

The Accountability and Corporate Social Responsibility of Multinational Corporations for Transgressions in Host States through International Investment Law

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1. Introduction

Companies ('foreign investors') play a key role in bringing foreign direct investment (FDI) to states by investing in various economic sectors of the capital-importing state (the 'host state').¹ The promotion and protection of investors and their investments has long been the focus of the international investment law regime, and is reflected in most International Investment Agreements (IIAs). IIAs have traditionally been concluded for the purpose of realizing economic objectives. Lately, however, non-economic goals, such as sustainable development, have also been included in a number of new generations of IIAs.² Driven by liberal trade and investment policies, economic globalization has promoted and made it easier for companies to conduct business and invest abroad.³ The FDI has been associated with some positive developments, such as the flow of capital into host states, and the transfer of specific expertise or knowledge by foreign investors.⁴

However, the activities of foreign investors in host states have also generated concerns regarding the responsibility and accountability of investors operating abroad.⁵ The activities of foreign investors in host states have in some cases had an adverse effect on the local environment and the human rights situation in a host state.⁶

The potential adverse impact of IIAs on human rights, international labour standards, and environmental protection standards in a host state has also been a concern in the negotiations preceding

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1 Please note that foreign investors are usually companies (in many cases multinational corporations) and sometimes individuals. See R. Dolzer & C. Schreuer, *Principles of International Investment Law* (2012), p. 44.

2 From the UNCTAD database of IIAs, it follows that out of 1,959 IIAs, 54 include a reference to sustainable development; see UNCTAD, 'IIA Mapping Project 2016' (2016), <<http://investmentpolicyhub.unctad.org/IIA/mappedContent#iialInnerMenu>> (last visited 20 April 2018). See also Art. 1 of the South African Development Community (SADC) Model BIT Template of 2012 with Commentaries, <<http://investmentpolicyhub.unctad.org/Download/TreatyFile/2875>> (last visited 20 April 2018). The concept of sustainable development occupies a central position in the SADC Model BIT. It is referred to as a 'main objective' of the agreement, with the view to 'encourage and increase investments (...) that support the sustainable development of each Party (...).'

3 K.J. Vandavelde, 'The Liberal Vision of the International Law on Foreign Investment', in C.L. Lim (ed.), *Alternative Visions on the International Law on Foreign Investment* (2016), p. 67.

4 Under certain conditions the FDI generates positive effects for a host state. A review of the effects of FDI is provided in J. Pohl, 'Societal benefits and costs of International Investment Agreements', *OECD Working paper* (2018). See also L. Colen et al., 'Foreign Direct Investment as an Engine for Economic Growth and Human Development: A Review of the Arguments and Empirical Evidence', *Working paper prepared for the IAP P6/06 Project: Working Package FDI-1* (2008).

5 P. Muchlinski, 'Corporate Social Responsibility', in P. Muchlinski et al. (eds.), *The Oxford Handbook of International Investment Law* (2008), p. 641.

6 For example, the extraction of natural resources by MNCs that in some cases led to environmental pollution and which had a negative impact on the health of the communities living in the area of contamination, as was the case of Chevron in Ecuador or Shell in Nigeria.

the EU-US Transatlantic Trade and Investment Partnership Agreement (TTIP) and the recently concluded Canada-EU Comprehensive Economic and Trade Agreement (CETA).⁷ One of the reasons for such concern was observed in the consultation paper on the TTIP, which stated that ‘the investment protection provisions [in investment agreements] do not impose any obligations on investors.’⁸ An improvement of this shortcoming has been suggested in the consultation paper, by ensuring that the ‘investor’s conduct complies with human rights, Corporate Social Responsibility (CSR) principles or international labor and environmental standards’.⁹ The call for the inclusion of the CSR principles, and the provisions referring to the protection of human rights, labour and the environment in IIAs has been a part of the larger efforts to rebalance the IIAs in order, on the one hand, to provide the policy space for host states to regulate in the public interest and, on the other, to ensure the effective protection of investors.¹⁰

In this paper it is argued that in order to create a better balance within IIAs, foreign investors should not only have rights under IIAs, but they should also assume obligations to respect human rights and environmental and labour standards in a host state. The regime of international investment law, as it currently stands, provides little opportunities to hold foreign investors accountable for those human rights, environmental and labour violations that are pertinent to investment, as these subjects are rarely a part of investment treaties or investment contracts.¹¹

The contracting states, the parties to IIAs, are free to include the obligations directly addressed to investors and the provisions for their enforcement. Some states have already introduced CSR provisions directly addressed to investors in the operative part of their IIAs. The term ‘CSR provisions’ is defined in this article as the clauses in IIAs that refer to certain obligations and responsibilities of foreign investors concerning human rights, environmental and labour standards that have been imposed on investors, either directly or indirectly, through the contracting state(s). As observed in the recent investment decision of *Urbaser v. Argentina*, it is no longer the case that ‘companies operating internationally are immune from becoming subjects of international law.’¹² The challenge is to establish how the international obligations concerning the issue of human rights, which relates to investment activities, can be applied to an investor.

This article explores whether the obligations which are pertinent to human rights, the environment and labour can be imposed on investors under international investment law. And, if so, what the legal implications of that in terms of the responsibility and accountability of companies for violations of human rights, environmental and labour standards are.

As will be discussed in this article, one way of incorporating human rights, environmental and labour obligations for investors is by including the legally binding CSR provisions. The examples of IIAs, discussed in this paper, have incorporated the CSR provisions in the operative part of their treaties. The legal implications of these CSR provisions in terms of the accountability of investors are addressed in Section 3 of this article.

7 United Nations Human Rights Office of the High Commissioner, ‘UN rights expert urges States not to sign the ‘flawed’ CETA treaty and put it to referendum’, <<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20787>> (last visited 20 January 2018); Green Peace International, ‘Leaked TTIP documents confirm major risks for climate, environment and consumer safety’, <<http://www.greenpeace.org/international/en/press/releases/2016/Leaked-TTIP-documents-confirm-major-risks-for-climate-environment-and-consumer-safety/>> (last visited 20 January 2018).

8 European Commission, ‘Online Public Consultation on Investment Protection and Investor-to-State Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement’ (2015), p. 33.

9 *Ibid.*, p. 33.

10 The European investment policy incorporated the objectives to balance the investor’s protection goals through substantive investment guarantees by e.g. ensuring that ‘EU companies are not discriminated against abroad’; operating ‘a predictable and transparent business environment’; enforcing ‘international investment rules clear and consistently’; and ensuring there is protection of ‘investments of EU citizens and companies abroad’. At the same time, ‘EU investment policy also fully preserves the right of home and host countries to regulate their economies in the public interest.’ See European Commission, ‘Investment: Objectives of the EU Investment Policy’, <<http://ec.europa.eu/trade/policy/accessing-markets/investment/>> (last visited 21 April 2018).

11 United Nations Human Rights Council, ‘Concept Note Proposed under the Responsibility of the Designated Chair, Ambassador Maria Fernanda Espinosa, Permanent Representative of Ecuador to the UN in Geneva, for the First Session of the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights’ (2015), para. 4. In the note, the imbalance between the rights and obligations of host states and investors is explained as follows: ‘(...) the international legal system reflects an asymmetry between rights and obligations of TNCs. While TNCs are granted rights through hard law instruments, such as bilateral investment treaties and investment rules in free trade agreements, and have access to a system of investor-state dispute settlement, there are no hard law instruments that address the obligations of corporations to respect human rights.’

12 *Urbaser v. Argentina*, ICSID Case No. ARB/07/26 Award (8 December 2016), para. 1195.

In the absence of explicit provisions stipulating the obligations and responsibilities of investors, tribunals may consider the investor's conduct at the different stages of the investment proceedings. For example, a counterclaim by a host state against an investor can be the possible avenue for holding an investor accountable for human rights, environmental or labour violations that are pertinent to an investment. The mechanism of counterclaims under international investment law is elaborated upon in Section 4.

Also, the investor's conduct may play a role at the merits stage of the investment dispute. In some of the recent decisions by investment tribunals, the extent of due diligence conducted by an investor in a host state has been a factor in determining the protection under the substantive investment protection standard, i.e. fair and equitable treatment (FET).

