain non-binding and voluntary. Therefore, they are, intrinsically to their nature, unable to help a better responsibility for HR violations. Indeed, at the international level, they were accepted as soft law because it was impossible to reach a consensus on a hard law instrument. More than 11 years later, the same discussions are taking place, but without more success. At the national level, as the Swiss RBI illustrates, the prospects are not much better. Indeed, the strong RBI proposal has been replaced by an outdated law with a reduced scope and the absence of liability. At the corporation level, some implemented their own code of conduct to have a good reputation. They only benefit from establishing these paper commitments since they will never be liable if they do not respect them. Furthermore, even if some societies conduct earnest due diligence, the remedies for violations that have occurred are almost non-existent. At the example of FIFA, while their HR policy is impressive, their denial of facts' recognition and responsibility is even greater. At the same time, since remedies are only allocated voluntarily, and upon recognition of the facts, they can only be acclaimed for their political declarations encouraging people to get together for the love of football instead of worrying about the human rights abuses in which their homelands have participated[548]. Furthermore, businesses are not responsible for promoting HR; states are. Thus, since the Swiss government – FIFA's homeland – refuses to introduce a binding mandatory due diligence law with extraterritorial effects – because it is deemed an unbearable obligation and reduces the conditions of competition of corporations – this responsibility should be bestowed on corporations that are only subject to the State. To give some perspective, this is the situation in Switzerland. This country is seen as extremely democratic, with a high degree of freedom of expression, and is home to the Human Rights Council. Thus, it is legitimate - and not condemnable - to imagine that the situation is not much better in other, more autocratic countries. Thirdly, given the dire above mentioned situation, tribunals are not magicians. Since most BIT do not contain any HR obligations, and the IHRL is only directly applicable to States, it is not the role of arbitrators to invent HR obligations for corporations. Furthermore, even if the arbitration clause is broad enough to offer the tribunal the possibility to accept HR

[548] Al Jazeera English, *FIFA President Gianni Infantino Press conference*, 19 November 2022, (19.11.2022), available at : https://www.youtube.com/watch?v=Xq5RzV8dj8Y.

counterclaims, the legal link between the breach of the BIT and the HR counterclaim is often non-existent. Thus, tribunals do not have the jurisdiction to examine them, and these concerns should be addressed to the competent Court of law. The Urbaser award is not binding on other tribunals, and the way it overstretched and misinterpreted the law shall not become an example for *investment* tribunals. Such reasoning can only be attained based on the BIT wording, which is – in most cases – not currently possible. Tribunals only interpret the law and do not create it. As a result, fourthly, BIT need to be amended or renegotiated. However, to change a BIT, States need to consent to it. Exporting states want to offer better protection to their investors and do not have any incentive to include HR obligations. While they accept the SDG and recognize the importance of HR, the home state only needs to protect *their* nationals and does not need to interfere with the conduct of their corporations abroad. Since they can already be prosecuted by the national laws of the host state for HR violations, this protection does not need to be included in a BIT whose primary goal is to protect investments. Furthermore, renegotiating a treaty is time, and money-consuming, and the home state does not see the need to make this effort if it will not benefit from it. If the other party is really discontent with the treaty, they can terminate it unilaterally in due time, and the investors will still beneficit from the 15-20 years of the survival clause protection. In a nutshell, every actor can ask themselves why they should be the first to act. Indeed, since the current system protects investors and exporting states, there is no reason for them to self-create obligations that they will later have to respect when they currently remain unpunished for their HR violations.

While this summary seems to be the synopsis of a horror movie, the one below would be its fairytale counterpart. By laying out both of them, I will let you choose the one appearing more reasonable for you.

To summarize, first, while the old BIT do not contain any HR provisions, we are now moving toward a new generation of BIT. This new generation wants to have more balanced BIT that will provide for investors' rights and *obligations*. This reform is mostly concentrating on preserving the state's right to regulate, prohibiting the lowering of standards to attract more FDI and incorporating the SDG within the BIT. However, at the example of the Morocco-Nigeria BIT, some BIT are going even further in this direction by promoting *sustainable* investments or erecting lists of labour rights that companies must respect. In parallel, secondly, many soft law principles are created. At the corporation level, while they are not binding, they create a framework allowing corporations to adopt responsible behaviour and conduct due diligence to assess the risk their activities can have on HR. CSR commitments also create an excepted standard of conduct for corporations adopting them. Knowing where the risks stand will help companies prevent possible HR violations. Furthermore, thanks to popular opinion, corporations feel like they have to abide by those principles to have a good reputation and keep their customers happy, thus indirectly helping the promotion of HR. Moreover, some companies are asking for the implementation of laws to hold them accountable. While the media only talks about irresponsible corporations committing grave HR violations, it does not mean that all companies are the same. Some are genuinely responsible and are making efforts to respect HR. At the international level, the UNGP were only the starting point for addressing HR issues. Therefore, a group is currently working on a multilateral agreement regulating transnational corporations with respect to HR. In parallel, at the national level, states are taking action to create a mandatory HR due diligence law based on the UNGP and the principle of CSR for transnational corporations. This kind of law shall hold corporations domiciled in the home state accountable even when they breach their due diligence obligations – whose content is usually based on the UNGP – abroad. Furthermore, the scope of the obligation is extended to their controlled subsidiaries as well as some parts of their supply chain. The UE is a leader in this field as it actively works on a solution. It also proposes a civil liability where corporations will have to pay damages to the victims when they breach their obligations. Given