Prior to the analysis of the legal implications of the CSR provisions in IIAs and the role of the investor's conduct in the decisions of investment tribunals, in Section 2 some background information will be provided on the role of the accountability and CSR of investors in the context of international investment law.

2. The accountability and corporate social responsibility of investors under international investment law

International investment law regulates the legal relationship between states and foreign investors. It contains a network of more than 3,000 IIAs, general principles of law, and rules of customary international law.¹³ IIAs are commonly considered to be the 'cornerstone of modern international investment law.'¹⁴ On the bilateral level, IIAs include Bilateral Investment Treaties (BITs). On the multilateral and regional levels, IIAs consist of Free Trade Agreements (FTAs) and Economic Partnership Agreements (EPAs). These types of agreements contain either investment chapters or investment provisions.

Foreign investors have the right to benefit from the investment protection guarantees laid down in IIAs. Even though the contracting parties to the IIAs are states, these agreements confer certain rights on foreign investors. Foreign investors have the ability to enforce these rights through an investor-state dispute settlement system (ISDS); this option is provided for in most of IIAs.¹⁵ The rights of foreign investors are formulated primarily in the substantive investment protection clauses contained in IIAs.¹⁶ To exemplify this, states are obliged to afford fair and equitable treatment (FET) to investors,¹⁷ to provide them with full protection and security,¹⁸ and to treat them in a way that is non-discriminatory. By contrast, the obligations of investors towards host states are rarely expressed in the text of these IIAs.¹⁹

This asymmetry in IIAs has led to criticisms by states, international organizations and scholars, which argue that IIAs may impose limitations on a host state's right to regulate and create a lack of accountability by foreign investors operating in host states.²⁰ The critique is primarily based on several investment cases in which investors have successfully challenged the state's regulations or policies in the areas of water management and sanitation,²¹ the ban on hazardous chemicals,²² measures aiming to combat an economic crisis²³ and so on.

13 UNCTAD, 'World Investment Report 2017' (2017), p. xii. The report provides that in 2017, 3,324 IIAs were concluded.

14 M. Chi, *Integrating Sustainable Development in International Investment Law* (2018), p. 16 (e-book).

15 A. Roberts, 'Triangular Treaties: The Extend and Limits of Investment Treaty Rights', (2015) 56 *Harvard Law Review*, no. 2, p. 369; S. Franck, 'Development and Outcomes of Investment Treaty Arbitration', (2009) 50 *Harvard International Law Journal*, no. 2, p. 442. Note that the host state cannot initiate arbitration proceedings against an investor.

16 A. Diehl, *The Core Standard of International Investment Protection* (2012), p. 307.

17 Art. 2(2) of the Albania-Bosnia and Herzegovina BIT (2008) which states that 'Investments of Investors of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party.'

18 Art. 4(1) of the Afghanistan-Germany BIT (2005) which states that 'Investments by investors of either Contracting State shall enjoy full protection and security in the territory of the other Contracting State.'

19 In some IIAs, investors are required to act in accordance with the domestic law of the host state. This has, however, been formulated as a pre-condition for investor protection, rather than an obligation towards the host state.

20 A. Titi, *Right to Regulate in International Investment Law* (2014) p. 72; See Chi, supra note 14, pp. 14-15.

21 ICSID Case No. ARB/01/12, *Azurix Corp. v. The Argentine Republic*, Award (14 July 2006); ICSID Case No. ARB/03/19, *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic*, Decision on Liability (30 July 2010); ICSID Case No. ARB/07/17, *Impreglio S.p.A v. Argentina*, Award (21 June 2011).

22 ICSID Case No. ARB(AF)/00/2, *Tecmed v. Mexico*, Award (29 May 2003).

23 ICSID Case No. ARB/01/8, *CMS Gas Transmission Co. v. The Argentine Republic*, Award (12 May 2005).

The conduct of investors, which has resulted in violations of environmental and/or human rights laws, has raised concerns regarding the negative impact of this conduct on the human rights and the environmental situation in the host states.²⁴ For example, the argument concerning the human right to water has been raised in a series of cases concerning the privatization of water services in Argentina.²⁵ The Government of Argentina and a number of NGOs argued that the companies had violated the right of local citizens to have access to water, since they had, among other things, increased the costs to such an extent that certain people were effectively denied access to water.

It has also been argued that the activities of foreign investors has had an adverse effect on the state's right to regulate in the public interest in an indirect way. Companies have obtained strong bargaining power with the potential to affect the decisions and policies of states, especially when investing in developing and least developing states.²⁶ This might be expressed as a so-called 'regulatory chill,' when a company threatens the state with a multi-billion law suit unless the host state withdraws or alters the proposed measure that interferes with the profitability of the business operations, even if such a measure is in the public interest.²⁷ The operations of international tobacco companies, especially in developing states, constitute such an example. In some cases, the tobacco companies have attempted to influence host states to abandon or to soften anti-tobacco laws by threatening or initiating law suits under investment or trade agreements.²⁸

Consequently, the activities of companies in host states may have a direct effect on, for example, environmental pollution, as well as having an indirect effect in the form of regulatory chill hindering the state's policies in the field of clean energy, or the protection of public health, amongst others. The accountability of foreign investors operating in host states under international law is far from clear. As will be further elaborated upon in this article, until recently IIAs provided for obligations for host states towards investors, but not *vice versa*²⁹ However, in the last ten years, efforts towards reforming international investment law so as to ensure a more adequate balance between investment protection, on the one hand, and policy space for the state to regulate in the public interest, on the other, has taken place. Also, the issue of promoting investors' responsibility and accountability in IIAs has become more prominent in recent years.³⁰

Several attempts to integrate CSR issues have been made within the framework of authoritative international codes and guidelines. These include, for example, the Organization for Economic Cooperation and Development (OECD) Guidelines on Multinational Enterprises,³¹ the Ten Principles of the UN Global Compact³² and the 2011 UN Guiding Principles on Business and Human Rights.³³

24 See *Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador*, which was litigated by courts and arbitration tribunals for more than 20 years (since 1993 until now). See, for example, PCA Case No. 2009-23, *Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador*, UNCITRAL (2003). The Chevron case involves an environmental dimension, i.e. the pollution brought about by Chevron/Texaco in the course of oil exploration and exploitation starting in the 1970s. The operations of the foreign investors and the domestic oil companies led to the environmental catastrophe affecting people's health and destroying nature. See B.G. de la Torre, 'Chevron-Texaco v. Ecuador: The Environmental Claim within a Claim of Denial of Justice', in Y. Levashova et al. (eds.), *Bridging the Gap between International Investment Law and the Environment* (2015) pp. 443-464.

25 See *Azurix Corp. v. The Argentine Republic*, supra note 21; *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic*, supra note 21; *Impreglio S.p.A. v. Argentina*, supra note 21.

26 See Chi, supra note 14, p. 6.

27 K. Tienhaara, 'Regulatory Chill and the Threat of Arbitration: A View from Political Science', in C. Brown & K. Miles (eds.), *Evolution in Investment Treaty Law and Arbitration* (2011), p. 615.

28 There are several examples of tobacco companies that attempted to exercise their influence on host states to block the state regulatory tobacco control measures that interfered with the profitability of their operations. See ICSID Case No. ARB/10/7, *Philip Morris v. Uruguay*, Award (8 July 2016); PCA Case No. 2012-12, *Philip Morris Asia Limited v. The Commonwealth of Australia*, UNCITRAL, Award on Jurisdiction and Liability (17 December 2015). For a further analysis see Chi, supra note 14, p.20. See also K. Tienhaara, 'Regulatory Chill in a Warning World: The Threat to Climate Policy Posed by Investor-State Dispute Settlement' (2017) *Transnational Environmental Law*, <https://doi.org/10.1017/S2047102517000309>, p. 9.

29 G. Bottini, 'Extending Responsibilities in International Investment Law', in *The E15 Initiative: Strengthening the Global Trade and Investment System for Sustainable Development* (2015) p. 1.

30 UNCTAD, 'World Investment Report 2017' (2017), p. 119. The report provides that 'IIA reform has made significant progress (...) [m]ost of today's new IIAs include sustainable development-oriented reform elements that preserve the right to regulate, while maintaining investor protection, foster responsible investment and improve investment dispute settlement.' See also M. Moïse Mbengue, 'Les obligations des investisseurs étrangers', in L. Dubin et al. (eds.), *L'entreprise multinationale et le droit international* (2017), p. 295.

31 OECD, 'OECD Guidelines for Multinational Enterprises' (2011), <<http://mneguidelines.oecd.org/guidelines/>> (last visited 20 January 2018).

32 United Nations, 'UN Global Compact: The Ten Principles' (2005), <<https://www.unglobalcompact.org/what-is-gc/mission/principles>> (last visited 20 January 2018).

33 UNHRC, 'Guiding Principles on Business and Human Rights', UN Doc. HR/PUB/11/04 (2011), <http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf> (last visited 20 January 2018).

For the purpose of international investment law and policymaking in particular, the United Nations Conference on Trade and Development (UNCTAD) developed, in 2012, the Investment Policy Framework for Sustainable Development (IPFSD), which was updated in 2015.³⁴ The IPFSD provides a set of principles for investment policymaking, guidelines for national policies and specific guidance for policymakers discussing all stages of the drafting process, as well as the specific provisions of the relevant IIAs. The guidance on international investment policies addressed to states includes, among other things, guidance on how to ‘balanc[e] State commitments with investor obligations and promoting responsible investment.’³⁵ The IPFSD proposes that ‘investor obligations could be the basis for stipulating in the IIA the consequences of an investor’s failure to comply with domestic laws. In addition, the IIA could refer to commonly recognized international standards and support the spread of CSR standards.’³⁶ Also, the IPFSD provides a number of concrete suggestions for policymakers on how to formulate and to incorporate CSR provisions in IIAs and in national investment laws and policies.

Following the IPFSD guidance, a growing number of both developed and developing countries have been reconsidering and reforming their international investment laws and policies in order to balance the rights and obligations of states and investors.³⁷ To this end, several states have included CSR provisions in their IIAs, as will be discussed in more detail in Section 3.

3. Accountability of investors through corporate social responsibility provisions in investment treaties

Over the past 10 years, a new generation of investment policies has emerged, which marks the starting point of a shift in investment treaty making.³⁸ This shift entails a focus on rebalancing the rights and obligations of states and investors, including the incorporation of investor obligations in IIAs.³⁹ Empirical research undertaken by the UNCTAD shows that the number of treaties incorporating CSR provisions in the operative text of the applicable IIAs is growing.⁴⁰

In this article several IIAs that have included CSR provisions have been analyzed. The ways in which CSR provisions are being reflected in this new generation of IIAs vary, however. Therefore, a distinction made by the author is between indirect CSR provisions addressed to the contracting states and direct CSR provisions that impose obligations on investors directly. This distinction is further explained and discussed below.

3.1 Indirect obligations of investors

In a number of IIAs, CSR provisions have been included in the operative part of the treaty. An example of such a CSR provision can be found in Article 16 of the Benin-Canada Bilateral Investment Treaty (BIT), 2013. It provides that:

34 UNCTAD, ‘Investment Policy Framework for Sustainable Development’ (2012) (updated in 2015), <[http://unctad.org/en/Pages/DIAE/International%20Investment%20Agreements%20\(IIA\)/IIA-IPFSD.aspx](http://unctad.org/en/Pages/DIAE/International%20Investment%20Agreements%20(IIA)/IIA-IPFSD.aspx)> (last visited 20 January 2018).

35 *Ibid.*, p. 8.

36 *Ibid.*

37 The EU, Indonesia, India, Ecuador, Brazil, and the African countries, among others, have engaged in comprehensive reforms of their IIAs. Also, the World Investment Report (2017) provides that reform in international investment law has ‘made significant progress (...) in five action areas: safeguarding the right to regulate, while providing protection; reforming investment dispute settlement; promoting and facilitating investment; ensuring responsible investment; and enhancing systemic consistency.’ See UNCTAD, ‘World Investment Report 2017’ (2017), p. xii.

38 See UNCTAD, *supra* note 34, p. 16.

39 UNCTAD, ‘World Investment Report: Towards a New Generation of Investment Policies’ (2012), p. xii. The report provides that a new generation of investment policies is emerging, stating that ‘investment policies place inclusive growth and sustainable development at the heart of efforts to attract and benefit from investment.’

40 The UNCTAD IIAs Mapping Project states that out of 1,958 IIAs, 28 included CSR provisions. In the preamble, 221 IIAs have included a reference to social investment aspects (e.g. CSR, human rights, poverty reduction, labour). Most of these IIAs were concluded after 2000. See UNCTAD, ‘IIA Mapping Project 2016’ (2016), <<http://investmentpolicyhub.unctad.org/IIA/mappedContent#iialInnerMenu>> (last visited 20 January 2018). According to the UNCTAD World Investment Report of 2017, there are currently 3,324 IIAs. UNCTAD, ‘World Investment Report 2017’ (2017), p. xii. The number of BITs has experienced significant growth, particularly between the early 1990s and early 2000s. See ‘Table of IIAs Trends concluded between 1980-2015’ in UNCTAD, ‘World Investment Report 2016’ (2016), p. 101, <http://unctad.org/en/PublicationsLibrary/wir2016_en.pdf> (last visited 20 January 2018).

Contracting Party should encourage enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate internationally recognized standards of corporate social responsibility in their practices and internal policies, such as statements of principle that have been endorsed or are supported by the Contracting Parties. These principles address issues such as labor, the environment, human rights, community relations and anti-corruption.⁴¹

Article 16 of the Benin-Canada Bilateral Investment Treaty imposes an obligation on the contracting states to promote responsible business conduct for companies operating within the territory or under the jurisdiction of one of the contracting states. This type of provision does not impose direct obligations on foreign investors, but rather indirect ones.⁴² This means that the states, not investors, are the primary addressees of the obligations outlined in these types of CSR provisions. The effect of such CSR formulations is two-fold.

On the one hand, such provisions leave the contracting states in charge of complying with CSR standards. Therefore, in order for this provision to have any effect, the contracting states need to take the necessary action through their internal laws and policies in order to ensure that the companies comply with CSR standards. If the state does not promote and encourage businesses to comply with such standards, the legal effect of this provision is limited.

On the other hand, CSR provisions incorporating indirect investor obligations signal that contracting states are expected to ensure that the 'operations of investors abide by certain internationally recognized CSR standards.'⁴³ In turn, this may indicate that by operating abroad, companies cannot count on the lower environmental or human rights standards that may sometimes apply in host states. As the 2017 UNCTAD World Investment Report underlined, such references 'flag the importance of sustainability in investor-State relations (...) [that] could attune investors to their sustainable development-related responsibilities and operate as a source of interpretive guidance for ICSID tribunals.'⁴⁴

3.2 Direct obligations of investors

In several recent IIAs, CSR provisions have emerged that address investors directly. To name a few, direct CSR obligations for investors have been incorporated into the 2016 Morocco-Nigeria BIT,⁴⁵ the 2016 Argentina-Qatar BIT,⁴⁶ the 2016 Pan-African Investment Code,⁴⁷ and the 2012 South African Development Community (SADC) Model Bilateral Investment Treaty Template.⁴⁸

Article 12 of the Argentina-Qatar BIT includes a provision on CSR. It states that investors should 'make efforts to voluntarily incorporate internationally recognized standards of corporate social responsibility into their business policies and practices.'⁴⁹ The language employed in this provision is broad and does not go further than encouraging investors to integrate CSR norms into their business.

Article 12 of the Argentina-Qatar BIT does not specify the CSR standards, stating merely that these standards should be 'internationally recognized.' There are a number of international instruments that set out internationally recognized CSR standards, the most prominent being the OECD Guidelines, the Global Compact, the UN Guiding Principles, the UN Principles for Responsible Investment, and the ISO 26000-Social Responsibility. However, the principles embodied in these instruments all have a different focus depending

41 Art. 16 of the Benin-Canada BIT (2013), <<http://investmentpolicyhub.unctad.org/Download/TreatyFile/438>> (last visited 20 January 2018).