the importance of FDI emanating from the UE, once this new law is implemented, it will positively affect HR. Moreover, one can hope that other states will be inspired by the UE and promulgate a similar rule. Thirdly, IHRL and IIL are getting more and more interlaced. As such, tribunals have the opportunity to interpret BIT to coordinate the two systems of rules. Following this approach, the Urbaser tribunal found that *corporations* have a direct negative obligation not to harm HR when they conduct their business activities. Based on an old not-progressive BIT, it accepted a HR counterclaim since the factual link – claim and counterclaim are based on the same investment – was sufficient. Furthermore, since the BIT did not exclude the application of other laws to solve the dispute, it looked at IHRL to interpret the BIT's provisions. The tribunal concluded that the obligation not to harm HR is a principle of international law that is also directly opposable to investors. Therefore, other tribunals can follow this reasoning, making it possible, even based on some old BIT, to oblige investors not to harm HR. Fourthly, at the same time, States should also make the effort to get rid of outdated BIT. For example, India has been terminating BIT unilaterally and is actively renegotiating new ones in agreement with its priorities. Moreover, UNCTAD provides different instruments to help States reform their BIT based on the SDG. I proposed that States agree to amend some BIT provisions by negotiating on widely accepted values and common interests. By formulating proposals based on a "pick and choose" menu, states can determine their priorities and negotiate with like-minded states. For instance, since the Italy Model BIT is highly progressive, it could be a starting point for other states to start negotiations with Italy to amend their old BIT. If some proposals require more obligations for states and investors, others should be easier to adopt. Therefore, states should be encouraged to start negotiations. Even if the outcome is only mediocre, it would still be better than the current old BIT. In a nutshell, developments to promote HR are happening on all levels. Within a few years, we will have some mandatory due diligence laws, as well as more innovative BIT, and corporations' CSR commitments might be better respected. Therefore, we should encourage states to move in this direction and set up forums to help perform this reform.

For my part, while I obviously wish for an outcome aligned with the fairy tale scenario, I am also fully aware that it would be naïve. The reality will probably lay somewhere in the middle. Some states will make efforts, while others will continue to put profit and power before humans. Some investors will be responsible, while others will keep staining and destroying everything they touch. If we do not make considerable efforts, the consequences on HR will become more important as those wielding more power choose to disregard them to make more money and serve their interests. Since we now have the tools to build a system of sustainable investments, we need to work on the creation of incentives to use them efficiently. However, knowing how to create a fruitful incentive cannot be compartmentalized into the domain of law. Therefore, we should start by understanding the IIL on a bigger scale than simply partitioning it to its lawful aspect. Indeed, we look at the ethics behind the appointment of arbitrators, the international relations behind the negotiations of treaties, and the economic functioning of transnational businesses. If we find some common ground between those different systems, it will be easier to propose solutions that might be accepted by all. Furthermore, I would like to highlight some factors that might seem surprising. For instance, Europe and the US are often seen as leading the game, but East Asia is developing faster than the former. Therefore, instead of always pleasing the "Western Alliance", could it not be possible to focus more on Eastern values? The same goes for African countries that are seen as the "Africa block", thus not considered individually. Could it not be possible to assess their particularities and create a bottom-up movement from emerging countries that would stick together to increase their bargaining power? Finally, closer to the HR issue, we always have prejudices against which countries are "better" and which are "worst". While this is not necessarily untrue, the media also distorts reality because states always need a "bad guy" to serve their own interests. Could it not be

possible to bring people together upon shared values and some HR instead of always trying to divide and conquer? I do not know the answer to any of these questions. I believe they are worth giving a try in order to avoid the horror movie scenario. Since HR are the very basis of humanity, no idea is too bad or insignificant not to give it a try.

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