42 According to the 2002 report of the International Council of Human Rights, indirect obligations of companies refer to the 'indirect form of accountability (...) according to which primary legal obligations lie with states.' International Council of Human Rights, 'Report: Beyond Voluntarism Human Rights and the Developing International Legal Obligations of Companies' (2002), p. 3, <http://www.ichrp.org/files/reports/7/107_report_en.pdf> (last visited 20 January 2018); see also R. Peels et al., 'Corporate Social Responsibility in International Trade and Investment Agreements: Implication for States, Business and Workers', (2016) *ILO Research Paper No. 13*, p. 15, <http://www.ilo.org/wcmsp5/groups/public/---dgreports/---inst/documents/publication/wcms_476193.pdf> (last visited 20 January 2018).

43 J. Viñuales, 'Investor Diligence in Investment Arbitration: Sources and Arguments', (2017) 32 *ICSID Review*, no. 2, p. 355.

44 UNCTAD, 'World Investment Report 2017' (2017), p. 139.

45 Morocco-Nigeria BIT (signed 3 December 2016), <<http://investmentpolicyhub.unctad.org/IIA/treaty/3711>> (last visited 20 January 2018).

46 Argentina-Qatar BIT (signed 6 November 2016), <<http://investmentpolicyhub.unctad.org/IIA/treaty/3706>> (last visited 20 January 2018).

47 United Nations Economic Commission for Africa, 'Conference of African Ministers of Finance, Planning and Economic Development', UN Doc. E/ECA/CM/50/1 AU/STC/FMEPI/MIN/1(III) (2017)

48 South African Development Community (SADC) Model BIT Template of 2012 with Commentaries, <<http://investmentpolicyhub.unctad.org/Download/TreatyFile/2875>> (last visited 20 November 2016).

49 Art. 12, Argentina-Qatar BIT (2016).

on the private actors they seek to address. The compliance mechanisms are also diverse, some providing for more rigid monitoring systems than others. Consequently, the reference to more specific CSR standards in IIAs, as has been laid down in the Morocco-Nigeria BIT, may provide better guidance in relation to the CSR standards that foreign investors should seek to comply with.

The 2016 Morocco-Nigeria BIT is an example of the new generation of IIAs with a number of progressive provisions focusing on the obligations of the investor. This BIT includes a CSR provision addressed to the investor,⁵⁰ pre-establishment obligations requiring investors to conduct environmental and social impact assessments and to apply the precautionary principle,⁵¹ post-establishment obligations requiring investors to comply with environmental and labour standards,⁵² investor obligations to abstain from corruption practices,⁵³ and a provision on investor liability,⁵⁴ to name but a few.

The CSR provision in Article 24(2) of the 2016 Morocco-Nigeria BIT specifies that 'Investors should apply the International Labour Organization (ILO) Tripartite Declaration on Multinational Investments and Social Policy as well as specific or sectoral standards of responsible practice where these exist.'⁵⁵ Article 24(1) of the 2016 Morocco-Nigeria BIT also provides that an investor has to comply with the laws and regulations of the host state and 'investors and their investments should strive to make the maximum feasible contributions to the sustainable development of the host state and local community through high level of socially responsible practices.'⁵⁶ Article 24 of the 2016 Morocco-Nigeria BIT is further complemented by the investor's obligation laid down in Article 18 to 'maintain an environmental management system' such as the ISO 14001; to 'uphold the human rights in the host state;' and 'to act in accordance with core labor standards required by the ILO Declaration on Fundamental principles and Rights of Work, 1998.'⁵⁷

The approach adopted in the aforementioned treaty is based on the notion that investors and their investments are the catalysts in stimulating sustainable development in a host state. From this perspective, investors are expected to comply with the environmental and social standards in a way that encourages sustainable investment. The language used in Articles 24 and 18 of the Morocco-Nigeria BIT identifies the CSR codes that investors have to adhere to. The reference to the specific CSR codes is a step forward in drafting CSR provisions with the effect of promoting better investor compliance with such norms. For example, the specific CSR codes, e.g. the Tripartite Declaration on Multinational Investments and Social Policy, provide guidelines to multinational corporations (MNCs) on how to execute 'social policy and inclusive, responsible and sustainable workplace practices.'⁵⁸ In particular, the Declaration, updated in 2017, encourages MNEs to make a 'positive contribution (...) to economic and social progress and the realization of decent work for all; and to minimize and resolve the difficulties to which their various operations may give rise.'⁵⁹ Where an investor does not comply with the guidelines provided in the aforementioned Declaration, tribunals may take this non-compliance into consideration if it is relevant to the claim raised by an investor and concerns the disputed investment.

In addition to specifying investor obligations, Article 20 of the Morocco-Nigeria BIT clarifies that a violation of the investor's obligations may lead to liability before the domestic courts. Article 20 of the Morocco-Nigeria BIT entitled 'Investor liability' provides that '[i]nvestors shall be subject to civil actions for liability in the judicial process of their home state for the acts or decisions made in relation to the investment where such acts or decisions lead to significant damage, personal injuries or loss of life in the host state.'⁶⁰

The rationale for such a liability clause is that a home state has 'duties (...) in matters relating to foreign investment which require the home state to intervene to ensure that its multinational corporations act

50 Art. 24, Morocco-Nigeria BIT (2016).

51 Art. 14, Morocco-Nigeria BIT (2016).

52 Art. 18, Morocco-Nigeria BIT (2016).

53 Art. 17, Morocco-Nigeria BIT (2016).

54 Art. 20, Morocco-Nigeria BIT (2016).

55 Art. 24, Morocco-Nigeria BIT (2016).

56 Art. 24(1), Morocco-Nigeria BIT (2016).

57 Art. 18, Morocco-Nigeria BIT (2016).

58 ILO, Tripartite declaration of principles concerning multinational enterprises and social policy (MNE Declaration) - 5th Edition (March 2017), <http://www.ilo.org/empent/Publications/WCMS_094386/lang-en/index.htm> (last visited 25 April 2018).

59 Ibid, para.2.

60 Art. 20, Morocco-Nigeria BIT (2016).

in accordance with emerging standards that require their accountability.⁶¹ This presumption is based on the fact that home states have the possibility to exercise legal control over the activities of MNCs abroad. Indeed, there are several countries whose courts have, in some cases, found jurisdiction to deal with human rights violations of companies operating abroad.⁶²

The formulation of the liability clause in the SADC Model BIT is similar to that of Article 20 of the Morocco-Nigeria BIT. The clause clarifies the actions expected from the home state to bring about the possibility to bring civil claims against an investor. To this end, Article 17(2) of the SADC provides that:

Home states shall ensure that their legal systems and rules allow for, or do not prevent or unduly restrict, the bringing of court actions on their merits before domestic courts relating to the civil liability of Investors and Investments for damages resulting from alleged acts, decisions or omissions made by Investors in relation to their Investments in the territory of the Host State.⁶³

The goal of this provision is to remove the procedural or jurisdictional barriers that prevent home state courts from bringing a claim based on investment misconduct.

3.3 Reflections on the corporate social responsibility provisions in the discussed IIAs

The above section has analyzed examples of IIAs that have incorporated CSR provisions. Two main approaches to imposing obligations on foreign investors have been distinguished. The first approach includes provisions contained in IIAs (including, for example, the Benin-Canada BIT) where CSR obligations address the contracting states. In such provisions, the contracting states are urged to encourage investors to adopt and adhere to certain CSR codes in conducting their business in the host state. The inspirational language of such CSR provisions may advance and promote responsible business practice. However, it does not impose a direct obligation on the investors involved.⁶⁴

The second approach consists of IIAs where CSR-related obligations are imposed directly on investors. Several observations can be made regarding these provisions. Firstly, the language employed in some of the discussed IIA CSR provisions in Section 3.2 raises questions regarding whether these provisions can be translated into legally binding obligations for investors. The openness of the formulation of CSR provisions can be demonstrated by way of Article 12 of the Argentina-Qatar BIT. This CSR provision stipulates that companies are merely to 'make efforts' to comply with the CSR standards involved, rather than being required to do so.

Secondly, the vastness of the definition of CSR norms can be traced to most IIA CSR provisions. The CSR norms are usually not specified in the treaties and merely refer to the 'internationally recognized standards of corporate social responsibility'.⁶⁵ In the absence of a definition of CSR norms, tribunals may face difficulty in interpreting these norms as it will remain unclear what investor obligations follow from such CSR provisions. A clearer definition of CSR norms has been adopted in the Morocco-Nigeria BIT in which the CSR codes that investors should apply are identified. In the Morocco-Nigeria BIT, reference is made to the ILO Tripartite Declaration, which provides more concrete guidance for investors, as well as arbitrators, regarding the CSR norms that investors are expected to comply with.

Thirdly, the key challenge of IIAs' CSR provisions which directly address investors still comes back to the enforcement of the investor's CSR obligations. This will depend on the formulation of the dispute settlement

61 M. Sornarajah, *The International Law on Foreign Investment* (2017), p. 144.

62 See for example the US, where the US courts on several occasions had asserted their jurisdiction over the claims brought against human rights violations of MNCs under the US Alien Tort Statute. J. Zerk, *Multinationals and Corporate Social Responsibility: Limitations and Opportunities in International Law* (2006). See also Great Britain, the Netherlands, Sweden, India, Australia, Democratic Republic of the Congo, Nigeria, Belgium, Papua New Guinea, Ecuador, Canada, Malawi, South Africa, France, Switzerland, and Uganda as examples of states where the courts have established jurisdiction over human rights-related abuse allegedly committed by MNCs or where these MNCs have allegedly been complicit therein. See J. Schrempf-Stirling & F. Wettstein, 'Beyond Guilty Verdicts: Human Rights Litigation and its Impact on Corporations' Human Rights Policies', (2017) 145 *Journal of Business Ethics*, p. 548.

63 Art. 17(2) of the South African Development Community (SADC) Model Bilateral Investment Treaty Template of 2012 with Commentaries, <<http://investmentpolicyhub.unctad.org/Download/TreatyFile/2875>> (last visited 20 November 2016).

64 See Chi, *supra* note 14, p. 49.

65 For example Art. 12, Argentina-Qatar BIT (2016).

provision; however, most contemporary IIAs do not yet provide for the possibility for a host state to directly initiate arbitration proceedings against an investor for a breach of the obligations under the IIA. This article has no intention to speculate on the inclusion of such a possibility, but rather discusses feasible solutions that are already applied in international investment law. Hence, tribunals may consider the investor's lack of compliance with the specific CSR standards as a part of the objection of the respondent state to the jurisdiction of the tribunal. Tribunals may alternatively take into account the violations of an investor as a result of the CSR provision in deciding on the specific standard of treatment outlined in the IIA, such as the FET standard, or indirect expropriation. Indeed, tribunals already limit the scope of protection afforded to investors under the FET standard by taking their conduct into account. This point is further addressed in Section 4.

Even in the absence of specific clauses on the obligations and responsibilities of investors, some tribunals recognize that corruption, fraudulent practices and serious crimes may constitute possible grounds for denying the protection afforded under an IIA.⁶⁶ In the words of the *Phoenix Action Ltd v. the Czech Republic* tribunal, '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.'⁶⁷ In *Metal-Tech Ltd v. the Republic of Uzbekistan*, the tribunal denied jurisdiction over all of the investor's claims because 'the investment was tainted by illegal activities, specifically corruption.'⁶⁸ Following the logic of the aforementioned cases, the serious misconduct of an investor in a host state resulting in the violation of the CSR provisions included in an IIA may potentially serve as one of the conditions or a legal basis for dismissing the claim of an investor at the jurisdictional stage. Alternatively, the tribunal may decide to condition or to reduce the protection under the substantive investment protection clauses if the investor has breached the CSR provisions outlined in the applicable IIA. This will however require the inclusion of a clearer and more specific formulation in IIAs. This point is further elaborated in Section 4.

The other solution in a number of the discussed IIAs for enforcing investors' obligations under international investment law is through the domestic courts. Under the SADC Model BIT and the Morocco-Nigeria BIT, investors may be held liable for 'significant damage, personal injuries or loss of life in a host state' before the courts of the home state. However, the effectiveness of a such provision still depends on the creation of enforcement mechanisms by the home states in their respective legal systems in order to enable litigation against investors. Many national courts tend to decline jurisdiction over the case by arguing that other courts or tribunals are better suited to hear the case. Even in countries that have provided the possibility for filing a claim against an MNC in their national laws, the success rate for holding the companies accountable is not high. From the 1980s to 2015, around 120 foreign direct liability cases were filed against MNCs worldwide.⁶⁹ The subject matter of these claims included alleged complicity in human rights violations. However, as observed by Schrempf-Stirling and Wettstein, amongst these 120 cases no MNCs had been found 'guilty and most human rights litigation cases were dismissed.'⁷⁰

Also in states that have made CSR obligations mandatory for companies, including – for example – Indonesia, the requirements for these rules to be enforced often remain vague and unclear.⁷¹ Furthermore, as was observed in the IPFSD, the domestic laws regulating CSR are often addressed to national companies, in contrast to those which 'own and control them.'⁷² The effectiveness of such a liability clause depends, therefore, on the home state's willingness to provide avenues allowing injured parties to bring a claim against an investor.

66 See Bottini, *supra* note 29, p.6.

67 ICSID Case No. ARB/06/5, *Phoenix Action Ltd. v. The Czech Republic*, Award (15 April 2009), para. 78.

68 ICSID Case No. ARB/10/3, *Metal-Tech Ltd. v. Republic of Uzbekistan*, Award (4 October 2013), para. 422.

69 See Schrempf-Stirling & Wettstein, *supra* note 62, p. 548.

70 *Ibid.*

71 K. Aini & Y. Levashova, 'Investment Law: The Implementation of CSR under Indonesian Laws and the Indonesian BITs: A Lack of Coherency?', in T. Lambooy et al. (eds.), *CSR in Indonesia: Legislative Developments and Case Studies* (2013).

72 UNCTAD, 'Investment Policy Framework for Sustainable Development' (2015), p. 110.

4. The role of investor conduct in the decisions of arbitral tribunals

The previous section of this article was devoted to the discussion on the CSR provisions in recently adopted IIAs. So far, these innovative provisions, elaborated upon in Section 3.2, have not yet been interpreted by investment tribunals. However, some recent tribunals, even in the absence of CSR provisions or other public interest provisions in applied IIAs, have moved towards the recognition of the obligations and responsibilities of investors. Two possibilities are addressed in this article: (i) the enforcement of investor obligations through counterclaims and (ii) the extent of a due diligence conducted by an investor, in deciding on the protection of an investor under the fair and equitable treatment standard.

4.1 The enforcement of investor obligations through counterclaims

4.1.1 General discussion

In principle, under an IIA, a host state may not initiate arbitration proceedings against an investor. Under some IIAs, a respondent state can however file a counterclaim against an investor requesting financial compensation.⁷³ The counterclaims filed by a state should have a connection to the primary claim filed by an investor against a state.⁷⁴ According to earlier cases, the content of the counterclaims filed by the respondent states usually contain the ‘allegedly faulty performance or some other wrongdoing on the part of the claimant [an investor].’⁷⁵ In principle, the possibility of bringing a counterclaim offers a state an opportunity to remedy the asymmetrical nature of investment treaties and to bring direct claims against investors for violations, including human rights abuses.

In practice, states have not employed the mechanism of counterclaims very often.⁷⁶ There are several reasons for this. Firstly, a majority of IIAs contain no provisions on counterclaims that can be invoked by states.⁷⁷ Secondly, investment tribunals rarely accept the counterclaims of host states. The jurisdictional requirements for a state to file a counterclaim have been proven to be challenging for states to fulfil. This explains why so far in only one case, *Urbaser v. Argentina*, which will be further elaborated, did the tribunal find that it had jurisdiction over the state’s human rights counterclaim.⁷⁸

In investment cases decided under the ICSID Convention, a counterclaim may be admitted by a tribunal subject the conditions that (1) the counterclaim is within the jurisdiction of the tribunal; (2) the counterclaim has to arise directly from the subject matter of the dispute, and directly out of the investment.⁷⁹ The second condition has been especially challenging for respondent states to comply with.⁸⁰ Tribunals have restrictively interpreted the requirement that a counterclaim has to arise directly from the subject matter of the dispute, e.g. requiring a legal connection between the original claim and the counterclaim.⁸¹

73 Whether it is possible for a state to file a counterclaim depends on how the dispute settlement provision in the applied IIA has been drafted.

74 C. Schreuer et al., *The ICSID Convention: A Commentary* (2009), p. 750.

75 Ibid.

76 J.A. Rivas, ‘ICSID Treaty Counterclaims: Case Law and Treaty Evolution’, in J.E. Kalicki & A.-Joubin-Bret (eds.), *Reshaping the Investor-State Dispute Settlement System: Journeys for the 21st Century* (2015), p. 779. The author noted that less than 3% of ICSID cases involved counterclaims.

77 M. Moïse Mbengue & S. Schacherer, ‘The ‘Africanization’ of International Investment Law: The Pan-African Investment Code and the Reform of the International Investment Regime’, (2017) 18 *Journal of World and Investment & Trade*, no. 1, p. 444.

78 It should be noted that in *Burlington Resources Inc. v. Ecuador*, the counterclaims of Ecuador against the company were successful. The tribunal awarded compensation to Ecuador finding that the company had violated the environmental laws of Ecuador. However, in this case the issue of jurisdiction over the state’s counterclaims was not the principal issue as the parties had agreed to confer jurisdiction over the counterclaims to the tribunal. See ICSID Case No. ARB/08/5 *Burlington Resources Inc. v. Republic of Ecuador*, Decision on Ecuador’s counterclaims (7 February 2017).

79 Art. 46 of the ICSID Convention. Furthermore, Art. 25 of the ICSID Convention provides that any legal dispute should arise ‘directly out of an investment.’

80 See E. Burova, ‘Jurisdiction of Investment Tribunals Over Host States’ Counterclaims: Wind of Change?’, Kluwer Arbitration Blog, <<http://arbitrationblog.kluwerarbitration.com/2017/03/06/jurisdiction-of-investment-tribunals-over-host-states-counterclaims-wind-of-change/>> (last visited 20 January 2018).

81 In *Saluka v. Czech Republic*, the tribunal dismissed the counterclaim of the Czech Republic by providing that the investor’s non-compliance with the state’s law was applicable to persons under the jurisdiction of the Czech Republic. The tribunal found that the subjects of the counterclaim were not connected closely enough to the subject of the original claim, relying on the close connection test, which required the same legal basis for the original claim and counterclaim. See *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL, Decision on Jurisdiction over the Czech Republic Counterclaim (7 May 2004), paras. 78-79. See the commentary by Z. Douglas, *The International Law of Investment Claims* (2009), p. 260.

In *Urbaser v. Argentina*, the tribunal departed from previous decisions and stated that the factual link between the claim and the counterclaim is sufficient for establishing a connection between the claims.⁸² To this end, the tribunal underlined that ‘the principal claim and the claim opposed to it are based on the same investment, or the alleged lack of sufficient investment, in relation to the same Concession. This would be sufficient to adopt jurisdiction over the counterclaim as well.’⁸³ The facts of the case and the subject matter of a counterclaim are explained below.

4.1.2 *Urbaser v. Argentina*

The *Urbaser v. Argentina* case concerned a water and sewage concession awarded to a foreign investor as a part of Argentina’s privatization programme. A Spanish company, Urbaser (the investor), was one of the main shareholders of a concession that provided water services in Buenos Aires. As a result of the severe economic crisis experienced by Argentina between 2001 and 2002, Argentina introduced emergency measures that impacted the financial position of the investment. After several unsuccessful attempts to renegotiate the concession, the authorities of Buenos Aires terminated it. Urbaser and other claimants initiated arbitration proceedings under the Spain-Argentina BIT. Argentina filed a counterclaim against the investor for an alleged violation of the human right to water.⁸⁴ The *Urbaser* tribunal assumed jurisdiction also over Argentina’s counterclaim, rejecting the investor’s assertion that the examination of its human rights obligations was outside the tribunal’s jurisdiction.

In deciding on the merits of the counterclaim, the tribunal made several observations regarding the nature of the investor’s obligations. Firstly, the tribunal rejected the claimant’s argument that the ‘human right to water is a duty that may be born solely by the State, and never borne also by private companies like the Claimants.’⁸⁵ The tribunal explained that, firstly, international law considers CSR to be of crucial importance for companies operating in the field of international commerce. Secondly, CSR involves ‘commitments to comply with human rights in the framework of those entities’ operations conducted in countries other than the country of their seat or incorporation.’⁸⁶ Thirdly, the tribunal observed that it is no longer the case that ‘companies operating internationally are immune from becoming subjects of international law.’⁸⁷ In making these observations, the tribunal nevertheless acknowledged the shortcomings of CSR, underlining that

[e]ven though several initiatives undertaken at the international scene are seriously targeting corporations’ human rights conduct, they are not, on their own, sufficient to oblige corporations to put their policies in line with human rights law. The focus must be, therefore, on contextualizing a corporation’s specific activities as they relate to the human right at issue in order to determine whether any international law obligations attach to the non-State individual.⁸⁸

The tribunal proceeded with an examination of whether the companies have obligations relating to the human right of access to water. The tribunal found that the right of access to water is a human right under international law and that private parties have an obligation to comply with this right. To this end, the tribunal referred to a number of international instruments, such as the Universal Declaration of Human Rights (UDHR), the International Covenant on Social Economic and Cultural Rights (ICSECR), the UN Guiding Principles on Business and Human Rights, and the International Labour Office’s Tripartite Declaration of Principles concerning Multilateral Enterprises and Social Policy. The tribunal applied Article 30 of the UDHR and Article 5(1) of the ICSECR to establish that companies can have human rights obligations under these instruments. Article 5(1) of the ICSECR provides that ‘nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the

82 See *Urbaser v. Argentina*, supra note 12, para. 1151.

83 Ibid.

84 The counterclaim was filed by an investor in pursuit to Art. 46 of the ICSID Convention and Rule 40(1) of ICSID Arbitration Rules.

85 See *Urbaser v. Argentina*, supra note 12, para. 1193.

86 See *Urbaser v. Argentina*, supra note 12, para. 1195.

87 Ibid.

88 Ibid.

destruction of any of the rights or freedoms recognized herein, or at their limitation to a greater extent than is provided for in the present Covenant.⁸⁹ In interpreting this provision, however, the tribunal determined that it did not apply to the human right of access to water. Consequently, it did not grant the counterclaim.

The *Urbaser v. Argentina* counterclaim decision has important implications for companies. Through this decision, the *Urbaser* tribunal demonstrated that counterclaims filed by host states against investors based on human rights violations may fall within the jurisdiction of investment tribunals. It clearly emphasized that companies cannot escape liability on the basis of the argument that they are not subjects of international law.

4.2 Investor conduct in the assessment of the fair and equitable treatment standard

The way in which tribunals may take into consideration the obligations of investors under the current system of investment law is by conditioning the investment protection provided for under the substantive provisions of IIAs. Investor conduct plays a role in the assessment of investment obligations under IIAs, such as the obligation to provide fair and equitable treatment (FET) to an investor. In evaluating whether the investor can rely on protection under the FET standard, international arbitration tribunals have considered, in a group of cases, the extent of the due diligence and risk assessment conducted by an investor.

The concept of due diligence is used in a variety of contexts, e.g. the obligation of the state under international law and the risk assessment for companies within the framework of commercial transactions. The human rights due diligence, conducted by companies, as a part of the CSR discourse has been primarily conceptualized through the work of the UN Special Representative on Business and Human Rights, John Ruggie.⁹⁰ According to the Guiding Principles on Business and Human Rights, drafted under his leadership, companies have a 'responsibility to respect human rights.'⁹¹ Within this responsibility, companies have to undertake due diligence 'in order to identify, prevent, mitigate and account for how they address their adverse human rights impacts.'⁹² Human rights due diligence should be understood as part of the company's CSR framework incorporated into 'broader enterprise management risk systems.'⁹³ This means that human rights due diligence is one of the integral elements of CSR whose aim is to ensure responsible business conduct and to prevent possible human rights violations, especially for companies operating abroad.

In international investment law, there is also a requirement for an investor to conduct due diligence.⁹⁴ Under investment law, foreign investors operating in host states are required, at least to some extent, to assess the socio-political and economic risks that might also include the human rights situation and the environmental issues effecting the investment. The requirement for an investor to conduct due diligence has been applied by investment tribunals in deciding on the protection of an investor under substantive investment protection clauses.

The obligations of investors can play a role in international investment tribunals' assessment of the substantive investment protection provisions of IIAs. One of these substantive protection provisions is the FET standard. The FET standard is one of the most commonly invoked provisions in investment cases. Almost all treaties provide that the investor should be treated fairly and equitably by a host state. One of the pivotal elements of the FET standard is the protection of the legitimate expectations of an investor. A breach of the legitimate expectations of an investor may lead to a violation of the FET standard.⁹⁵ The investor's legitimate expectations are usually based on implicit or explicit assurances or representations made by the host state to the investor. These can be provided to investors in different forms, e.g. in the state's legislation

89 1966 International Covenant on Economic, Social and Cultural Rights, 993 *United Nations Treaty Series*, Art. 5(1), <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx>> (last visited 18 January 2018).

90 See: UN Doc A/HRC/8/5, 'Report of the Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises – Protect, Respect and Remedy: A Framework for Business and Human Rights' (2008).

91 UNHR Office of the High Commissioner, 'UN Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework' (2011), principle 11, p. 13.

92 *Ibid.*, principle 17, p. 17.

93 See UNHR Office of the High Commissioner, *supra* note 91, pp. 17-18.

94 See Viñuales, *supra* note 43, p. 346.

95 R. Dolzer & C. Schreuer, *Principles of International Investment Law* (2014), p. 145.

or through contractual commitments.⁹⁶ In the absence of any explicit or implicit representations by the host state towards the investor, the latter can still have legitimate expectations, based on the expectation of the stability of the general legal framework.⁹⁷

In assessing the legitimacy of expectations, a number of recent tribunals have underlined the importance of the investor's own diligent conduct for the purpose of protecting its legitimate expectations.⁹⁸ This is primarily related to the risk assessment and due diligence checks that are expected to be performed by an investor in order to justify its expectations. In several investment decisions, tribunals have emphasized that an investor, before claiming the protection of its legitimate expectations, has to assess the possible risks and to perform a due diligence check before investing in a host state.

For example, the investment tribunal in *Biwater v. Tanzania* stressed that 'countervailing factors such as the responsibility of foreign investors, both in terms of prior due diligence as well as subsequent conduct' should be considered in establishing the violation.⁹⁹

On the part of an investor, the performance of a due diligence test and risk assessment may include the collection of information on the rules and regulations concerning the investor's investment. Also in some FET decisions, tribunals have emphasized that an investor should take into account the economic and socio-political background in the host state. The level of preparation by the investor is expressed in the extent of the due diligence test and risk assessment conducted by the investor.

This point has been emphasized by the tribunal in *Parkerings v. Lithuania*. The tribunal stated that considering the socio-political and economic transition that had taken place in Lithuania, the investor should have anticipated the changes in the regulatory framework. The tribunal stated:

In 1998, at the time of the Agreement, the political environment in Lithuania was characteristic of a country in transition from its past being part of the Soviet Union to candidate for the European Union membership. Thus, legislative changes, far from being unpredictable, were in fact to be regarded as likely. As any businessman would, the Claimant was aware of the risk that changes of laws would probably occur after the conclusion of the Agreement.¹⁰⁰

Therefore, the investor is expected to consider the business risk that depends on the country that is the target of its investment.¹⁰¹ In other words, if an investor invests in an economically and politically unstable country, it would be unreasonable to expect that the representations made by the state to that investor would remain unaltered.¹⁰²

In two recent FET decisions, *Mamidoil v. Albania* and *Charanne v. Spain*, the tribunals did not only emphasize the significance of due diligence, but also provided that an investor has the obligation to exercise due diligence in order to obtain protection under the standard of legitimate expectations. In *Charanne v. Spain*, the tribunal stated that in order for an investor to 'exercise the right of legitimate expectations,' it should perform a 'diligent analysis of the legal framework for the investment.'¹⁰³ Consequently, an investor can only claim protection under the notion of legitimate expectations if 'regulatory measures must not have been reasonably foreseeable at the time of the investment.'¹⁰⁴ In this case, the tribunal was of the opinion that these changes were foreseeable and the claim therefore failed.

The examples provided in this section indicate the growing importance of the cautiousness and proper preparation conducted by the investor in the assessment of the protection of legitimate expectations under

96 See *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic*, supra note 21, para. 222. The tribunal explained that 'when an investor undertakes an investment, a host government through its laws, regulations, declared policies, and statements creates in the investor certain expectations about the nature of the treatment that it may anticipate from the host State.'

97 R. Klager, *Fair and Equitable Treatment in International Investment Law* (2011), p. 164.

98 M. Potestà, 'Legitimate Expectations in Investment Treaty Law: Understanding the Roots and the Limits of a Controversial Concept', (2013) 28 *ICSID Review*, no. 1, p. 38; M. Sornarajah, *Resistance and Change in the International Law on Foreign Investments* (2015), p. 278.

99 ICSID Case No. ARB/05/22, *Biwater v. Tanzania*, Final Award (24 July 2008), para. 601.

100 ICSID Case No. ARB/05/8, *Parkerings v. Lithuania*, Award (11 September 2007), para. 335.

101 A.R. Sureda, 'Legitimate Expectations, Risk and Due Diligence', in A.R. Sureda (ed.), *Investment Treaty Arbitration: Judging under Uncertainty* (2012), p. 79.

102 See Viñuales, supra note 43, p. 363.

103 SCC Case No. 062/2012, *Charanne Construction v. Spain*, Award (21 January 2016), para. 505.

104 Ibid.

the FET standard. Before claiming protection under the FET standard, an investor has the responsibility to take into account the relevant regulations, policies and decisions concerning its investment in order to anticipate the possible risks. Furthermore, the investor is expected to conduct due diligence in a host state by taking into account the political, social and economic background prevailing in the state at the time of the investment, in order to reasonably assess the possibility of any changes.

4.3 Reflections on the role of an investor's conduct in investment decisions

The above section has provided an example of how investment tribunals through counterclaims may take into account investors' obligations concerning the protection of human rights, the environment and labour standards. It has also outlined how an investor's conduct, such as its due diligence exercised with regard to its investment in a host state, can be a condition for protection under the FET standard of the applicable investment treaty.

The recent case of *Urbaser v. Argentina* demonstrated that states may hold investors responsible for human rights violations relating to an investment by filing a counterclaim against an investor. The *Urbaser* tribunal established jurisdiction over Argentina's human rights counterclaim, which has so far proved to be the only case where the tribunal has found that it has jurisdiction over such a counterclaim. The *Urbaser* decision has already been called groundbreaking and some have claimed that it has potentially set a precedent for future human rights claims by a host state.¹⁰⁵ Whether this decision will in fact create a precedent for future investment tribunals is, however, questionable. Even though investment tribunals have 'systematically considered and referred to previous decisions of other tribunals,' there is no rule of precedent in international investment law.¹⁰⁶ The degree of reliance that arbitrators place on earlier decisions varies among tribunals. Several tribunals have emphasized the significance of earlier judgments. As the tribunal in the *AWG v. Argentina* decision on liability asserted, '[a]lthough this tribunal is not bound by such prior decisions, they [prior decisions] do constitute "subsidiary means for the determination of the rules of [international] law"'.¹⁰⁷ Other tribunals have been reticent to rely on the earlier tribunals. In international investment law, each tribunal is constituted for a specific case and is often based on a different treaty. Consequently, tribunals often rely on different IIAs and have to consider the relevance of previous decisions for the purpose of interpreting the case at hand. For this reason, a body of investment decisions, for example on the FET standard, has not always developed in interpreting this standard in a consistent and predictable manner. Therefore, whether future tribunals will follow the *Urbaser* test in deciding on their jurisdiction over human rights counterclaims will depend on the specific nature of the case, the scope and formulation of the relevant provisions of the applicable IIA, and the quality of the arguments of the respondent state filing the counterclaim, among others.

In order to avoid any reliance on the discretion of tribunals in ruling on potential human rights counterclaims, such a possibility could be included in the provisions of IIAs. Currently there are only a small number of agreements providing for such an option. One example is the SADC Model BIT¹⁰⁸ and the Draft Pan-African Model Code,¹⁰⁹ discussed earlier in this article. The inclusion of a possibility for filing a counterclaim by a host state against an investor, where the investor has breached one of the provisions under the agreement such as the obligation to adhere to CSR norms, may provide a feasible and realistic way of holding companies accountable for breaches under the IIA. It would require specific and clear provisions on the CSR obligations of investors, outlining the concrete norms which the investor should adhere to.

In Section 4.2, the role of the investor's conduct as a possible condition in claiming the legitimate expectations protection under the FET standard has been discussed. Recent tribunals have underlined that

105 E. Guntrip, 'Urbaser v. Argentina: The Origins of a Host State Human Rights Counterclaim in ICSID Arbitration', Blog of the *European Journal of International Law*, <<https://www.ejiltalk.org/urbaser-v-argentina-the-origins-of-a-host-state-human-rights-counterclaim-in-icsid-arbitration/>> (last visited 20 January 2018); C. Simson, 'Ruling On Human Rights Claim Touches New Ground', *Law360* February 2017, <<https://www.law360.com/articles/894704/ruling-on-human-rights-claim-touches-new-ground>> (last visited 20 January 2018).

106 T. Gazzini, *Interpretation of International Investment Treaties* (2016), p. 292.

107 *AWG v. Argentina*, UNCITRAL Arbitration, Decision on Liability (30 July 2010), para. 189.

108 Art. 19.2 of the South African Development Community (SADC) Model BIT Template (2012).

109 Art. 43 of the Draft Pan-African Code.

an investor bears responsibility for appraising the reality and the context of the state where the investment is made by performing due diligence and risk assessments. The investor cannot subjectively claim protection from a breach of legitimate expectations without ‘evaluat[ing] the circumstances’ and ‘understand[ing] the content and the context of the law and the administrative practice.’¹¹⁰ Before claiming protection under legitimate expectations, an investor has to be aware of and take into account the relevant regulations, policies and decisions concerning its investment in order to anticipate the possible risks.

What remains unclear, however, is how much weight tribunals attribute on an investor’s due diligence against the private interests of an investor in deciding on whether the legitimate expectations of an investor have been frustrated.

Referring to the investor’s due diligence in IIA FET standard provisions – which have already been mentioned in investment practice – would give tribunals some indication as to what the contracting parties imply by legitimate expectations. Examples of such practices are already evident. For example, in the FET provision of the Investment Agreement for the COMESA Common Investment Area, the contracting parties underlined that the different levels of economic development among states should be taken into account when assessing the FET standard.¹¹¹ The inclusion of references to the conduct of the investor in IIAs – including the undertaking of proper due diligence and risk assessments – in claiming the protection of legitimate expectations may have stronger legal consequences with regard to an investor’s responsibilities in contrast to CSR provisions discussed in the sections above.

5. Conclusion

The goal of this article was to investigate whether the obligations that are pertinent to human rights, the environment and labour standards can be imposed on investors under international investment law. It has been found that in recent IIAs states have included CSR provisions in their treaties. Some of these CSR provisions establish certain obligations for investors. Also, in one investment decision addressed in this article, the tribunal has assessed the obligations of investors under human rights treaties through the counterclaim filed by a state. In addition, in some cases, tribunals have taken into account the investor’s conduct for the purpose of deciding on liability under the FET standard.

IIAs were traditionally designed for the protection and promotion of foreign investors and their investments. By integrating sustainable development objectives into a new generation of IIAs, the content of investment treaties has been changing. Conventionally, IIAs only included obligations for host states towards investors and not *vice versa*. However, in a number of recent IIAs there has been a shift towards recognizing the responsibility and accountability of investors. To balance IIAs and to prevent human rights violations by MNCs, states have been reforming their treaties by incorporating CSR provisions therein.

The CSR provisions contained in a number of recent treaties vary according to their scope of application for investors. In this article, a distinction is made between indirect CSR provisions addressed to the contracting states and direct CSR provisions that impose obligations on investors. The indirect provisions are addressed to states and usually urge the contracting parties to encourage investors to adopt and to adhere to certain CSR codes in conducting their business in the host state. Such provisions do not usually contain mandatory language for a state to require companies to adhere to CSR standards. This creates a voluntary option for a state to comply with such a provision, with no concrete legal consequences. Therefore, the effectiveness of such a CSR provision directly depends on the willingness of states to implement the necessary laws and policies mandating the companies to comply with CSR standards. Moreover, the weakness of such CSR provisions can be mainly attributed to the fact that they do not impose a direct obligation on the investors involved.

110 ICSID Case No. ARB/11/24, *Mamidoil Jetoil Greek Petroleum Products Société S.A. v. Republic of Albania*, Award (30 March 2015), para. 634.

111 Art. 14(3) COMESA CIA (signed 23 May 2007), <<http://investmentpolicyhub.unctad.org/Download/TreatyFile/3092>> (last visited 27 June 2017). Art. 14 (3) provides that ‘[f]or greater certainty, Member States understand that different Member States have different forms of administrative, legislative and judicial systems and that Member States at different levels of development may not achieve the same standards at the same time. Paras. 1 and 2 [fair and equitable treatment obligation] of this Article do not establish a single international standard in this context.’

In this article, the IIAs where CSR-related obligations are imposed directly on investors were evaluated. These new types of CSR provisions certainly amount to a step towards the recognition of the enforceable obligations of investors under IIAs. However, in terms of their enforcement, several points can be made. In some CSR provisions that directly address investors, compliance with the CSR norms is formulated in hortatory, rather than mandatory language, which seems to provide a choice for a company as to whether to adhere to the CSR norms or not. Furthermore, a majority of such agreements do not specify the CSR norms which an investor has to comply with. The exception is the Morocco-Nigeria BIT, where a reference is made to the ILO Tripartite Declaration, which provides for more concrete guidance to investors, as well as arbitrators, regarding the CSR norms that investors are expected to observe.

The enforcement of CSR provisions, even those addressed directly to investors, is far from clear. IIAs do not provide for the possibility for a host state to directly initiate arbitration proceedings against an investor for a breach of the obligations under the IIA. The innovative element in some of the recent IIAs is the provision on the liability of investors that can be enforced through the domestic courts. For example, under the Morocco-Nigeria BIT, investors may be held liable for 'significant damage, personal injuries or loss of life in a host state' before the courts of the home state. As was discussed in this article, the effectiveness of this approach depends on whether the home states will be able to facilitate the necessary conditions in their legal systems in order to enable litigation against investors. So far, the national courts, which have established jurisdiction over human rights claims against MNCs, have not been very successful in holding these companies accountable.

In this article, the accountability of companies for environmental, human rights or labour violations was explored through investment arbitration under IIAs. The counterclaim can be a viable option to enforce the direct obligations of investors. Through a counterclaim, states may potentially hold investors responsible for human rights violations relating to an investment. However, the requirements for a successful counterclaim have proved to be challenging for respondent states to fulfil. The *Urbaser* tribunal has provided a less restrictive interpretation of the counterclaim's jurisdictional test, thereby allowing the human rights counterclaim by Argentina. However, this does not mean that future tribunals will follow the same reasoning. There is no rule of precedent in international investment law, and some of investment jurisprudence has been criticized for following a rather unpredictable path. Therefore, the possible solution for future agreements which has already been proposed in some IIAs, i.e. the Draft Pan-African Model Code,¹¹² is to include the option for a counterclaim in the text of IIAs.

The other option for tribunals to take the investor's conduct into account under the current system of investment law is by conditioning the investment protection provided under the substantive provisions of IIAs. An example of such a substantive provision, as analyzed in this article, is the FET standard. It has been demonstrated that some of the recent tribunals in FET cases have emphasized that an investor has responsibility for appraising the reality and the position of the state where the investment is to be made. This means that an investor should conduct due diligence and risk assessment procedures before claiming protection under the doctrine of legitimate expectations as a part of the FET standard. Some tribunals have clearly indicated that the subjective interests of an investor will not be protected. The investor should be able to demonstrate that it did investigate the relevant legal framework of the host state, that it did examine the rules and even the socio-political and economic circumstances that are relevant for the investment before claiming protection under the FET standard. However, the weight to be attached to the investor's conduct in the overall assessment of the FET standard has not yet been clarified by tribunals. This clarification, defining the scope of the FET standard, and incorporating the investor's due diligence as a possible condition for protection could be included in future IIAs. By including a reference to the investor's conduct for the purpose of deciding on the FET standard, tribunals will have an obligation to take the diligence of the investor into account, thereby promoting socially responsible investment conduct. ■

112 Art. 43 of the Draft Pan-African Code.